

Joint Meeting of the Special Subcommittees of the House Committee on General Laws and the Senate Committee on Rehabilitation and Social Services Studying Certain ABC Issues

August 26, 2008
Meeting Summary

The Special Subcommittees of the House Committee on General Laws and the Senate Committee on Rehabilitation and Social Services Studying Certain ABC Issues held their third joint meeting on Tuesday, August 26, 2008.¹ Delegate Albo presided over the meeting and reminded the Subcommittees that the issues before them were alternatives for the food-beverage ratio for mixed beverage licensees, limiting the proliferation of specialty licenses (day spa and meal assembly kitchen licenses), and the feasibility of creating a bar license as a separate mixed beverage license. Delegate Albo stated that the reason he asked the ABC Board to work on a method whereby a licensee having trouble meeting the ratio could petition the ABC Board was based largely on the assumption that the failure to meet the ratio may be anecdotal.

Curtis Coleburn, Department of Alcoholic Beverage Control, distributed a draft to address Delegate Albo's concerns raised at the previous meeting. The draft would allow a mixed beverage licensee to petition the ABC Board to remain qualified to hold the license when the licensee could not meet its 45% food-beverage ratio. As originally envisioned, the ABC Board could accomplish this result through regulation; however because the ratio is found in statute, it was deemed advisable to amend the statute directly. The draft, amending § 4.1-210, provided that the ABC Board may allow a mixed beverage restaurant licensee who does not meet the 45% food-beverage ratio to continue to hold the license if the licensee can establish to the satisfaction of the ABC Board that the failure to meet the ratio is primarily the result of the sale of mixed beverages made from high-priced brands of distilled spirits. Delegate Bulova stated that the phrase "to the satisfaction of the Board" left too much discretion with the Board. Staff advised that this language was commonly used with regulatory boards because they have specialized knowledge of their respective areas. In addition, it was noted that if Board action was challenged, the administrative standard of review was a preponderance of the evidence. Additionally, if this language were to be adopted, further limitations on the discretion of the ABC Board could be added. For example, a licensee could petition the ABC Board only where the licensee's food-beverage ratio was more than 30%. Mr. Coleburn told the Subcommittees that the real issue is the recent 20% decrease in food sales and not so much an increase in the sale of alcoholic beverages. Mr. Coleburn advised that the ratio is reviewed annually by the ABC Board.

The Subcommittees then considered the staff draft addressing the proliferation of specialty licenses. Staff reported that the draft created a new limited service license that would subsume day spa and meal assembly kitchen licenses; but would allow for the addition of future types of licenses meeting the criteria established in the draft. Essentially, a limited service license could be granted to a commercial establishment (i) that offers personal services to the public for compensation, (ii) where the provision of alcoholic beverages to bona fide customers is incidental to the principal

¹ Delegates Albo, Gear, Wright, Cosgrove, E. Scott, and Bulova, and Senators Puller and Herring were present. Delegates Suit, Abbitt, Bowling, Carrico, Dance, and J. Miller, and Senators Wagner, Y. Miller, and Hurt were absent.

business purpose of the commercial establishment, and (iii) that has sufficient employees to perform the functionally equivalent services of wait staff. Additionally, the draft would require that food be available and offered by the licensee at substantially all hours that wine and beer is served. Staff advised the Subcommittees that the problem with this approach was that the term "personal services" is not defined. A search was done to see if the term was defined elsewhere in the Code of Virginia; but there was no definition of "personal service." Feasibly under the draft, licenses could be issued to dry cleaning, automotive care, and other businesses. The Subcommittee agreed with staff that this approach was problematic. Margaret Bower, representing the meal assembly kitchen licensees, stated that her group was not in favor of requiring food to be available and offered when the wine or beer is given to customers. Additionally, Ms. Bower noted that the food requirement may subject the licensees to unwanted food safety inspections by the Department of Health. Jack Knapp, Independent Assembly of Baptists, told the Subcommittees that the limited service license was a bad idea and was an expansion of the service of alcoholic beverages. Two restaurant licensees of the ABC Board testified that every retail on-premises licensee should have the same set of rules.

The Subcommittees also discussed the draft prepared by staff that would create Class A, B, and C restaurant licenses. As drafted, Class A and B restaurant licenses are new names for the existing mixed beverage restaurant license and the limited mixed beverage restaurant, respectively. The Class C license would be a new license category for bars. Essentially the requirement for each class of license is as follows.

Restaurant Class A: Nothing changes from the current requirements for mixed beverage restaurant licenses. Calculated on a monthly basis, the revenue from the sale of food plus non-alcoholic beverages exceeds 45% of the total revenue from the sale of food, non-alcoholic beverages, wine, beer, and mixed beverages. Licensees would also retain the current minimum monthly food sale requirement of \$4,000 of which at least \$2,000 shall be in the form of meals with entrees.

Restaurant Class B: Nothing changes from the current requirements for limited mixed beverage restaurant licenses. The sale of liqueur-based drinks shall not exceed 10 % of the total annual gross sales. There is currently no minimum monthly food sale requirement.

Restaurant Class C: No food ratio requirement, but licensee would have to maintain minimum food sale requirements. Food must be available at all times alcohol is served. There will be some form of limit on the number of licenses issued and the license fee and annual tax would be significantly higher than any current license.

Testimony from current mixed beverage restaurant licensees on this draft was generally in opposition. Instead, they suggested that the food-beverage ratio be eliminated. They advised that their patrons dictate what is sold at their establishments. It was also noted that the words "bar" or "night club" are generally met with a negative reaction. It was explained that restaurant licensees virtually have to give food away to keep the food sales up. In addition, for one shot of good scotch costing \$20, \$12 worth of food would have to be sold. The new Class C license was seen as unnecessary when the focus should be on fixing the ratio. Delegate Albo mentioned the inherent unfairness of the system when a restaurant licensee has to compete with Nissan Pavilion when it does not have any food sale requirement. Delegate Ed Scott questioned whether there would be

any incentive for a Class C (bar) license when staff and regulatory costs are all the same. The Subcommittees next discussed the purposefully high license fee for the Class C license in order to limit the number of this new license. There was consensus that perhaps \$5,000 to \$7,000 would make the license affordable; however the \$25,000 license fee found in the draft was too high and would put people out of business, save the larger venues that could afford it. Staff reminded the Subcommittee the license fee was set at \$25,000 for discussion purposes. Senator Herring asked whether there were similar problems with licensees meeting the \$4,000 per month dollar sale requirement. Mr. Coleburn responded in the negative.

Delegate Cosgrove noted that the 45% ratio is based on dollar to dollar when it should be based on volume of the alcohol sold. As liquor prices increase, it becomes harder to meet the ratio. Mr. Coleburn responded that the information the ABC Board receives does not show that higher priced alcoholic beverages are preventing licensees from meeting the ratio. In addition, Mr. Coleburn stated that if the ABC Board based the ratio on volume, it would necessarily involve the calculation of proof of the alcohol as well. He advised that the ABC Board can track alcoholic beverages sold; but with food, there is no way of measuring. He noted that no matter what the basis, it is all arbitrary and some licensees will be helped and some will be hurt. He reminded the Subcommittees that in 1968 with the advent of liquor by the drink, the policy was that mixed beverages would be allowed only in restaurants and the ratio was set to establish that the licensee was a bona fide restaurant. Both Delegates Cosgrove and Bulova stated that there needs to be a new formula instead of the 45% food-beverage ratio. Delegate Albo opined that the bottom line seems to be that the ratio causes the economics to be distorted and as a result, licensees have to keep food costs low to meet the ratio.

Tom Lisk, representing the Virginia Hospitality and Travel Association stated that the industry preferred one standard ratio for all on-premises licensees over the new Class C license. He suggested that the focus should be to establish a standard for what it means to be a restaurant and not how much alcohol is sold. He noted that there is no similar standard for wine and beer licensees and no distinction in proof of wine and beer. The standard for determining that a business is a bona fide restaurant should be based on a required sale of a certain monthly dollar amount of food prepared in a full service kitchen. Once that dollar threshold is met, it doesn't matter how much alcohol is sold. Mr. Lisk reiterated that in 1968 with the advent of liquor by the drink, the policy was that mixed beverages would be allowed only in restaurants and the ratio was set to establish that the licensee was a bona fide restaurant. This underlying policy is not being adhered to as evidenced by the existence of mixed beverage licenses that are not subject to any food ratio or minimum dollar sale. He noted however, that the sky hasn't fallen because there is no food requirement for these licensees. He stated that the focus should be on safe, peaceful establishments and protecting the public safety.

Walter Marston, representing wine and beer wholesalers, provided a legislative history of mixed beverages and the food-beverage ratio, and stated that it was the industry that asked for the ratio. He noted that wine and beer have always been treated differently in the law. He stated that he disagreed with the suggestion to treat all alcoholic beverages that same. He questioned whether the issue of mixed beverage licensees not meeting the 45% ratio was anything more than anecdotal. Mr. Marston stated that the law should not change based on a handful of mixed beverage licensees who do not meet the ratio.

Delegate Albo reiterated his earlier remarks that it may be anecdotal that mixed beverage licensees are having trouble meeting the ratio. He stated, however, that he has been told that big restaurants are not having a problem while other "night life" licensees are. Delegate Albo arrayed some options to address the food-beverage ratio, including determining volume of alcohol based on square footage of the service area of a restaurant or volume of alcohol based on seating in the restaurant. He noted that the ABC Board knows exactly how many distilled spirits bottles are sold as all mixed beverage licensees must purchase distilled spirits from the ABC Board. Senators Puller and Herring stated that they have not heard of any problems that licensees in their districts are not able to meet the food-beverage ratio.

Delegate Albo stated that for the next meeting of the Subcommittee, he would like a draft prepared that has a volume calculation for the food-beverage ratio. He stated that current wine and beer dollar sales standards should be left alone. Delegate Ed Scott suggested that the Subcommittees also explore increasing the monthly dollar food sales requirement. He suggested that the Subcommittees revisit the Class C license draft.

The next meeting of the Subcommittees is tentatively set for November, after the election.

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