



**Second Meeting  
2009 Interim  
July 28, 2009**

**Room 413  
State Capitol Building  
Pierre, South Dakota**

**Tuesday, July 28, 2009**

The second meeting of the Alcoholic Beverage Control and Licensing Laws Committee was called to order by the Chair, Senator Tom Nelson, at 9:30 a.m. (CDT) in Room 413 of the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members answering the roll call: Senators Tom Nelson (Chair) and Craig Tieszen; and Representatives Lance Carson, Mark Kirkeby, Dan Lederman, Eldon Nygaard, Betty Olson, Tim Rounds (Vice Chair), Oran Sorenson, Steve Street, and Charles Turbiville. Senators Ryan Maher and Russell Olson and Representative Bob Faehn were excused.

Staff members present included: Jim Fry, Director; Fred Baatz, Principal Research Analyst; and Lisa Shafer, Legislative Secretary.

(NOTE: For purpose of continuity, the following minutes are not necessarily in chronological order. Also, all referenced documents distributed at the meeting are attached to the original minutes on file in the Legislative Research Council (LRC). This meeting was web cast live. The archived web cast is available at the LRC web site at <http://legis.state.sd.us> under "Interim Information – Minutes and Agendas.")

**Approval of Minutes**

**REPRESENTATIVE TURBIVILLE MOVED, SECONDED BY REPRESENTATIVE ROUNDS, TO APPROVE THE MINUTES FROM THE FIRST MEETING ON JUNE 19, 2009. The motion prevailed unanimously on a voice vote.**

**Minimum Drinking Age and the Affect on the State Highway Funds**

**Mr. Darin Bergquist**, Secretary for the Department of Transportation, said that in 1984, Congress passed the National Minimum Drinking Age Act. It required states to prohibit persons from under the age of 21 from purchasing or publicly possessing any alcoholic beverage. Failure to conform to the Act by October 1, 1987, resulted in the state losing certain highway funds.

At the time the National Minimum Drinking Age Act was passed, South Dakota allowed people to purchase beer containing up to 3.2% alcohol at the age of 18. When the Act was passed, the state brought a legal act challenging the constitutionality of the Act. The United States Supreme Court ruled in a 7-2 decision that the law was constitutional and Congress could restrict the receipt of specific funds as long as certain conditions were met.

As a result of the lawsuit, all 50 states have a minimum drinking age of 21. There is variance amongst the states as to how the National Minimum Drinking age Act is applied. The Act is

only concerned about the purchase and public possession of alcohol by people under the age of 21. The Act does not address private consumption. Therefore, not all states prohibit consumption in a private setting. However, all states prohibit the purchase of alcohol by anyone under the age of 21.

The penalty for the failure to comply is the potential loss of 10% highway funds in certain categories – service transportation program, national highway assistance funds, and the interstate maintenance funds. The three categories comprise about 85% of the state highway funds. Based on the 2009 allocation of federal funds, a 10% reduction in funding for those three areas would be about \$17.5 million in federal highway funding.

In response to a question posed by **Representative Tim Rounds**, Secretary Bergquist said that the definition of public possession would include a private business, street dance, and any public establishment.

Secretary Bergquist stated, in response to a question by Representative Rounds, that the federal government made the possession of alcohol by a person under the age of 21 illegal, but not consumption. A person under the age of 21 would be able to consume alcohol in a private establishment, such as a home or private club, in a state where the possession is illegal and not consumption. However, South Dakota bans consumption for any person under the age of 21.

Representative Rounds asked about the exceptions for people under the age of 21 to consume alcohol listed in §35-9-1.1. Secretary Bergquist said that the exception are outside the purchase or public possession restrictions in the federal act and therefore do not affect the highway funding.

Secretary Bergquist read the federal rule that defines public possession. The South Dakota exceptions listed in the statute are tied directly with the US Department of Transportation's definition for public possession.

## Revenue Report

**Mr. Matt Fonder**, Deputy Director of Property and Special Taxes with the Department of Revenue and Regulation (DRR), answered questions posed at the previous meeting. In response to Representative Nygaard's question pertaining to compliance checks, Mr. Fonder distributed a handout entitled "Age of Seller Caught in Alcohol Compliance Checks". (**Document #1**) The DRR looked through the last 125 violations and police reports to create the handout.

In response to a previous question posed by Representative Kirkeby, Mr. Fonder said that the department collects enough in fees to cover the administrative costs. The DRR collects over \$500,000 in fees and budgets about \$330,000 for administrative costs in the Special Taxes Division.

Mr. Fonder distributed a draft legislation entitled "An Act to revise the statutes regarding the days and hours that alcohol can be sold on a licensed premise, and who can sell, serve, or dispense alcohol on a licensed premise." (**Document #2**) He said that draft legislation is a consolidation of the current statutes and clarification of statutes. Mr. Fonder explained the changes in the draft legislation.

**Representative Charles Turbiville** requested that the proposal include the sale of alcoholic beverages on Christmas Day and Memorial Day.

Mr. Fonder responded to **Representative Oran Sorenson's** question, that certain off-sale licensed establishments can have people as young as 14 sell alcohol. This draft legislation would increase the age requirement to sell to 18.

### **Review and Discussion of Form and Style Legislation**

**384Q0850** – An Act to revise certain provisions regarding alcoholic beverage control and licensing laws. (**Document #3**)

**Mr. Fred Baatz**, Principal Research Analyst for the Legislative Research Council (LRC), told the committee that some of the changes in the draft legislation 384Q0850 are truly form and style changes while some are substantive changes. The draft legislation is a consolidation of some definitions listed in other sections, clean-up of out-dated legislation, and clarification of terms and definitions in the current statute. Mr. Baatz explained the recommended changes in the draft legislation.

Mr. Baatz noted a change that needs to be made to the legislation. On page 16, line 6, the cross references should be sections 32-34 and not sections 29-31.

Representative Rounds asked if section 25 refers to a new fee. Mr. Baatz responded that municipalities currently charge a fee for noncompliance, but there are no guidelines that a municipality must follow. Directions as to the maximum fee for other offenses are listed in other statutes. Mr. Baatz is not certain if the change would require a 2/3 vote since there currently is a fee and the amount listed in the draft legislation is similar to what is currently charged.

The committee recessed from 10:35 a.m. and reconvened at 10:58 a.m.

**Representative Lance Carson** asked if “consumption” should be inserted after the word “sale” on page 13, line 20 and page 14, line 9. Mr. Baatz responded that he will review the legislation and report back to the committee.

In response to Representative Sorenson's question regarding a universal enforcement of the warning sign for drinking while pregnant, **Mr. Shawn Lyons**, South Dakota Retailers Association, stated that he will research the issue and report back to the committee. Mr. Baatz stated that according to SDCL §35-4-99, a warning sign must be displayed and a failure to do so is a petty offense.

**Mr. Tim Dougherty**, South Dakota Retail Beverage Dealers Association, informed the committee about dram shop liability laws. He said that the liability exists when a licensed retailer serves alcoholic beverages to a patron who becomes intoxicated and gets injured due to being intoxicated. South Dakota law states that the licensee cannot be civilly liable for damages. This issue was addressed in the Supreme Court decision of *Waltz v. City of Hudson*.

Section 27 of the draft legislation addresses civil liability. Mr. Dougherty suggested that “or consumption” be included after the word “sale” on page 14, line 9. To be consistent in the draft

legislation, he also suggested that “or consumption” be inserted after “sale” on page 13, line 20 (Section 26).

Mr. Dougherty said that SDCL chapter 35-11 deals with civil liability related to intoxication. There are two sections in the chapter – §35-11-1 aggregates the Supreme Court case of *Waltx v. City of Hudson* and §35-11-2 provides liability protection for a social host. If a person serves alcoholic beverages at their house and another person leaves and has an accident as a result of being intoxicated, the host is not liable for the accident. The Supreme Court has found that neither the licensee nor social host can hold civil liability due to the actions caused by intoxication of another person.

In response to Representative Sorenson’s questions, Mr. Dougherty said that there is no age limit for the civil liability coverage for a social host. However, there could be criminal liability issues if the social host knowingly served an underage person.

An example of a race track in North Sioux City where an underage employee stole alcohol, drank, drove, and caused an accident. Although the employer has rules prohibiting the consumption of alcohol while working, the Supreme Court found that the employer (race track) failed to exercise proper supervision and was civilly liable. Mr. Dougherty said that he has drafted legislation to address similar situations, which will be discussed later.

Representative Tom Nelson requested a copy of the Supreme Court case be provided to the committee.

The committee recessed at 11:38 a.m. and reconvened at 1:07 p.m.

### **Review of Requested Draft Legislation**

**756Q0854** – An Act to require nondiscriminatory pricing between malt beverage suppliers and malt beverage wholesalers. (**Document #4**)

**Representative Steve Street** informed the committee that the draft legislation is intended to make the manufacturer of malt beverages deliver the product to the wholesaler for a flat price. The draft legislation addresses only malt beverages. Currently, wholesalers are required to provide products to retailers at a flat price. The draft legislation is an attempt to level the playing field between manufacturers and wholesalers.

**Mr. Jim Fry**, Director of the Legislative Research Council, said that the language on page three of the draft legislation mirrors the language from the North Dakota statute. The wholesaler will be required to sell the product at the same price to all clients except for freight costs.

In response to **Representative Eldon Nygaard’s** question about leveling the playing field between small businesses and large corporations, Representative Street said that the legislation is intended to offer parity to the wholesaler since they are required to have a flat price and therefore the manufacturer should have a flat price also. **Mr. Robert Riter**, South Dakota Beer Wholesalers Association, said that the issue is not large versus small retailers, but rather the ability to price products as deem appropriate. This allows a distributor to have similar prices (considering freight charge), to allow the retailers to compete with other retailers across the state

**Senator Craig Tieszen** asked about the state's interest in regulating the product. Mr. Riter responded that alcohol is different than other products in that the state has the responsibility to regulate. SDCL §35-8A addressed the relationship and the state oversight.

In response to Representative Turbiville's question, Mr. Riter said that the draft legislation would help accomplish a fairer and more consistent price to the consumer. Initially the benefit would be to the distributor, but it would carry through to the retailers in the market place.

Representative Rounds asked about shipments to further distant areas. Mr. Riter stated that cost is calculated for freight-on-board point of origin. The base price will still be the same.

**855Q0856** – An Act to establish a unified age to sell or serve alcoholic beverages. (**Document #5**)

Representative Nygaard said that the intent of the draft legislation is to simplify the age requirements to sell or serve alcoholic beverages by creating a mandatory minimum age of 18.

Representative Rounds requested that the language pertaining to the age for consuming and selling alcoholic beverages be omitted from the omnibus bill and placed in separate bills due to the issue being highly debatable.

In response to Representative Turbiville's question, Mr. Fry said that loitering has been defined in case law as people aimlessly hanging-out at a location without an apparent purpose and without a legal purpose to be there.

Representative Sorenson asked if the draft legislation would hurt small establishments that have people younger than 21 serving food and alcoholic beverages. Mr. Fry said that the draft legislation would require people to be 18 years old to serve alcoholic beverages. **Representative Betty Olson** responded that the change will hurt small businesses in rural areas that depend on people younger than 18 to sell and serve both food and alcoholic beverages.

**918Q0853** – An Act to revise certain rule-making authority regarding the sale of certain alcoholic beverage container sizes to on-sale licenses. (**Document #6**)

Representative Olson said that the draft legislation was created at the request of Senator Ryan Maher. The draft legislation removes the restriction for the size of the container retailers are allowed to purchase and sell from. Currently, retailers are able to buy larger containers of alcohol but are only able to sell the alcohol from the smaller container. Therefore, the retailer needs to pour the alcohol from the larger container into the smaller container to legally sell the product. The draft legislation would remove the restriction.

In response to Representative Nygaard's question, Mr. Fry stated that the legislation was enacted as a consumer protection law by prohibiting the retailer from pouring the alcohol from the larger container of an inferior quantity into other types of containers.

**189Q0855** – An Act to permit certain alcoholic beverage licensees to purchase inventory from another alcoholic beverage licensee in limited circumstances. (**Document #7**)

Representative Olson told the committee that currently, retailers are only able to purchase alcoholic beverages from the distributor. Due to storage issues and unexpected increases in demand, some retailers run out of beverages. The intent of the draft legislation is to allow retailers, that run out of alcoholic beverage products due to a special event, to purchase alcohol beverages from other businesses.

The committee discussed the topic and stated their support for the concept.

In response to a question posed by Representative Rounds, Mr. Riter said that distributors have territories and areas of responsibilities. All beer sold in that area needs to be tracked by the distributor. The distributor also ensures that only people authorized to sell alcoholic beverages are receiving the products. He understands the emergency situation, but the integrity of the product is in jeopardy with this proposal. The distributor ensures that the product is not dated beyond its shelf-life.

Representative Rounds asked if there is a way to transfer cases of beer as long as the product remains in the same territory. Mr. Fonder stated that he will look into the issue.

**HB 1226** – An Act to allow certain artisan distillers and farm wineries to sell certain distilled spirits to wholesalers and retailers. (**Document #8**)

Representative Nygaard said that House Bill 1226 was brought before the Legislature last session. It is an attempt to allow artisan distillers and farm wineries to sell distilled spirits produced in the state to the wholesalers and retailers in the state.

### **Public Testimony Regarding the Draft Legislation**

Mr. Dougherty said that he agrees with the proposed legislation brought forth by Mr. Fonder with a couple exceptions. The second to last sentence of section 1 allows for municipalities or counties to further restrict the hours of operation. This contradicts with the rest of the section, and there needs to be uniformity. By inserting that sentence and allowing municipalities or counties to set their own hours and days of operation, the result will be a system similar to the current one with variations across the entire state.

Mr. Dougherty stated his concern about changing the age of sale listed in section 5 of the proposed legislation. This would require all convenience store operators to be 18 years or older to sell the product. There currently is no minimum age, and this change could be burdensome on some businesses that have trouble finding employees.

**Mr. Jeremiah M. Murphy**, Republic National Beverage, echoed Mr. Dougherty's concerns for hours of operation. By allowing varying times of operation, it becomes more difficult to deliver the product and service the clients. This change could undermine a very valuable system, for tax collection and regulation by the state.

In the draft legislation presented by Mr. Baatz, there are two definitions that are proposed to be changed – page 1, line 16 and page 2, line 24. He is concerned about the effect of those changes on the balance of the statute; particularly §35-4-5.1; which states that a manufacturer may not be licensed as a wholesaler. He would like to know if the three-tier system is affected by changing the definitions.

As to the HB 1226, Mr. Murphy would like to research the topic more thoroughly with the proposed changes and report back to the committee.

Mr. Lyons echoed the concerns of the previous testifiers as to the draft legislation presented by Mr. Baatz. He would like to review the language for the dram shop laws and report back to the committee.

As to the draft legislation presented by Mr. Fonder, Mr. Lyons stated his concern with section 1 allowing the municipalities or counties to set hours and days of operation. The purpose of the committee is to create consistency and uniformity in the process, and Mr. Lyons is not certain the language in the presented draft legislation is a good solution.

Mr. Lyons said that labor is a major issue for many businesses. Many times the retailers can only get people under the age of 18 to work and serve alcoholic beverages. The change would be burdensome on the businesses. Mr. Lyons noted that in compliance check handout (Document #1) distributed by DRR, there is more of an issue with compliance for sellers in the age group of 21-30 years old.

In regards to the draft legislation presented by Representative Street, Mr. Lyons would like to know the impact to the retailers in North Dakota.

As to the draft legislation presented by Representative Olson, Mr. Lyons said that his members would like the ability to transfer alcoholic beverages from one location to another. This would be a cost efficient management issue for the businesses.

Mr. Lyons believes that more time is needed as to determining the appropriate age for serving and selling alcohol.

The committee recessed at 2:35 p.m. and reconvened at 2:54 p.m.

Mr. Riter commented on the draft legislation presented by Mr. Baatz. Section 52 of the draft pertains to the relationship between the brewers and distributors. There was a reason for the passage of that statute. Before the legislation is voted on, he would like to review the topic and report back to the committee. Mr. Riter said that many of the equity agreements do not have a termination date. The brewer will have an agreement with his organization stating the obligations. He wants to ensure that the legislation will not only be prospective, but also apply to the agreements that exist without a termination date.

The main change in section 20 of the LRC draft legislation would be to change the commas to semicolons. Mr. Riter said that the intent is applied to the manufacturer of distilled spirits. He would like to check and ensure that the change would not impact the beer manufacturers or other malt beverage dealers.

Section 8 of the LRC draft legislation refers to kegs. Mr. Riter checked and said that beer kegs have serial numbers. When the kegs are given to a retailer to be utilized, the kegs are marked to allow them to be traced.

Representative Rounds asked if Mr. Riter is satisfied with the definition of keg. Mr. Riter said that the language used was from existing statute. He will check if there is other terminology.

## Public Testimony

**Mr. Michael Hammrich**, citizen of Ipswich, South Dakota, distributed a handout pertaining to the new liquor licenses available for restaurants. (**Document #9**) He told the committee that the city passed the full service restaurant on-sale license resolution in May 2009; setting the license fee at \$124,385 in a town with a population of 943. He believes that amount for a liquor license is too high for a town the size of Ipswich. Anything more than \$15,000 is not feasible for a license in a town like Ipswich.

The last liquor license sold in Ipswich was sold for \$124,385 but the previous license was sold in September of 2003 for \$943. If the most recent liquor license would have been purchased nine months sooner, the value of the full service restaurant on-sale license could have been set at \$943.

The minimum fee for the new license is either \$1 for each person in the jurisdiction or the “fair market value” of the license, whichever is greater. The fair market value is the documented price of the on-sale liquor license most recently sold in an arms length transaction, less the value of any real or personal property included in the transaction. Mr. Hammrich explained fair market value determination process utilizing the transaction in Ipswich.

Mr. Hammrich suggested looking at the guidelines and implementing caps for the restaurant liquor licenses and renewal fees.

Representative Nelson asked if the city council can revisit the price for fair market value of a sale. Mr. Fry said that the city council may be able to readdress the fair market value and amend the ordinance if the council has new sufficient information showing the previous information was invalid.

Representative Lederman inquired about the formula to determine fair market value. He said that the legislature may have overlooked the best method to gauge a value for a business – averaging the past five years of previous sales and earnings. He suggested the committee make an amendment to SB 126 from 2002 that would include the five year average for sales and earnings to reduce the actual cost of the license.

Mr. Dougherty provided a historical perspective on SB 126. The pricing methodology was developed by the municipal league and the DRR and was part of the legislation as a compromise. In SDCL §35-4-116, each municipality or county shall set the full service restaurant on-sale license fee within ninety days of adopting the ordinance within thirty days after the resolution of any appeal. After the fee for full service restaurant on-sale license has been determined, no municipality or county may change the fee for a period of ten years unless a growth in population reported by the federal decennial census requires an increase in the fee.

Mr. Dougherty said that the prices will not be in place forever. The purpose of the pricing methodology was to protect the value of the existing licenses that have been previously purchased.

Representative Nygaard asked if there is anything that can be done to help the small communities. Mr. Dougherty said that the sale of the license is determined based on the formula and not whether the person will generate that amount in revenue. The person that purchased the license for \$150,000 will want to sell it for that amount also.



### Staff Direction

Mr. Fry listed the staff directives stated throughout the meeting.

Representative Rounds would like research performed pertaining to the allowance of people under the age of 21 to enter and drink at private clubs and establishments that comply with the definition in the National Minimum Drinking Age Act.

Representative Rounds requested proposed legislation that would lower the drinking age without losing federal highway funds.

Senator Tieszen requested that Ms. Yvonne Taylor with the Municipal League be contacted regarding any changes to temporary licenses.

Representative Turbiville asked that the draft legislation presented by Mr. Fonder be changed to have one set of hours and days of operations. He does not want local control for the municipalities or counties to be included to maintain uniformity.

Representative Turbiville requested that sales prohibitions on Memorial Day and Christmas Day be retained in the draft legislation presented by Mr. Fonder.

Representative Turbiville requested that a separate bill be created that deletes lines 9 – 15 on page 18 of the LRC draft legislation.

Representative Rounds asked that staff research the issue of pregnancy warning signs to determine if there is a federal mandate.

Representative Lederman asked about the number of ordinances and licenses that have been passed pursuant to the passage of the new liquor licenses for restaurants. Mr. Fonder said that about 7-10 ordinances have been passed and only one license has been issued.

Senator Nelson asked about the fee charged for the license that was issued. Mr. Hammrich said the license was sold in Eagle Butte for \$620.

### Next Meeting

The next meeting of the Alcoholic Beverage Control and Licensing Laws Committee is scheduled for Tuesday, September 29, 2009, in Pierre.

### Adjourn

**REPRESENTATIVE ROUNDS MOVED, SECONDED BY REPRESENTATIVE TURBIVILLE, THAT THE COMMITTEE ADJOURN. The motion passed unanimously on a voice vote.**

The committee adjourned at 4:07 p.m.

