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March 31, 1988

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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Beer Licenses

Dear Mr. Smyser:

This letter is in response to your inquiry dated March 4, 1988. The issue is whether a municipality may require prospective tavern keepers to obtain the consent of adjacent residents before a liquor license is issued. Although the city has the authority to limit both the number and location of licenses, requiring the written consent of resident owners as a condition precedent to obtaining a license conflicts with both federal and state law.

Regulating the sale of alcoholic beverages is a valid exercise of the police power under art. 12, § 2, of the Idaho Constitution. Crazy Horse, Inc. v. Pearce, 98 Idaho 762, 572 P.2d 865 (1977). Accordingly, the proposed limitation of the maximum number of outstanding licenses that may be issued is a valid exercise of the city's police power. In Gartland v. Talbott, 72 Idaho 125, 237 P.2d 1067 (1951), the Idaho Supreme Court specifically recognized that "[a] limitation of the number of licenses which will be issued for the sale of intoxicants within a municipality or within a given area is not of itself prohibitory, and is recognized as a legitimate regulation tending to promote public health, safety and welfare within the police power." Id. at 130.

The issue, therefore, is not whether the limitation of the number of licenses is constitutional, but whether the condition

precedent of obtaining the adjacent residents' consent is a valid exercise of the police power. Because the proposed ordinance limits the location (inherently a zoning process), and not the individuals (inherently a licensing process), the ordinance must conform with the Local Planning Act of 1975, which requires certain procedures be followed in order to protect the rights of individuals subject to the zoning process. Idaho Code §§ 67-6501 - 6536. The Local Planning Act specifically authorizes only the city council or a specifically defined commission to decide matters of zoning. Idaho Code § 67-6504. The Idaho Supreme Court held that this authorization of decision-making powers is exclusive. In other words, no other procedure is permitted. Gumprecht v. City of Coeur d'Alene, 104 Idaho 615, 651 P.2d 1214 (1983). The issue in Gumprecht was whether local zoning ordinances could be amended or enacted through an initiative election. Id. at 615. According to the Idaho Supreme Court, because the statutory law mandated that only the city or its established commission could decide zoning matters, any other procedure granting that decision-making authority to others, such as the initiative process in Gumprecht, would violate the law. Gumprecht contemplated a district wide initiative, whereas the proposed ordinance allows a much smaller segment of the population - 75% of owners or occupants within five hundred feet of the premises - to make that decision. Accordingly, just as the Gumprecht procedure violated state law, so too would the consent requirement in the proposed ordinance.

Gumprecht was decided on state statutory grounds, but the proposed ordinance would also violate the Due Process Clause of the U.S. Constitution. The United States Supreme Court case on point is Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928). In Roberge, supra, the issue was whether a land owner's due process rights were violated by a zoning ordinance which required consent of the owners of two-thirds of the property within four hundred feet of the proposed building. Id. at 120. The United States Supreme Court held that such a "delegation of power . . . is repugnant to the due process clause of the fourteenth amendment." Id. at 122. The Court noted that the ordinance did not provide for any review procedure: once the homeowners refused to consent, the land owner had no recourse. Because the homeowners were not bound by any official duty, they were free to withhold their consent for any capricious or selfish reason. The possibility for such capricious action is clearly repugnant to the due process clause of the fourteenth amendment.

The proposed legislation fits squarely into the Roberge facts. In both cases the ordinances in question require a percentage of the residents to give written consent. Just as that requirement of written consent violated the due process

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clause in Roberge, so does the requirement in the proposed legislation for written consent also violate the due process clause. The Roberge case, although decided in 1928, was upheld in 1976 by City of East Lake v. Forrest City Enterprises, Inc., 426 U.S. 668, 677-78, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976). In East Lake the United States Supreme Court affirmed Roberge stating that the delegation of the decision-making authority to a narrow segment of the community violates the due process clause.

The requirement of written consent would also violate general Idaho law. According to the Idaho Supreme Court, "it is the general rule that where authority to license and regulate a business is granted by the legislature to a municipality, the regulations adopted must not be unreasonable, unjust, or unduly oppressive." Barth v. De Coursey, 69 Idaho 469, 207 P.2d 1165 (1949). The supreme court has also stated that ordinances must have "a reasonable connection to a goal legitimately related to the police power." Cooper v. Board of Ada County Commissioners, 96 Idaho 656, 658, 534 P.2d 1096 (1975). As long as the ordinance bears "a rational relationship to permissible state objectives," the ordinance is valid. Id. at 659. When a narrow segment of the population decides whether a liquor license should issue, the decision is inherently fraught with arbitrary and capricious bias. A requirement of consent does not promote any general public welfare or health. Rather, the consent requirement vitiates any impartial, reasoned opinion a neutral city council may have. Such a delegation of decision-making power to a narrow segment of the population clearly would violate the due process clause, as well as being inconsistent with Idaho law.

Sincerely,

PRISCILLA HAYES NIELSON
Deputy Attorney General

PHN/mkf

cc: Jim Weatherby,
Association of Idaho Cities