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BEFORE THE IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL

IDAHO STATE POLICE,)	
ALCOHOL BEVERAGE CONTROL)	Case No. 10ABC-COM014
)	
Complainant,)	SUMMARY JUDGMENT DECISION,
)	FINDINGS OF FACT,
vs.)	CONCLUSIONS OF LAW
)	AND PRELIMINARY ORDER
DAVID SAMUELSEN, Licensee,)	
dba, THE OFFICE,)	
)	
Respondent.)	
_____)	

This proceeding is being conducted pursuant to Idaho Code Title 23 and the Idaho Administrative Procedures Act, Title 67, Chapter 52, Idaho Code (“IAPA”). This case was assigned to David E. Wynkoop to conduct quasi-judicial contested case proceedings pursuant to the IAPA and the promulgated regulations of the Complainant, Idaho State Police, Alcohol Beverage Control (“ABC”), IDAPA 11.05.01.001, *et seq.* ABC has incorporated into its procedures the regulations of the Idaho Attorney General’s office, IDAPA 04.11.01.

ABC filed a Motion for Summary Judgment and a supporting memorandum and affidavits on January 14, 2011, together with supporting affidavits. A briefing schedule was established and a hearing to present argument was set for February 28, 2011. On February 11, 2011, Respondent David Samuelsen¹ (“Samuelsen”) filed a Memorandum in Opposition to

¹ David Samuelsen died on December 9, 2010 and so the Respondent is now Mr. Samuelsen’s estate. *See* Finding of Fact #2. For simplicity, Mr. Samuelsen individually and his estate will be referred to as “Samuelsen”.

Summary Judgment. On February 18, 2011, ABC filed a Response Memorandum for Summary Judgment and an additional Affidavit of Timothy A. Davidson. Samuelsen objected to the filing of the new Davidson affidavit, arguing prejudice because of Samuelsen's inability to respond prior to oral argument on the motion for summary judgment.

Accordingly, the initial summary judgment hearing set for February 28, 2011 was vacated and dates for a new briefing schedule and summary judgment hearing were set. ABC filed a Supplementary Summary Judgment Brief on March 28, 2011. Samuelsen filed a Supplementary Summary Judgment Memorandum on April 4, 2011, together with five supporting affidavits. On April 11, 2011 ABC filed a Supplementary Response Memorandum in Support of Summary Judgment, together with a Supplemental Affidavit of Robert Clements. On April 18, 2011, Samuelsen filed a Motion to Strike the April 11, 2011 Affidavit of Mr. Clements.

Argument on ABC's Motion for Summary Judgment was heard on April 19, 2011. Samuelsen appeared through attorneys Steven Meade and Rory Jones. ABC appeared through Deputy Attorney General Cheryl Emmons. At the hearing, Samuelsen's Motion to Strike was denied. However, Samuelsen was provided additional time to present affidavits to oppose the April 11, 2011, Affidavit of Mr. Clements. On April 22, 2011, Samuelsen's counsel sent an e-mail stating that Samuelsen declined the opportunity to submit new affidavits to refute the April 11, 2011, Clement's affidavit.

The Motion for Summary Judgment has now been fully submitted to the Hearing Officer for a decision regarding whether summary judgment should be granted.

Standard for Summary Judgment

The standards for Summary Judgment set forth in Samuelsen's Supplemental Memorandum in Opposition to Summary Judgment and in ABC's Memorandum in Support of

Motion for Summary Judgment are hereby adopted and incorporated by reference into this decision.

“Summary judgment is proper when ‘the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 307, 160 P.3d 743, 746 (2007), (quoting I.R.C.P. 56(C)).

The burden is on the moving party to prove there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. *Cafferty v. State, Dept. of Transp., Div. of Motor Vehicle Servs.*, 144 Idaho 324, 327, 160 P.3d 763, 766 (2007) (emphasis added). When, as in the present case, there will be no jury trial and the Hearing Officer will act as the trier of fact, the Hearing Office “is not necessarily constrained to draw inferences in favor of the nonmoving party. Rather, the [Hearing Officer] may draw those inferences which he or she deems most probable on uncontroverted facts.” *Stillman v. First National Bank of North Idaho*, 117 Idaho 642, 643, 791 P.2d 23, 24 (Ct.App. 1990), *citing Argyle v. Slemaker*, 107 Idaho 668, 70, 691 P.2d 1283, 1285 (Ct.App. 1984); *Riverside Development Co., v. Ritchie*, 103 Idaho 515, 650 P.3d 657 (1982). This is because where the evidentiary facts are not disputed and the Hearing Officer rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the Hearing Officer alone will be responsible for resolving the conflict between those inferences. *See Pierson v. Jones*, 102 Idaho 82, 85, 625 P.2d 1085, 1088 (1981); *Hollandsworth v. Cottonwood Elevator Co.*, 95 Idaho 468, 471, 511 P.2d 285, 288 (1973).

Idaho Rule of Civil Procedure 56(e) provides further guidance regarding summary judgment standards.

[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

I. FACTS NOT MATERIALLY DISPUTED

Based upon the pleadings, the affidavits and the exhibits attached to the affidavits, the following facts are not materially disputed in this matter:

1. ABC is the public agency with the responsibility and authority pursuant to Idaho Code §23-804 to enforce Idaho's alcohol beverage statutes. *See* Idaho Code, Title 23, Chapters 8, 9, 10 and 13;
2. Samuelsen died on December 9, 2010 and so it is his estate which has pursued this administrative appeal;
3. On May 5, 1993, Samuelsen filed an application for an alcohol beverage license;
4. On August 27, 2007, Samuelsen was notified regarding the availability of an alcohol beverage license;
5. On September 5, 2007, Samuelsen sent a letter to ABC notifying ABC of his intent to accept the alcohol beverage license;
6. On February 1, 2008, Samuelsen registered with the Idaho Secretary of State as a sole proprietor dba "The Office";
7. On February 5, 2008, Samuelsen applied with Central District Health for a license to operate a food establishment indicating the Manager would be "Duffer D, LLC"²;

² Duffer D, LLC was never the Manager of The Office, but rather the landlord. Sounds Right, Inc. was actually the Manager. Both entities were controlled by Chris Berg. Apparently Samuelsen had some confusion regarding which of Chris Berg's business entities would become the Manager when he applied for the Central District Health license.

8. On February 11, 2008, Samuelsen entered into a Lease Agreement with Duffer D., LLC by and through its principal, Chris Berg;
9. On February 11, 2008, Samuelsen entered into a Management Agreement with Sounds Right, Inc., by and through its principal, Chris Berg;
10. On February 19, 2008, attorney Brian Donesley, on behalf of Samuelsen, submitted a formal application for an alcohol beverage license. Included with Samuelsen's February 19, 2008 application was a copy of the Management Agreement between Samuelsen and Chris Berg dba Sounds Right, Inc.;
11. Samuelsen certified in his formal application to ABC for an alcohol beverage license that he is the bona fide owner of the business applying for the alcohol beverage license;
12. On March 26, 2008, Samuelsen was awarded liquor license 1A-7129, doing business as The Office at 6125 W. Fairview, Boise, Idaho;
13. On April 4, 2008, ABC cited a bartender at The Office for serving alcohol to a minor;
14. On April 9, 2008, Samuelsen filed a renewal application for a liquor license;
15. On May 1, 2008, Samuelsen was awarded a new liquor license;
16. On June 16, 2008, ABC filed a Complaint for Suspension of Samuelsen's license based upon the allegation of sale of beer to a minor at The Office on April 4, 2008;
17. On August 5, 2008, ABC entered into a stipulation with Samuelsen that Samuelsen "though his employee, sold beer to a person under twenty-one years of

age....” The person who sold the beer was not an employee of Samuelsen but was an employee of Sounds Rights, Inc.;

18. In October, 2008 an Assignment and Assumption Agreement (the “Assignment”) was entered into between Sounds Right, Inc., Duffer D, LLC and Servantz, Incorporated (“Servantz”), transferring all rights and responsibilities of Sounds Right, Inc. and Duffer D, LLC under the Management Agreement to Servantz. Jade Jesser signed the Assignment as the principal of Servantz;
19. Samuelsen signed the Assignment indicating that he consented to the terms of the Assignment;
20. Pursuant to Recital B of the Assignment, Servantz “...desires to operate a restaurant and bar located at 6125 Fairview Avenue, Boise, Idaho 83704 pursuant to the terms of the Management Agreement”;
21. Since October 13, 2008, Servantz, through its principal, Jade Jesser, has operated the business known as The Office, located at 6125 Fairview Avenue, Boise, Idaho, using liquor license #1A-7129 issued to Samuelsen. Neither Servantz or Jade Jesser had their own liquor license;
22. On November 3, 2008, Samuelsen mailed the Assignment to ABC;
23. On November 5, 2008, ABC received the Assignment;
24. On April 2, 2009, Samuelsen filed a renewal application for a liquor license with ABC;
25. On May 1, 2009, Samuelsen received a renewed liquor license from ABC;
26. On March 15, 2010, Samuelsen filed a renewal application for liquor license with ABC;

27. On May 1, 2010, Samuelsen received a renewed liquor license from ABC;
28. On July 7, 2010, Jesser, Inc., by and through its principal Jade Jesser, submitted to ABC a transfer application seeking transfer of the liquor license #1A-7129 from Samuelsen dba The Office to Jesser, Inc.;
29. On July 19, 2010, ABC issued an Administrative Violation notice against Samuelsen dba The Office;
30. On August 11, 2010 Samuelsen wrote a letter to ABC urging acceptance of the July 7, 2010 Jesser, Inc. application to transfer Samuelsen's license #1A-7129;
31. On August 18, 2010, ABC issued a Complaint for Forfeiture of Samuelsen's retail alcohol beverage license;
32. On August 19, 2010, Jesser, Inc. submitted a completed application for transfer of the Samuelsen license;
33. Samuelsen had no employees working at The Office during all time periods that Sounds Right, Inc. and Servantz served as Managers at The Office;
34. On May 11, 2010, Samuelsen, as Seller, entered into a Sale and Purchase Agreement with Jade Jesser as Buyer to sell the business known as The Office, together with the Samuelsen liquor license;
35. The Sale and Purchase Agreement dated May 11, 2010 signed by Samuelsen and Jade Jesser states at paragraph 8 that Jade Jesser agreed to purchase the liquor license from Samuelsen for the price of \$150,000;
36. Paragraph 3 of the May 11, 2010 Sale and Purchase Agreement entered into between Samuelsen and Jesser, Inc. and signed by Samuelsen and Jade Jesser provided that "Buyer has been operating said business (The Office) as Servantz

since October 31st 2008, and is familiar with the assets and liabilities of The Office”;

37. Samuelsen stated under oath as part of each of his applications for liquor license dated February 19, 2008, April 9, 2008, April 2, 2009 and March 15, 2010 that he was the bona fide owner of the business where the liquor license was placed into use;
38. Based upon staffing levels during all relevant periods of time, ABC was unable to thoroughly review all liquor license applications for compliance with Idaho liquor law and administrative rules. Only major priorities or cases that come to the attention of ABC were able to be addressed. ABC has determined that it is a priority to investigate arrangements where unlicensed Managers are engaging in alcohol sales under lease agreements with absentee licensees;
39. ABC has identified the use of newly issued liquor license by parties other than the bona fide owner of the business to be a major priority for enforcement activities so as to remove speculators from the class of persons entitled to liquor licenses.
40. The Management Agreement entered into on February 11, 2008 between Samuelsen and Sounds Right, Inc. (signed by Chris Berg as President) later assigned to Servantz (signed by Jade Jesser) contained the following provisions:
 - A. Paragraph B of the Recitals recites that
“...Owner (Samuelsen) owns and operates a restaurant business known as ‘**THE OFFICE**’ on the Premises...”
 - B. Paragraph D of the Recitals recites that:
“...Owner desires to retain Manager (Sounds Right, Inc. and later, Servantz) as an independent contractor to provide management,

day-to-day administration, employment and supervision of personnel needed for the Owner's Business..."

C. Paragraph 1 provides for Manager's responsibilities including:

a. Manager shall provide on-Premises management of the Business.

d. Manager, ...shall maintain the Premises, supply all equipment, supplies and personal property.

e. Manager exclusively shall employ persons necessary for the conduct of the Business and shall pay all employee related wages, taxes, withholdings, worker compensation, unemployment, FICA, FUTA and/or any other obligations arising from its employment of such employees and shall indemnify, defend and hold Owner harmless therefrom.

f. Insurance. Manager and/or Landlord (Duffer D, LLC, an entity owned and controlled by Chris Berg) shall, at all times during the term of this Agreement, at its own costs and expense...maintain (1) commercial general liability insurance (occurrence), including without limitation risks for so-called 'dramshop liability...commercial auto liability insurance...workers' compensation insurance...

D. Paragraph 2 provides that the Owner (Samuelsen) had the following obligations:

a. Maintain and pay fees for all licensees required for the Business, including all alcoholic beverage licenses.

b. Pay all state sales tax obligations for the Business.

c. Purchase all food and beverage inventory for the Business.

d. Except as otherwise provided in this Agreement or the Lease, Owner shall be responsible for paying all costs, expenses, taxes, utilities, and other charges of whatever kind or nature, incurred by Manager in connection with the performance of Manager's duties and functions for the Business, except otherwise as expressly provided herein.

[see Finding of Fact #52. Based upon records from the Idaho Tax Commission, Chris Berg and Jade Jesser actually filed the sales and use tax returns for The Office and paid the taxes. See also Finding of Fact #54. Based upon bank records, Samuelsen did not

write any checks for expenses attributable to The Office, except one check for license renewal.]

- E. Paragraph 3 provides that Manager's compensation to be gross receipts of the business, less all expenses and less \$1,200. Thus, the Managers paid Samuelsen \$1,200 per month for the privilege of utilizing Samuelsen's license.
- F. Paragraph 4 provides that Manager will provide to Owner a monthly accounting of all "...sales and resulting sales tax obligations for the Business."
- G. Paragraph 8 provides that Manager and Manager's employees are independent contractors and "...under no circumstances, shall be treated as or deemed to be employees of Owner."
- H. Paragraph 9 provides that

Manager agrees to indemnify, defend, protect and hold Owner harmless for, from and against any and all liability, obligation, damage, cause of action, claim or judgment, including attorneys' fees and expenses, asserted against Owner or Landlord by reason of:

- (i) the operation of the Owner's Business under this Agreement;
- (ii) Manager's employment of employees and conduct of Manager's business contemplated herein in relation thereto; or
- (iii) Manager's negligence or willful misconduct, breaches, acts or omissions. Manager agrees to abide by all applicable laws and regulations. And in the event Manager or any of Manager's employees or agents violate any applicable law or regulation, Manager agrees to reimburse Owner for any fines, penalties or assessments levied or imposed and paid by Owner, and Manager further agrees to hold harmless and defend Owner against any action taken or threatened to be taken on account of such violation.

- I. Paragraph 11 contains a cross default clause with the Lease Agreement, entered into between Samuelsen and Chris Berg (as principal of Duffer D LLC) such that a default under the Management Agreement also constituted a default under the Lease Agreement; and a default under the Lease Agreement also constituted a default under the Management Agreement.
41. Samuelsen, as Tenant entered into a Lease Agreement dated February 11, 2008 with Duffer D, LLC as Landlord (the “Lease Agreement”);
42. Under the Lease Agreement, Samuelsen was responsible for paying Chris Berg’s company, Duffer D, LLC the sum of \$4,300 per month, triple net, adjusted annually; but under paragraph 3 of the Management Agreement, Chris Berg’s other company, Sounds Right, Inc. was responsible for payment of all rent owed by Samuelsen to Duffer D., LLC;
43. Pursuant to paragraph 7.01(a) of the Lease Agreement, Landlord was responsible for all insurances and named the Tenant as an additional insured on each of the Landlord’s insurance policies;
44. Pursuant to paragraph 8.01 of the Lease Agreement, Landlord agreed to indemnify and hold harmless the Tenant from any breach of Landlord’s duties. There was no reciprocal indemnification and hold harmless clause from Tenant to Landlord.
45. Samuelsen did not hire any employees to work at The Office;
46. Samuelsen did not supervise any employees at The Office;

47. Based upon records from the Idaho State Liquor Dispensary and The Office checking account, Samuelsen did not purchase any alcohol for sale at The Office. Such purchases were made by the Managers;
48. Samuelsen did not pay payroll, FICA or withholding taxes for any employee of The Office;
49. Samuelsen did not own the building where Samuelsen's license was placed into use. Berg owned the building and Berg indemnified Samuelsen from all liability. Samuelsen leased the building from Berg, but assigned rights back to Berg under the Management Agreement;
50. Samuelsen did not purchase liability insurance for The Office. Berg purchased the liability insurance;
51. Samuelsen was not ultimately responsible for any fines or penalties attributable to activities at The Office. Under the Management Agreement, the Manager reimbursed Samuelsen for any civil penalties;
52. Based upon Idaho State Tax Commission records, Chris Berg and later, Jade Jesser, filed Sales and Use Tax returns for The Office and paid the tax;
53. Samuelsen did not identify The Office as a business entity on his personal income tax returns for 2008 and 2009, or identify expenses or profits attributable to The Office;
54. Samuelsen's bank records indicate that Samuelsen did not write any checks for expenses attributable to The Office, except one check for a license renewal;
55. Samuelsen did not sign Sales and Use Tax Returns for The Office. The returns were signed by Chris Berg or Jade Jesser;

56. Check #1015 on The Office bank account dated November 23, 2008 was signed by Jade Jesser and written to Samuelsen in the amount of \$1,200. The memo line of the check indicated that the purpose of the check was for “Dec LL Rent”. Mr. Jesser wrote numerous other checks to Samuelsen, approximately once a month, in the amount of \$1,200, where the memo line indicated “Rent.” The amount of \$1,200 is the amount required to be paid monthly by the Manager to Samuelsen pursuant to paragraph 3 of the Management Agreement. Later “Rent” checks were written by Jesser to Samuelsen in the amount of \$1,600, reflecting an increase in the rental amount for the use of Samuelsen’s license.
57. Jade Jesser wrote check #1242 in late January, 2010, on The Office checking account made payable to Joe Hand Productions for \$1,300.00. This is the same amount that an attorney for Mr. Jesser sought to settle the dispute with Joe Hand Productions regarding the allegation of an illegal broadcast.
58. The liquor license applications filled out by Samuelsen contained a question as to whether any other person had a financial interest in the business where the liquor license would be placed into use. Samuelsen checked the “no” box on each application.
59. Prior to his death, Samuelsen was a long time Idaho attorney.

II. RELEVANT LEGAL AUTHORITIES

A. Idaho Constitutional Provisions

1. The Twenty-first Amendment to the United States Constitution provides the state of Idaho authority to regulate the sale of alcohol.

“... *Section 2.* The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited...”

2. The Idaho Constitution, Article III, Sections 24 and 26, provide authority to regulate the sale and consumption of alcohol.

Article III, Section 24: PROMOTION OF TEMPERANCE AND MORALITY. The first concern of all good government is the virtue and sobriety of the people, and the purity of the home. The legislature should further all wise and well directed efforts for the promotion of temperance and morality.

Article III, Section 26: POWER AND AUTHORITY OVER INTOXICATING LIQUORS. From and after the thirty-first day of December in the year 1934, the legislature of the state of Idaho shall have full power and authority to permit, control and regulate or prohibit the manufacture, sale, keeping for sale, and transportation for sale, of intoxicating liquors for beverage purposes.

B. 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. (emphasis added)

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 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 §23-907. Investigation of applications. Upon receipt of an application for a license under this act, accompanied by the necessary license fee, the director, within ninety (90) days thereafter, shall cause to be made a thorough investigation of all matters pertaining thereto. The investigation shall include a fingerprint-based criminal history check of the Idaho central criminal history database and the federal bureau of investigation criminal history database. Each person listed as an applicant on an initial application shall submit a full set of fingerprints and the fee to cover the cost of the criminal history background check for such person with the application. If the director shall determine that the contents of the application are true, that such applicant is qualified to receive a license, that his premises are suitable for the carrying on of the business, and that the requirements of this act and the rules promulgated by the director are met and complied with, he shall issue such license; otherwise the application shall be denied and the license fee, less the costs and expenses of investigation, returned to the applicant.

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 hereunder (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. (emphasis added)

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 §23-933. Suspension, revocation, and refusal to renew licenses.

(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... 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.

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.

... (emphasis added)

...(6) ... 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. (emphasis added).

Idaho Code §23-1038. Suspension, revocation and refusal to renew licenses.

When the director shall make a determination to revoke, to suspend, or to refuse to grant renewal of a license issued pursuant to the terms of this act for any violation of or failure to comply with the provisions of this act or rules promulgated by the director...the procedures for...revocation...shall be in accordance with the provisions of chapter 52, title 67 Idaho Code.

C. RS 4883C2 Statement of Purpose to I.C. §23-908 (1980)

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

III. DISCUSSION

Samuelsen's liquor license 1A-7129 was one for the sale of liquor by the drink.

Samuelsen, as the licensee, was required to 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). Samuelsen was entitled to a

license for the sale of beer only if he was 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). 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. 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(1).

According to Black’s Law Dictionary, “bona fide” is defined 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.

Black’s Law Dictionary (West 6th Ed. 1999).

Selling liquor by the drink is a privilege granted to a person or entity, in this case Samuelsen. The privileges associated with the license can only be exercised by the person or entity so licensed. Samuelsen’s license for the sale of liquor by the drink could lawfully only be used by Samuelsen. “No person except the licensee therein named...shall exercise any of the privileges granted thereunder.” *See* I.C. §23-908(1). Additionally, such license “shall be placed into actual use by the original licensee...and shall not be transferable for a period of two (2) years from the date of original issuance.” I.C. §23-908(4).

A liquor license is simply the grant or permission under governmental authority to the licensee to engage in the business of selling liquor. Such a license is a temporary permit to do that which would otherwise be unlawful; it is a privilege rather than a natural right and is personal to the licensee; it is neither a right of property nor a contract, or a contract right. (citations omitted).

Nampa Lodge No. 1389 v. Smylie, 71 Idaho 212, 229 P.2d 991 (1951).

ABC has the statutory duty to satisfy itself that licenses are 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 has] 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. Haling*, 103 Idaho 364, 369, 647 P.2d, 1236, 1241 (1982).

Here, Samuelsen never personally placed the license into actual use but rather leased or otherwise transferred it to others to actually use. This is corroborated by the compensation scheme for the Managers under the Management Agreement, whereby the Managers in effect paid Samuelsen \$1,200 (and later, \$1,600) per month for the use of Samuelsen's license. The Managers, Chris Berg and Jade Jesser, had not been investigated by ABC and determined to meet the statutory criteria for the issuance of a license at the time they were utilizing Samuelsen's liquor license.

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. Smile*, 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 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 in severable 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. In this case Samuelsen transferred the License to Chris Berg and later to Jade Jesser prior to the expiration of the two year transfer restriction. Samuelsen never personally placed the license into actual use and therefore was not eligible to have the license renewed. The Management Agreement, together with Samuelsen’s lack of involvement in the business of The Office, indicates that Samuelsen did what the statutes and the *Uptick* Court prohibit. Namely, Samuelsen transferred the license to individuals who were not licensed and who had not been approved in advance by ABC to exercise the rights and privileges that are part of the license.

Such delegation of duties and responsibilities by Samuelsen in effect transferred virtually all 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), but under the Agreement the sales were conducted, managed and accounted for by Chris Berg and Jade Jesser. The law further requires that the licensee personally place the license into actual use for a period of six months. Under the Management Agreement, this responsibility was purportedly transferred from Samuelsen to Managers Chris Berg and Jade Jesser.

Under the Management Agreement, Chris Berg and Jade Jesser were charged with adhering to the statutes and regulations governing the sale of liquor by the drink, and were responsible 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.

These arrangements between Samuelsen, Chris Berg and Jade Jesser are analogous to the arrangement in *Uptick*. Just as the *Uptick* Court was concerned that the agreement struck between the lesser and licensee circumvented the scrutiny and approval process of ABC, the provisions of the Management Agreement together with the facts of what actually occurred, allowed others than the licensee 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.

Under the statutory scheme, what actually occurred that must be examined together with what the parties contemplated what would occur based upon the Management Agreement. Certainly the Management Agreement provides insight into the parties intent and may well have contemplated an unlawful transfer. The totality of the facts should be examined to determine whether Samuelsen was the bona fide owner of the business and/or placed the license into actual use within six months and/or attempted to unlawfully transfer use of the license during the two year probationary period.

When reviewing the entire relationship between Samuelsen, Chris Berg and Jade Jesser as a whole, it appears that Samuelsen's role was to procure the license while Berg and Jesser ran the business and paid Samuelsen for the use of the license. Such a relationship is in direct contravention of 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 Samuelsen and Chris Berg and Jade Jesser, together with what actually

occurred, was inconsistent with what the Legislature intended, i.e. requiring the original licensee to personally place the license into actual use.

Moreover, the legislative statement of purpose, attached to an amendment (RS 4883 C2) made to I.C. 23-908 in 1980, states, “the purpose of this bill is to discourage speculation in liquor licensing by requiring the original holder of the license to put it into use immediately upon its receipt and to continue its use for six consecutive months and by providing that the license will not be transferable for two years after its original issuance.” 1980 Idaho Sess. Laws Ch. 314. *Citing*, RS 4883C2.

Samuelsen was not the bona fide owner of the business which was engaged in the sale of beer at retail, nor was he the entity exercising the privileges granted under a license to sell liquor by the drink. Thus, Samuelsen did not meet the statutory requirements that he personally place the liquor license into service nor was Samuelsen the bona fide owner of the business which held the liquor license. Samuelsen transferred his license to Berg and Jesser prior to the two year prohibition period in violation of the letter of the law, and certainly in violation of the intent of the law.

Indicia of Ownership

The parties repeatedly made arguments about whether the Management Agreement was legal. ABC argued that it was unlawful on its face because it transferred all authority and responsibility for the use of the license to others. Samuelsen argued that ABC had previously approved the use of Management Agreements and should now be prevented from arguing that the Management Agreement in this case was unlawful. Neither position is correct in this case.

Here, the Management Agreement turned over virtually all control of The Office from Samuelsen to Sounds Right, Inc. and later to Jesser, Inc. Based upon the affidavits, it appears

that the Management Agreement was fully implemented in this regard. Based upon the affidavits and exhibits, it is clear that Samuelsen, in fact, exercised little or no operational control over the business of The Office or over the actual use of the liquor license. Samuelsen allowed Berg and Jesser to use Samuelsen's license in violation of Idaho Code §23-514. Certainly, Samuelsen did not personally utilize the license during the first six months from the date of the issuance of the license.

The Manager, not Samuelsen, hired and supervised the employees. The Manager, not Samuelsen, handled all payroll, withholding, accounting and taxes. The Manager, not Samuelsen, purchased the alcohol and the food inventory for the business. The Manager, not Samuelsen purchased liability insurance. The Manager broadly indemnified Samuelsen from virtually all liability which might occur as a result of operation of The Office. The Manager agreed to reimburse Samuelsen for any fines or penalties paid by Samuelsen related to the business. There is no evidence that Samuelsen had any involvement in the service of food or alcohol at The Office. The Manager's monthly compensation under the Management Agreement was gross receipts, less gross expenses, less \$1,200 paid to Samuelsen. Thus, the Manager, in effect, paid Samuelsen \$1,200 per month for the use of Samuelsen's liquor license. Moreover, under this arrangement, the Manager kept all profits after paying a \$1,200 (later, \$1,600) monthly rental amount to Samuelsen for the use of the license. Under paragraph 7.0 (a) of the Lease Agreement, Landlord was responsible for all insurance related to the building and contents and named the Tenant as an additional insured on the Landlord's insurance policies. Usually in a commercial lease, the Tenant procures insurance for contents and names the landlord as an additional insured on the tenants insurance policy.

The Sale and Purchase Agreement dated May 11, 2010, and signed by Samuelsen and Jade Jesser is particularly compelling to indicate who was actually using the Samuelsen license. That Agreement stated at paragraph 3 that “Buyer (Jesser) has been operating said business (The Office) as Servantz since October 31, 2008”. Also, the Assignment dated October 2, 2008 states that Servantz (Jesser) “desires to operate” the business of The Office. These statements further corroborate that Samuelsen had very little involvement in the business of The Office.

So exactly what did Samuelsen do with respect to personally placing his liquor license into actual use? Based upon the April 4, 2011, Affidavit of Servantz, Incorporated (hereafter “Servantz Affidavit”),

...Servantz Incorporated frequently met with Mr. Samuelsen to discuss the profits and losses of the business and promotional events. We also discussed weekly sales and expenditures. We would also discuss sales and expenses projections for the upcoming month. If we did not meet weekly, we would meet usually every other week to discuss these matters. We also frequently discussed matters relating to “The Office” over the phone.

Servantz Affidavit, p. 2, ¶6, in pertinent part.

The Servantz Affidavit is signed by Jade Jesser on behalf of Servantz. Mr. Jesser states that he and Samuelsen met frequently to discuss sales, expenses and promotional events. He and Samuelsen “would meet usually every other week to discuss these matters”, and had additional telephone conversations. Thus, it appears that the extent of Samuelsen’s operational control over the business of The Office was to have a conversation approximately every other week regarding sales, expenses and promotional events. This limited involvement does not arise to the level of Samuelsen personally placing his liquor license into actual use. Moreover, under the terms of the Management Agreement, business income and expenses were not really an issue for Samuelsen, so long as he received his \$1,200 monthly payment for the use of the license. The

risk of low gross receipts or high expenses were risks borne entirely by the Manager, and not by Samuelsen. All net profits of The Office, after Samuelsen received his monthly rental for the use of the liquor license, went to the Managers. Thus, Samuelsen's interest was not even that of an investor who would benefit from the net profits generated from the business.

Another item identified by the Servantz Affidavit in an attempt to establish that Samuelsen remained the bona fide owner of The Office was that Samuelsen negotiated a settlement with ABC when an employee of The Office was charged with illegal service to a minor. However, the language of the Management Agreement required that the Manager indemnify and hold harmless Samuelsen from any such liability. Thus, either Samuelsen was repaid for any such expenditure or Samuelsen had a right to be repaid.

The Servantz Affidavit also points to an incident where The Office received a demand letter from Joe Hand Productions alleging the unlawful showing at The Office of an ultimate fighting event. Samuelsen apparently responded by a letter dated September 9, 2010, attached as Exhibit 5 to the Servantz Affidavit. However, this letter was unsigned and therefore it is unclear whether it was actually submitted to the claimant. Also, it is unclear from the letter whether Samuelsen was representing himself, or serving as the attorney for Servantz. Finally, the matter was transferred to other legal counsel for handling on behalf of "The Office." *See* Exhibit 4 to Servantz Affidavit. Furthermore, under the Management Agreement, the Manager had a duty to indemnify and hold Samuelsen harmless from any such liability. Finally, it appears from The Office check #1242 that Jade Jesser attempted to settle this claim for the amount of \$1,300. *See* Finding of Fact #57.

Samuelsen also argues that his receipt of demand letters from the Idaho State Tax Commission for unpaid sales and withholding tax obligations for The Office demonstrate that

Samuelsen was the bona fide owner of The Office. Samuelsen argues that this evidence shows that Samuelsen was responsible for payment of sales and withholding taxes. However, no evidence was presented regarding who actually responded to the Idaho State Tax Commission or whether the past due taxes were actually paid, or by whom. In any case, if Samuelsen paid on the Tax Commission's demand, Samuelsen had a right to be reimbursed by the Manager under the Management Agreement. Moreover, under the Management Agreement, Samuelsen was not responsible for withholding taxes of The Office employees. Thus the receipt of the Tax Commission letters does not support Samuelsen's argument that he was the bona fide owner of the business where the license was placed into use. All it proves is that Samuelsen was identified as the owner of record in the Tax Commission records.

Samuelsen also argues under the Management Agreement Samuelsen was required to: (a) maintain and pay for all licenses, (b) pay state sales tax, (c) purchase food and beverage inventory for the business, (d) be responsible for all remaining costs and expenses. It appears Samuelsen did pay for at least one of liquor license fees. But it also appears the Managers actually paid the sales tax, and purchased the alcohol inventory for the business. The Idaho States Liquor Dispensary records established that Samuelsen made no alcohol purchases. Also, based upon the reimbursement scheme contained in paragraph 3 of the Management Agreement, the Manager was actually responsible for all costs and expenses. Particularly compelling is that Samuelsen did not list any income or expense from The Office on his income tax returns. This suggests that Samuelsen did not really consider The Office to be his business.

Samuelsen notes that he had the rights under the Management Agreement to terminate the Manager and to observe and correct the Manager's performance. From the Servantz Affidavit, it appears that the actual "observations" occurred in meetings or telephone

conferences every other week. The Manager was changed from Sounds Right, Inc. to Servantz on November 5, 2008, by virtue of the Assignment signed by Chris Berg and Jade Jesser . We do not know whether this change was initiated by Samuelsen or whether Samuelsen signed off after Berg and Jesser came to an agreement.

Samuelsen further argues that under the statutes, nothing requires Samuelsen to be the one to personally pour drinks. Samuelsen acknowledges that he delegated most of his duties to others, but argues that he retained the overall responsibility for statutory compliance. Yet under paragraph 9 of the Management Agreement, even this duty was delegated to the Manager. Under the statutory scheme, and the relevant Idaho case law, ABC has a duty to approve and monitor licenses. If one accepts Samuelsen's argument, all statutory duties could be delegated by the licensee to others, if the licensee retains some degree of theoretical control. This is not consistent with the letter or the spirit of the law. It appears that Samuelsen's intent was to hold a license in his name while the actual use was transferred to the Managers, and then to wait out the two year "probationary period" and hope to sell the license for a large profit (in this case, \$150,000. See Finding of Fact #25). The Idaho legislature specifically intended that such a practice not be condoned.

RS 4883C2 Statement of Purpose to I.C. §23-908 (1980)

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

Samuelsen argues that the case of *Fischer v. Cooper*, 116 Idaho 374, 775 P.2d 1216 (Idaho, 1989) supports his contention that he remained the bona fide owner of the business even though he had delegated most or all of his duties to others. *Fischer* was a dram shop liability

case. Cooper had entered into a lease agreement with Watsons. Watsons served liquor to a patron who later was involved in an accident with a motorcyclist. The injured motorcyclist sued Cooper as the license holder alleging dram shop liability. Cooper defended that she delegated her responsibilities to the Watsons and could not be held liable. The court rejected Cooper's argument and held that as licensee she remained liable for motor vehicle accidents which may occur as a result of over-service. In our case, while Samuelsen may have retained theoretical dram shop liability, as a practical matter the Manager purchased liability insurance and agreed to indemnify and hold harmless Samuelsen from any and all such liability.

Further corroboration regarding the practices and intentions of Samuelsen and his Managers is contained in the Assignment dated October, 2008. The document was entered into and signed by Sounds Right, Inc. (Chris Berg) the first Manager, and Servantz, incorporated (Jade Jesser), the second Manager. The Agreement was also signed by Samuelsen, granting his consent to the assignment. The Agreement states in recital B that Servantz "...desires to **operate** a restaurant and bar located at 6125 Fairview Avenue, Boise, Idaho 83704 pursuant to the terms of the Management Agreement." The language was that the Manager "operated" the bar as opposed to managed the bar. *See also* the Sale and Purchase Agreement dated May 11, 2010, signed by Samuelsen, which indicated that The Office had been "operated" by Servantz. This language indicates the true intent of Samuelsen and both of his Managers. Samuelsen's role was to obtain the liquor license and lease it to the Managers during the two year transfer prohibition period. Samuelsen then would be free to sell the license to one of the Managers or to someone else.

Is ABC estopped from revoking Samuelsen’s license or from disapproving the transfer from Samuelsen to Jesser?

Samuelsen argues that equitable estoppel or quasi estoppel precludes ABC from revoking Samuelsen’s license or from refusing to approve the transfer to Jesser. As noted by Samuelsen at pp. 20-21 in his Memorandum in Opposition to Motion for Summary Judgment, the elements in Idaho law for equitable estoppel are: “(1) a false representation or concealment of a material fact with actual knowledge of the truth; (2) the party asserting estoppel did not know or discover the truth; (3) that the false statement or concealment was made with the intention that it would be relied upon; (4) that the person to whom the representation was made to or from who the facts were concealed, relied upon and acted upon the representation or concealment to his prejudice. *Terrazas v. Blaine County*, 147 Idaho 193, 201, 207 P.3d 169, 177 (2009); *Williams v. Blakely*, 114 Idaho 323, 325, 757 P.2d 186, 188 (1987).”

As an initial matter, it should be noted that Idaho Courts exercise caution when estoppel is asserted as a defense against governmental actions.

[E]quitable estoppel may not ordinarily be invoked against a government or public agency functioning in a sovereign or governmental capacity.”

Young Elec. Sign Co., v. State, ex rel Winder, 135 Idaho 804, 25 P.3d 117 (2001).

Samuelsen correctly notes that ABC was aware of the Management Agreement since Samuelsen submitted the agreement to ABC as part of the liquor license application. Additionally, ABC had a statutory duty to investigate the contents of the application pursuant to Idaho Code §23-907. Samuelsen argues that if the requirements of the application did not meet the statutory requirements, ABC had a duty to deny the application and since ABC approved the application, ABC is now estopped from denying that the application complied with Idaho law.

ABC argued that estoppel should not apply. ABC was short-staffed at the time the application was submitted and so was able to only spot check applications and act only on high priority issues when irregularities came to ABC's attention.

As Samuelsen correctly notes, one of the elements of equitable estoppel is a false representation or concealment of a material truth. Samuelsen has failed to point to any false representation made by ABC. Nor has Samuelsen established that ABC concealed a material fact with actual knowledge of the truth. The most that can be argued is that ABC failed to fully comply with its statutory duties in failing to disapprove of Samuelsen's initial application and renewals. Such a failure does not arise to the level of a false representation or a concealment of a material fact with actual knowledge of the truth. Also, Samuelsen fails to prove the second element of equitable estoppel; namely, that Samuelsen did not know or discover the truth about the existence and content of the Management Agreement. Clearly, Samuelsen knew of the Management Agreement since he was an attorney and had himself signed the Management Agreement prepared by his attorney. Thus Samuelsen cannot contend that he was unaware of the contents of the Management Agreement.

Moreover, it is not the Management Agreement itself that is determinative. Based upon all of the facts and circumstances, Samuelsen was not the bona fide owner of the business, nor did he personally place the license into actual use, but rather transferred all operational control of his license to others. ABC could not have been aware of all of these facts and circumstances when it approved Samuelsen's initial license application. Indeed, ABC did not become aware of all of the facts and circumstances in this matter until it investigated what actually occurred during the course of this proceeding.

Samuelsen also argues that the doctrine of quasi estoppel bars ABC from revoking Samuelsen's license. Quasi estoppel is similar to equitable estoppel, except that the element of false representation need not be proved. Rather, quasi estoppel is invoked when one party changes its position to the detriment of the other party and under circumstances where it would be unconscionable for the first party to maintain the inconsistent position. Samuelsen argues that ABC had previously approved of management agreements and therefore it would be unconscionable for ABC to now disapprove of Samuelsen's Management Agreement. The affidavits show that ABC has previously disapproved of some Management Agreements. See *Idaho State Police, Alcohol Beverage Control v. Michael Eddy, Licensee dba Zen Bento*, Case No. 07ABC-COM113, decided April 5, 2009 **and** *Last Chance, Inc., Applicant v. Idaho State Police, Alcohol Beverage Control*, Case No. 07ABC-004 decided January 22, 2008. Also the Grunke Memorandum dated April 16, 2004, introduced into the records by Samuelsen, indicates that ABC has previously had serious concerns about whether some Management Agreements disqualified a liquor license applicant from eligibility. As noted above, the Management Agreement, together with the facts of what actually occurred, rendered Samuelsen ineligible to hold his license. Samuelsen has failed to establish how ABC's past approval or failure to disapprove of some Management Agreements makes it unconscionable for ABC to disapprove of the Management Agreement at issue here. ABC has placed applicants on notice that Management Agreements may be closely scrutinized. Finally, ABC receives no benefit from attempting to revoke Samuelsen's license. In fact, this proceedings has been highly contested and has taken a great deal of ABC's resources and time. ABC has actually suffered a loss of revenue which would otherwise have been generated from the transfer fee. Thus, ABC has received no unconscionable advantage which preclude the enforcement actions in this case.

ABC also responds to Samuelsen’s estoppel arguments that based upon Idaho Code §23-1010(6), ABC can revoke a license at any time if the license cannot affirmatively establish eligibility.

If at any time during the period for which the license is issued a license becomes unable to make the affirmative showings required by the section, (the) license shall be revoked...

Samuelsen responds that this section of the statute applies only to applications.

However, the plain language of the text of the statute refers to the “licensee” not the applicant.

Thus, ABC has the legal authority to commence proceedings to revoke a license during any time that a license is being held, where ABC becomes aware that the licensee fails to meet the statutory criteria for eligibility.

For the reasons stated above, Samuelsen has not established the defense of equitable estoppel or quasi-estoppel.

Failure to promulgate new ABC interpretations through IAPA rulemaking.

Samuelsen argues that ABC has changed its interpretations of actual use, bona fide ownership, unlawful transfer and the propriety of management agreements over time and that such changes in interpretation were required to be implemented by means of rule making pursuant to IAPA. Samuelsen cites the case of *Asarco, Inc. v. State*, 138 Idaho 719 (2003). The *Asarco* Court held that the Idaho Department of Environmental Quality (“DEQ”) engaged in illegal rulemaking when it established pollution standards (TMDLs) for certain Idaho Rivers without formally promulgating new rules using the procedures set forth in IAPA.³ *Asarco* enunciated the standards to determine when agency action must be accomplished through IAPA

³ The establishment of brand new TMDL’s was DEQ’s attempt to interpret and implement the Federal Clean Water Act in Idaho.

rulemaking. Formal IAPA rule-making is required where a new agency policy: 1) has wide coverage, 2) applies generally and uniformly, 3) operates only in future cases, 4) prescribes a legal standard or directive not otherwise provided by enabling statutes, and 5) is an interpretation of the law or general policy. *Asarco*, 138 Idaho at 723. In the case before us, it is not clear that ABC has adopted a new policy. Nor have elements 2), 3) and 4) been established.

Issues about bona fide ownership and whether the license was placed into actual use are highly factually intensive to each unique situation. It would not be possible to promulgate a rule to apply uniformly to all situations and, accordingly, element 2 of the *Asarco* test is not met. Also, element 3 is not met since the interpretation in this case applies to what occurred in 2007 to 2010, thus looking to what happened in the past rather than what will happen in the future. Also, in our case, there is an enabling statute which ABC is attempting to interpret and enforce; specifically, whether Samuelsen personally placed his license into actual use or transferred it to someone else to place it into use, and whether Samuelsen was the bona fide owner of the business. *See* I.C. 23-903. Thus element 4 of the *Asarco* standard does not apply. Based upon IAPA and *Asarco*, it was not necessary for ABC to first engage in rulemaking prior to interpreting the state statutes it is charged with enforcing.

Samuelsen attempts to bolster his argument with the affidavit of his attorney, Steven Meade, containing an October 7, 2009 Administrative Bulletin showing that ABC proposed rule-making to define “bona fide owner” for purposes of Idaho Code §23-1010(2)(a). Therefore, argues Samuelsen, ABC itself acknowledged that its change of interpretation of bona fide ownership should have been through promulgation of a new rule rather than an informal policy.

The October 7, 2009 rule-making was part of a much larger effort by ABC to add numerous rules and regulations relating to the issuance of liquor licenses and the interpretation

of and procedures for enforcement of liquor control statutes. Based on the Clements Affidavit of April 18, 2011, the proposed regulations were withdrawn at the request of the Governor's office for the reason that a legislative committee was looking into the possibility of new statutes to address some of the issues being considered by the rule-making..

The fact that ABC earlier proposed a definition of bona fide owner by regulation does not relieve ABC from its duty to interpret and enforce the existing statutory requirement of bona fide ownership. Nor does it mean that the only means of interpreting the statute is through promulgating new regulations. Further, in this case, it does not appear that ABC has significantly modified its interpretation of "bona fide owner" as applied to Samuelsen. Agencies must have the flexibility to modify their interpretation of statutes to reflect changing realities. *See Washington Water Power Co. v. Idaho Public Utilities Commission*, 101 Idaho 567, 617 P.2d 1242 (1980). As acknowledged by Samuelsen, agencies have broad discretion to interpret their enabling statutes, unless the interpretation is arbitrary and capricious. "[T]he construction given a statute by the executive and administrative officers of the State is entitled to great weight and will be followed by the Court unless there are cogent reasons for holding otherwise." *Kopp v. State*, 100 Idaho 160, 163, 595 P.2d 309, 312 (Idaho, 1979).

Samuelsen relies heavily on the Affidavit of Brian Donesley in support of his arguments that ABC has recently done an about face with respect to its view of the lawfulness of Management Agreements. At one time, Mr. Donesley was an attorney for the predecessor to Alcohol Beverage Control and even for a period of time supervised ABC's predecessor. Mr. Donesley is now an attorney in private practice representing bar owners and liquor license holders as part of his practice. Mr. Donesley is also the attorney who represented Samuelsen in

the drafting of the Management Agreement and the Lease Agreement, and assisted Samuelsen in preparing and presenting the paperwork to procure liquor license 1A7129.

Mr. Donesley asserts in his affidavit that ABC (or its predecessor) used to regularly approve Management Agreements, and its failure to do so now represents a shift in policy and statutory interpretation. However, all of Mr. Donesley's examples point to other issues, such as the definitions of actual use and actual sales. For example, Mr. Donesley points to the *Fuchs* case where Mr. Donesley represented the licensee. In *Fuchs*, the issue was not whether the licensee was the bona fide owner of the business, or had personally placed the license into actual use, but rather whether there were sufficient sales of alcoholic beverages to conclude that Fuchs had placed his license into actual use at all.

In the case before us, the issues are very different. There is no allegation about whether license 1A-7129 was placed into actual use. Clearly it was. Rather, the key to our case is whether the license was placed into use by Samuelsen, or whether the license was illegally transferred to the Managers, Sounds Right, Inc. and/or Jesser, Inc.

Likewise, all of the other examples cited by Mr. Donesley deal with issues, such as what constitutes an adequate amount of use for purposes of the actual use requirement. Again, in our proceeding, the key issue is not amount of use but rather unlawful transfer.

Mr. Donesley discusses and analyzes an April 16, 2004 memorandum from Jenny Grunke (the "Memorandum") which is attached as an exhibit to his affidavit. Ms. Grunke acted in her capacity as an attorney for ABC when she drafted this Memorandum. ABC moved to strike the Memorandum on the basis of attorney-client privilege. The motion was denied on the basis that the attorney-client privilege was waived when ABC provided the Memorandum to Mr. Donesley in discovery in another case.

The Memorandum does not aid Samuelsen's argument that ABC has changed its position with respect to the propriety of management agreements. Rather, the April 16, 2004, Memorandum disapproved of a management agreement similar to the one at issue in our case. The Memorandum further indicates that as of April 16, 2004, nearly four years before the Management Agreement was entered into between Samuelsen and Berg, ABC had serious concerns about the use of such agreements.

Ms. Grunke opined that

It is clear from the intent language of the statute, as well as comments made in committee, the reason that liquor licenses are to be put into actual use by the original holder of the licensee and not to be assigned to a third party until the original owner has put the license in actual use for two years, is to dissuade license holders from simply obtaining a liquor license for the sole purpose of making a profit from selling the license.

Grunke Memorandum, p. 6, attached to the Affidavit of Brian Donesley as Exhibit E.

Ms. Grunke concluded that the management agreement was illegal for the reason that it resulted in the transfer of the actual use of the license from the original licensee to a contractor prior to two years in violation of Idaho Code §23-908(4).

Rather than supporting Samuelsen's arguments in this case, the Grunke Memorandum suggests that the arrangement here between Samuelsen and the Managers resulted in an unlawful transfer of Samuelsen's license.

The Donesley Affidavit also contains as Exhibit H, a letter dated June 25, 2004 from ABC signed by Lt. Bob Clements, to license applicants containing guidance regarding the minimum standards for management agreements. This guidance is consistent with the position taken by ABC in this case. In particular, that the licensee must be the bona fide owner of the business, that will be engaged in the sale of liquor by the drink. This letter was also issued nearly four years prior to the date of the Management Agreement in our case.

Finally, the Donesley Affidavit contains as Exhibit I a letter dated May 31, 2005, from Lt. Clements to Mr. Donesley, advising that a management agreement which was very similar to the one at issue in this matter, operated as a lease of the license which constituted an illegal transfer of the license. The May 31, 2005, Clements' letter indicates that the management agreement at issue in May of 2005 contained many of the same clauses as the Management Agreement at issue in our case.

The exhibits attached to the Donesley Affidavit indicate that ABC's interpretations of bona fide ownership, personally placing the license into actual use, illegal transfers, and use of management agreements have not materially changed since well before Samuelsen entered into the Management Agreement with Mr. Berg and Mr. Jesser. This refutes any argument Samuelsen may make that ABC has changed its position for purposes of Samuelsen's estoppel defenses. It also refutes Samuelsen's argument that ABC unlawfully changed its interpretation, which change can only be accomplished by means of promulgated regulations.

Samuelsen overstates his case when he argues that ABC is suddenly and dramatically changing its interpretations of actual use and bona fide ownership. ABC has had concerns about speculation in liquor licenses for quite some time. ABC has clearly disapproved of some management agreements in the past.

Indeed, the Memorandum of Jenny Grunke relied on heavily by Samuelsen, indicates that not all management agreements will be approved. The Grunke memorandum attempts to set forth some standards for ABC to consider when reviewing management agreements. Certainly, these standards are not set in concrete. Based on the facts here, it appears that ABC is making a good faith attempt to interpret and implement its statutes. There is no indication that ABC's

interpretations are arbitrary and capricious, or that ABC's enforcement actions to revoke Samuelsen's license have been based upon illegal discrimination or any other improper purpose.

Which License is ABC attempting to revoke?

Idaho Code §23-1010(6) provides that a liquor license may be revoked "during the period for which it was issued". Samuelsen argues that it is too late for ABC to revoke a license held by Samuelsen, except the one which was in use when the Administrative Notice was issued by ABC on July 19, 2010. Based upon the evidence in the record, when Samuelsen received his most recent license on May 1, 2010, Samuelsen was not the bona fide owner of the business where his license was being used. He had never personally placed his license into actual use but rather had transferred to others the privilege of using his license. Under these circumstances, nothing prevents ABC from revoking Samuelsen's license, or obligates ABC to transfer the license from Samuelsen to Jesser, Inc.

Idaho Code §23-1010(2)(a) provides "...If at any time during the period for which the license is issued a licensee becomes unable to make the affirmative showings required by this section, the license shall be revoked..." Samuelsen has been unable to show that he was the bona fide owner of the business or that he ever personally placed the license into actual use. Accordingly, his license should be revoked. If the retail beer license is revoked pursuant to I.C. §23-1010, the liquor license must be revoked pursuant to I.C. §23-910(5). *See also* Idaho Code §23-933(1).

Based upon the facts presented in this proceeding, the authorization of the transfer from Samuelsen to Jesser, Inc. would violate not only the liquor control statutes but also the legislative intent to prevent speculation in liquor licenses. A licensee who is granted a liquor

license but who is never in compliance with the requirements of Idaho Code §23-903 is subject to revocation. *Hensen v. Dept. of Law Enforcement*, 107 Idaho 19, 24 (1984).

IV. CONCLUSIONS OF LAW

1. Numerous affidavits were submitted by both parties in support of and in opposition to ABC's Motion for Summary Judgment. Much of the content of the affidavits contained arguments based upon the facts and inferences to be drawn from the facts. However, there is no genuine issue as to any material fact set forth in the pleadings and the affidavits.

2. On February 19, 2008, Samuelsen filed an application for a liquor license and stated under penalty of perjury that he was the bona fide owner of the business of "The Office" where he intended to use the liquor license to sell alcohol. Samuelsen was not the owner of "The Office" and did not intend to personally place the license into actual use, but rather intended to place the license into use through Chris Berg doing business as Sounds Rights, Inc. and Duffer D, LLC.

3. On March 26, 2008, Samuelsen was granted liquor License 1A-7129. Samuelsen failed to personally place the license into actual use and was not the bona fide owner of the business where the license was placed into use. Samuelsen unlawfully transferred the use of his license to Chris Berg doing business as Sounds Rights, Inc.

4. On April 9, 2008, Samuelsen filed an application for a liquor license stating under penalty of perjury that he was the bona fide owner of the business where License 1A-7129 was placed into actual use. In fact, Samuelsen was not the bona fide owner of the business where License 1A-7129 was placed into use.

5. On May 1, 2008, Samuelsen procured a renewed liquor license and did not personally place it into actual use and was not the bona fide owner of the business where the license was placed into use. Samuelsen unlawfully transferred this license to Chris Berg doing business as Sounds Right, Inc. Samuelsen later unlawfully transferred this license to Jade Jesser doing business as Servantz.

6. On April 2, 2009, Samuelsen filed an application for a liquor license stating under penalty of perjury that he was the bona fide owner of the business where License 1A-7129 was placed into actual use. In fact, Samuelsen was not the bona fide owner of the business where License 1A-7129 was placed into use.

7. On May 1, 2009, Samuelsen received a renewed liquor license. In fact, Samuelson was not the bona fide owner of the business where License 1A-7129 was placed into use. Samuelsen unlawfully transferred this license to Jade Jesser doing business as Servantz..

8. On March 15, 2010, Samuelsen filed an application for a liquor license stating under penalty of perjury that he was the bona fide owner of the business where License 1A-7129 was placed into actual use. In fact, Samuelsen was not the bona fide owner of the business where License 1A-7129 was placed into use.

9. On May 1, 2010, Samuelsen received a renewed liquor license. In fact, Samuelsen was not the bona fide owner of the business where License 1A-7129 was place into use. Samuelsen unlawfully transferred this license to Jade Jesser doing business as Servantz.

For the reasons outlined in this Decision, Samuelsen's License 1A-7129 should be revoked and the application to transfer the license to Jesser, Inc. should be denied.

V. ATTORNEY FEES

Both parties have requested attorney fees and costs pursuant to Idaho Code §12-117. Pursuant to this Statute, the prevailing party may be awarded attorneys fees if it is determined that the other party prosecuted or defended this proceeding without a reasonable basis in law or in fact. Samuelsen is not the prevailing party and so is not entitled to an award of attorney fees and costs.

ABC is the prevailing party. However, Samuelsen raised several defenses which are, to the knowledge of the undersigned, issues of first impression in ABC administrative proceedings, including the defense of estoppel and failure to promulgate rules to change past ABC policies and interpretations. When Samuelsen filed an application on May 5, 1993 and when Samuelsen notified ABC of his intent to accept the liquor license in September 5, 2007, there may have been some past confusion regarding ABC's policies and interpretations. There is some evidence in the record to conclude that ABC's interpretations of applicable statutes may have changed somewhat over time into more strict interpretation of actual use, bona fide ownership, unlawful transfer and the lawfulness of Management Agreements. It cannot be said that Samuelsen defended this proceeding with no reasonable basis in law or fact, since there was some reasonable basis to dispute the application of the law to these facts. Accordingly, no award of attorney fees or costs should be made in this case.

VI. CONCLUSION AND PRELIMINARY DECISION

Samuelsen did not personally place his license to sell alcoholic beverages into actual use within six months, or even within two years, and he was not the bona fide owner of the business where the license was placed into actual use, and he unlawfully transferred the privileges accorded under the license to the Managers. What occurred here goes against the legislative intent and the language of the applicable statutes.

There are no material facts in dispute. ABC is granted summary judgment as a matter of law. ABC's action to revoke Samuelsen's license and to deny the transfer of the license from Samuelsen to Jesser, Inc. is affirmed.

APPEAL RIGHTS

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 for 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.

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:

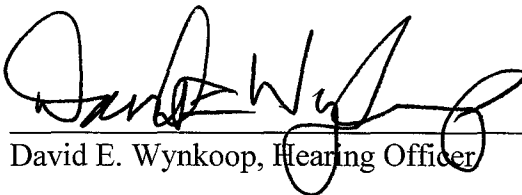
- i. A hearing was held;
- ii. The final agency action was taken;
- iii. The party seeking review of the order resides, or operates its principal place of business in Idaho; or

iv. 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.

DATED this 6th day of June, 2011



David E. Wynkoop, Hearing Officer

CERTIFICATE OF SERVICE

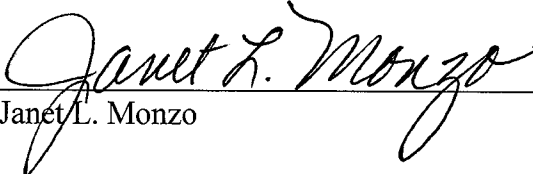
I HEREBY CERTIFY that on this 6 day of June, 2011, I served a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER by facsimile upon the following:

Cheryl Emmons
Deputy Attorney General
Alcohol Beverage Control
700 S. Stratford
Meridian, Idaho 83680-0700

XX via e-mail to Cheryl.meade@isp.idaho.gov
and first class mail

Rory R. Jones
Steven J. Meade
TROUT JONES GLEDHILL
FUHRMAN, GOURLEY, P.A.
P.O. Box 1097
Boise, Idaho 83701

XX via e-mail to RJones@idalaw.com
XX via e-mail to SMeade@idalaw.com
and first class mail



Janet L. Monzo