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RESEARCH MEMORANDUM

To:

From: Nora.Legal

Date:

Re: Law on Residency Requirements for Liquor License and Issuance of Food permit

QUESTIONS PRESENTED

Law on residency requirements for liquor license, and on the food permit

SUMMARY

Although section Ind. Code Ann. 7.1-3-21-3, 4, 5, 5.2, and 5.4 prohibit the issuance of an alcoholic beverage permit to a persons or entities, 7.1-3-21-6 provides certain exceptions. Specifically, it exempts a hotel's liquor license from the residency requirements.

Regarding food permits, it appears these are issued by the county, rather than the state, and are non-transferrable.

RESEARCH FINDINGS

Relevant Statutory Sections

1. Residency requirements

7.1-3-21-3. Residency requirements.

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The commission shall not issue an alcoholic beverage retailer's or dealer's permit of any type to a person who has not been a continuous and bona fide resident of Indiana for five (5) years immediately preceding the date of the application for a permit.

7.1-3-21-5.4 Issuance of permits to limited liability companies; qualifications

Sec. 5.4. (a) The commission shall not issue an alcoholic beverage retailer's or dealer's permit of any type to a limited liability company unless at least sixty percent (60%) of the membership interest is owned by persons who have been continuous and bona fide residents of Indiana for five (5) years.

(b) Each manager and member of a limited liability company must possess all other qualifications required of an individual applicant for that particular type of permit.

Ind. Code Ann. § 7.1-3-21-5.4 (West)

Sec. 5.4. (a) The commission shall not issue an alcoholic beverage retailer's permit of any type to a limited liability company unless at least sixty percent (60%) of the membership interest is owned by persons who have been continuous and bona fide residents of Indiana for five (5) years.

(b) The commission shall not issue an alcoholic beverage dealer's permit of any type for the premises of a package liquor store to a limited liability company unless:

(1) at least sixty percent (60%) of the outstanding membership interest in the limited liability company is owned by persons who have been continuous and bona fide residents of Indiana for five (5) years; and

(2) the membership interest described in subdivision (1) constitutes a controlling interest in the limited partnership.

(c) Each manager and member of a limited liability company must possess all other qualifications required of an individual applicant for that particular type of permit.

7.1-3-21-6 Exceptions for retail and dealer partnerships, corporations, limited partnerships, and limited liability companies.

Sec. 6. (a) The provisions of sections 4, 5, 5.2, and 5.4 of this chapter concerning retail and dealer partnerships, corporations, limited partnerships, and limited liability companies shall not apply to the issuance of:

(1) a dining car permit;

(2) a boat permit;

(3) a drug store permit;

(4) a grocery store permit;

(5) a hotel permit;

(6) an airplane permit;

(7) a gaming site permit;

(8) a horse track permit;

(9) a satellite facility permit; or

(10) a retail permit to an establishment:

(A) that is sufficiently served by adequate law enforcement at its permit location; and

(B) whose annual gross food sales at the permit location:

(i) exceed one hundred thousand dollars (\$100,000); or
(ii) in the case of a new application and as proved by the applicant to the local board and the commission, will exceed two hundred thousand dollars (\$200,000) by the end of the two (2) year period from the date of the issuance of the permit.

(b) The commission shall not issue a permit listed in subsection (a) to a foreign:
(1) corporation;
(2) limited partnership; or
(3) limited liability company;

that is not duly qualified to do business in Indiana.
Ind. Code Ann. § 7.1-3-21-6 (West)

2. Gross Food sales requirements.

Hendricks County Food Ordinance No. 2010-08

Permit - means the document issued by the Hendricks County Health Department that authorizes a Person to operate a Retail Food Establishment, Mobile Food Establishment, Temporary Food Establishment, Farmers' Market Vendor, or Bed and Breakfast Establishment.

Person- means an association; a corporation; an individual; partnership; or other legal entity, government, or governmental subdivision or agency.

Section II, Permits

It shall be unlawful for any Person to operate a Retail Food Establishment, Mobile Food Establishment, Temporary Food Establishment, Farmers' Market Vendor, or Bed and Breakfast Establishment in Hendricks County, who does not possess a valid Permit from the Health Officer; except when the entire operation of the establishment is receiving inspections by an appropriate State or Federal governmental agency. Valid Hendricks County Food Permits shall be posted in a conspicuous place at the establishment at all times.

A. Only Persons who comply with the applicable requirements of this Ordinance will be entitled to receive and retain such a Permit.

B. Permit duration for:

(1) Retail Food Establishments and Bed and Breakfast Establishments shall be one year beginning from the date of issuance and shall be applied for by the establishment annually.

(2) Mobile Retail Food Establishments shall include expiration on December 31st of the calendar year in which the permit is issued.

(3) Temporary Food Establishments shall be for the term of one continuous event at one location. This Permit is not to exceed fourteen (14) consecutive days.

(4) Farmers' Market Vendors permits shall expire on December 31st of the calendar year in which the Permit is issued.

C. Any Permits issued by the Health Officer shall contain the name of the establishment, the address of the establishment, duration of Permit, and other pertinent information required by the Health Officer.

- D. Required Permits shall be provided by the Hendricks County Health Officer subject to a completed application, payment of fees, and compliance with all applicable state statutes, rules and regulations and local Ordinances. The applicant must be an owner and/or Operator of the Retail Food Establishment, Mobile Food Establishment, Temporary Food Establishment, Farmers' Market Vendor, or Bed and Breakfast Establishment.
- E. A late renewal fee will apply if a Permit for a Retail Food Establishment or Bed and Breakfast Establishment is not renewed by the date of expiration. Application for a Mobile Food Establishment, Temporary Food Establishment, or Farmers' Market Vendor Permit must be submitted to the Health Department at least 48 hours prior to start of the event or operation, or late application fees will apply.
- F. Public events where catered food is served or prepared shall occur at a facility holding a valid Hendricks County Establishment Permit. This permitted establishment shall obtain a current copy of the caterer's local health department food Permit. If the site or the caterer is not permitted, the caterer must obtain a Temporary Food Establishment Permit for the event.
- G. Any Person who desires to operate a Temporary Food Establishment in Hendricks County shall obtain from the Health Officer a Permit for a Temporary Food Establishment. Such Temporary Permit shall be provided by the Health Officer if a completed application for a Permit and appropriate fees are presented and the Temporary Food Establishment demonstrates compliance with all critical requirements.
- H. A Temporary Permit will not be issued to a Temporary Food Establishment in operation in one location for more than thirty (30) days in one calendar year.
- I. A separate Permit shall be required for each Retail Food Establishment, Mobile Establishment, Temporary Food Establishment, Farmers' Market Vendor, or Bed and Breakfast Establishment operated or to be operated by any Person. Any Permit issued under this Ordinance is not transferable from one Person to another, from one establishment to another, from one mobile unit to another, or from one type of operation to another.
- J. A nonrenewable provisional Permit is available for a Person taking over an existing, permitted establishment. The following conditions apply:
- (1) The provisional Permit shall be provided by the Hendricks County Health Officer if a completed application and the appropriate fee are received by the Hendricks County Health Department.
 - (2) The provisional Permit will be valid for ninety (90) days from the date of issue. No extensions will be provided.
 - (3) An annual Permit must be obtained before the expiration of the provisional Permit. The annual Permit will not be issued until all outstanding violations, if any, have been corrected and an acceptable compliance inspection by the Hendricks County Health Department is recorded.
 - (4) The annual Permit shall have the anniversary date of the original date of provisional Permit.
- http://www.co.hendricks.in.us/egov/documents/1433180821_74445.pdf

Relevant Decisions (note these deal with wholesalers and appear inapplicable here).

Since Indiana places so much weight upon the applicant's character and reputation in the community it certainly cannot be said that some residency requirement is unreasonable and improper. It is elementary that before an applicant can obtain a reputation in the community he must reside for some period of time within the community.

The question this Court must address, however, is whether the five year residency requirement is too long a time period to achieve an otherwise legitimate state interest. The plaintiff would wish this Court to conclude that while some residency requirement is permissible a five year residency requirement is constitutionally impermissible.

This Court cannot agree. It is quite clear to this Court that there does indeed exist a rational nexus between the challenged residency requirement and, under the Twenty-first Amendment a legitimate state interest the licensing of the sale and distribution of alcoholic beverages. Additionally, given the specific constitutional authority under the Twenty-first Amendment enabling the states to exclusively control within their respective jurisdictions the sale and distribution of alcoholic beverages, this Court cannot hold that a five year residency requirement is constitutionally infirm.

Quite obviously the plaintiff would have a much stronger case were the challenged statute unaffected by the Twenty-first Amendment. But this Court must examine the statute ever mindful of the broad power and authority granted to the states to legislate in matters dealing with the sale and distribution of alcoholic beverages. The challenged residency requirement must be viewed in the light of the Twenty-first Amendment as well as the Fourteenth Amendment.

Furthermore, this Court will not engage in the exercise of determining that five years is constitutionally infirm but three years, however, is constitutionally permissible. Such constitutional hairsplitting, would be entirely inappropriate. Under the Twenty-first Amendment the people of Indiana, through their elected legislature, have determined that five years is the length of time necessary for a community to formulate an opinion of a prospective licensee's reputation in the community. This Court will not substitute its judgment that the desired goal may be reached in less than five years nor does the Constitution require it. The constitutional requirement that there exist a rational nexus between the challenged statute and a legitimate state interest is, in this case, met. Paraphrasing a portion of the Supreme Court's opinion in *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 317, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). This Court does not decide today that the Indiana Statute is wise, that it best fulfils the relevant social and economic objectives that Indiana might ideally espouse, or that a more just and humane system could not be devised. This Court only decides today that the statute enacted by the Indiana legislature, I.C. 7.1-3-21-3, does not deny the plaintiff the equal protection of the laws under the Constitution of the United States.

Coolman v. Robinson, 452 F. Supp. 1324, 1330-31 (N.D. Ind. 1978).

Throughout the greater part of this century, Indiana has imposed some sort of residency requirement on applicants for alcoholic beverage licenses.¹³ The Alcoholic Beverage Act of 1935 provided in part that:

No liquor wholesaler's permit shall be issued or continued in effect, if issued, to any person who is not a bona fide resident of the State of Indiana and continues to be such resident while said wholesaler's permit is in force, or to any co-partnership any of the members of which are not bona fide residents of the State of Indiana.

1935 Ind.Acts 226, § 17.¹⁴

In 1939, the legislature amended the Alcoholic Beverage Act of 1935 to allow corporations to hold beer wholesaler's permits, so long as "the stockholders thereof [are] citizens of the State of Indiana[.]" 1939 Ind.Acts 30, § 2. In 1945, the General Assembly created the

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Indiana Alcoholic Beverage Commission, consolidated the residency requirements *105 for beer, wine, and liquor permits, and reduced the resident ownership requirement for corporations to “eighty (80) per centum of outstanding *common stock*.” 1945 Ind.Acts 357, § 10 (emphasis added). By 1965, the General Assembly had reduced further the resident ownership requirement to 60% of common stock. 1965 Ind.Acts 256, § 1. A similar version of the Residency Statute remains in effect today.¹⁵ See Ind.Code § 7.1-3-21-5.

The evolution of the Residency Statute arguably evinces a legislative intent not to mandate resident control of corporate wine and liquor wholesaler permittees. Had the General Assembly intended to impose a control requirement, as National and Olinger suggest, it could have retained the broader language of the Alcoholic Beverage Act of 1939, *i.e.*, requiring 100% resident ownership corporate wholesaler permittees; instead, in 1945, it inserted the adjective “common” before the word “stock” and reduced the resident ownership quota to 80%, which it further reduced to 60% in 1965.

Indiana Wholesale Wine & Liquor Co. v. State ex rel. Indiana Alcoholic Beverage Comm'n, 695 N.E.2d 99, 104-05 (Ind. 1998).