

# **INTERIM JOINT COMMITTEE ON LICENSING, OCCUPATIONS, AND ADMINISTRATIVE REGULATIONS**

## **Minutes of the 6th Meeting of the 2019 Interim**

**December 16, 2019**

### **Call to Order and Roll Call**

The 6th meeting of the Interim Joint Committee on Licensing, Occupations, and Administrative Regulations was held on Monday, December 16, 2019, at 10:00 AM, in Room 149 of the Capitol Annex. Representative Adam Koenig, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator John Schickel, Co-Chair; Representative Adam Koenig, Co-Chair; Senators Tom Buford, Denise Harper Angel, Damon Thayer, and Reginald Thomas; Representatives Tom Burch, Al Gentry, Thomas Huff, Matthew Koch, C. Ed Massey, Chad McCoy, Jerry T. Miller, Phillip Pratt, and Buddy Wheatley.

LRC Staff: Tom Hewlett, Bryce Amburgey, Jasmine Williams, Melissa McQueen, and Lisa W. Moore

Guests: Doug Gallenstein, Owner, Stadium Liquor Store; Karen Thomas-Lentz, Kentucky Liquor Retailer Coalition; Dr. Marty Pollio, Jefferson County Public Schools; Abby Piper, Government Affairs, Jefferson County Public Schools; Tony Florence, Kentucky Smoke Free Association; Cindy Castle, Chairperson, Kentucky Board of Ophthalmic Dispensers; and Bob Babbage, Babbage Cofounder.

### **Approval of minutes from November 20, 2019, meeting**

Senator Schickel moved to approve the minutes from the November 20<sup>th</sup>, 2019, meeting, and Senator Thayer seconded the motion. The motion was approved by voice vote.

### **Constitutionality of Sports Betting**

Dan Wallach, JD, Wallach Legal LLC, said Kentucky's constitution does not impede the legislature from voting to allow sports wagering. He noted Section 226 (3) of the Kentucky Constitution prohibits only "lotteries and gift enterprises," not all forms of gambling. As recognized by Kentucky's highest court, the framers of the Constitution expressly rejected a proposal to expand the prohibition to include other forms of gambling, including sports betting. Mr. Wallach noted sports betting is not expressly prohibited by the Kentucky Constitution.

Mr. Wallach said the term “lottery” is not defined in the Constitution. For guidance, he researched the debates surrounding the Constitutional Convention of 1890 for evidence of the framers’ intent. In 1892, Delegate John Thompson Funk proposed to add an amendment that would include all forms of gaming, however, the delegate voted the amendment down 52-38. He said it is clear that this debate was settled 130 years ago and the proceedings and debates in the Constitutional Convention are proof that lotteries do not include sports betting.

Mr. Wallach said the Court of Appeals concluded in *Kentucky Jockey Club* that gaming, betting, and lotteries are separate and distinct things in law and fact, and have been recognized consistently as calling for different treatment and varying penalties. Although more than 85 years have passed since the *Kentucky Jockey Club* opinion was entered, it still provides the most thoughtful and relevant analysis of the questions at hand. It is clear by the debate surrounding the Constitutional Conventions of 1890, the relevant Kentucky case law (including the *Kentucky Jockey Club* decision, and advisory opinions from the state’s attorney general), the following constitutional conclusions can be drawn: 1) the term “lotteries,” as used in Section 226, is “separate and distinct” from other forms of gambling, including sports betting and pari-mutuel betting on horse races; 2) the constitutional prohibition on “lotteries” is to be read narrowly; 3) the object of Section 226 was simply to prohibit the sale of “lottery licenses,” and not reach “other forms of gambling,” for which there were already statutory prohibitions on the books; 4) other forms of gambling were intentionally excluded from this prohibition; 5) the framers of the Constitution even considered a proposed amendment that would have expanded the reach of Section 226 to include sports betting, but rejected it; 6) hence, there is no constitutional barrier to the legalization of sports betting; and 7) the legislature is free to legalize sports betting through the enactment of a statutory regime.

Mr. Wallach said sports betting is not a constitutionally-prohibited lottery because lotteries are games of chance, whereas wagering on sports requires a substantial amount of skill to be successful. While Kentucky’s Constitution distinguishes lotteries from other forms of gambling, the Constitution itself does not define the term “lottery.” Kentucky courts have described a lottery as “a species of gambling,” defining it as a “scheme for the distribution of prizes or things of value purely by lot or chance among persons we have agreed to pay consideration for the chance to share in the distribution.”

By contrast, wagering on sporting events is widely considered to be a contest of skill, requiring substantial skill and knowledge to succeed. In other words, it is the antithesis of a random-chance lottery. This is amply supported by a number of state attorney general opinions including Michigan, New York, Colorado, Tennessee, and West Virginia. It is notable that of the 19 states that legalized sports betting since the fall of the Professional and Amateur Sports Protection Act of 1992, at least eight have constitutional bans against lotteries. Yet, there has not been a single challenge made to any of these state

laws on the basis that their state-authorized sports wagering systems are somehow in violation of their state's constitutional ban on lotteries. Nor can there be. Such an assertion would be belied by the clear distinction between "skill-dominant" sports wagering and "random-chance" lotteries, and by the opinions of multiple state attorney generals.

Mr. Wallach said federal law also recognizes the distinction between sports betting and a lottery. Several federal statutes exclude sports wagering from the definition of a "lottery", and federal law authorities have asserted that wagering on sporting events requires a substantial amount of skill. Finally, because of the obvious similarity between betting on horse racing and betting on sports, it is helpful to look at various cases involving horse racing. He noted the outcome was the same. As explained by Tennessee's attorney general: Courts have generally reasoned that chance does not control the outcome of horse races because the skill of the jockey and the condition, speed, and endurance of the jockey's horse are all factors that affect the results of the race. Moreover, bettors on horse races have sources of information that they may review before placing their bets. This information includes not only data on the actual race, but also previous records on the past performance of the jockeys and the horses. These sources allow the bettor to exercise his judgment and discretion in determining the horse on which to bet. Thus, courts generally reason that chance does not predominate. Even betting on dogs, commonly referred to as greyhound racing, entails a significant degree of skill.

Mr. Wallach's view, based on the wide spectrum of federal and state sources of law, is that the legislature is free to enact legislation authorizing, licensing, and regulating sports wagering in the Commonwealth of Kentucky without running afoul of the constitutional ban against "lotteries". He does not see how any reasonable decision maker or court could conclude that legal sports wagering as contemplated by this committee constitutes forbidden "lottery" under Section 226 of the Kentucky Constitution.

Responding to a question from Representative Wheatley, Mr. Wallach said no one is suggesting that sports betting is a gift enterprise, and is happy to expand his memorandum to address the issue. He was focused on the lottery prohibition and has seen no evidence that gift enterprises were a concern.

Senator Thayer said this a mic drop moment and thanked him for his compelling testimony. He also thanked the co-chairs for fully vetting the issue of sports betting multiple times before the committee during the interim. This testimony has debunked the notion of a constitutional amendment being needing to legalize sports betting so the opponents will need to find a new excuse to oppose. Lotteries and casinos are clearly games of chance, while horse racing and sports wagering are games of skill, and there is a clear distinction between the two. Mr. Wallach responded that the official report of the proceedings and debates of the Constitutional Convention of 1890 is the mic drop.

### **Consideration of Referred Administrative Regulations**

Lois Ann Disponett, Chair, Kentucky Real Estate Commission, H.E. Corder II, Executive Director, Kentucky Real Estate Authority, and Marc Manley, General Counsel, Kentucky Real Estate Real Authority, represented the agency to review the administrative regulations: 201 KAR 11:002; 201 KAR 11:011, 201 KAR 011:105; 201 KAR 011:121; 201 KAR 011:170; 201 KAR 011:190; 201 KAR 011:210; 201 KAR 011:220 and 201 KAR 011:461.

Mr. Manley explained the background summary for 201 KAR 11.121. Responding to Senator Schickel, Mr. Corder said all affected entities, including the Kentucky Realtors' Association, were in agreement on the amendment. Responding to Senator Buford, Mr. Manley said there are no fee increases in the amendments to the regulations. The process is changing to a two- year renewal so it appears as the initial cost is more, but it is actually the same per year. The change to a two-year renewal also reduces administrative costs. Representative Burch motioned to approve the agency amendment to 201 KAR 11:121 and Senator Schickel seconded the motion. Motion carried by voice vote. There were no objections.

Mr. Manley explained the background summary for 201 KAR 11:210. Senator Schickel motioned to approve the agency amendment to 201 KAR 11:210 and Representative Burch seconded the motion. Motion carried by voice vote. Senator Schickel motioned to approve the committee amendment to 201 KAR 11:210 and Representative Burch seconded the motion. With no objections, the motion passed by voice vote.

### **Kentucky Guild of Brewers**

Adam Watson, Government Affairs Chair, Kentucky Guild of Brewers, said the craft brewing industry is experiencing growth in Kentucky. The General Assembly has been instrumental in clearing the path for success. The industry needs continued support to modernize and advance laws, improve tax structures, and avoid the dangerous temptation to leave things the way they have always been.

Mr. Watson said the craft brewing industry is concerned with several key issues both nationally, and in Kentucky. They include: transparency; brewery direct to consumer sales (shipping and limited self-distribution for small brewers); franchise reform; excise tax and tax reform; tariffs and trade; underage drinking and responsible consumption; preservation of existing privileges; independent distribution systems; access to materials; water quality; modernization of state's alcohol laws; and threats to the ability to be competitive.

Mr. Watson discussed sales tax on manufacturing and industrial equipment with the Department of Revenue. This issue also impacts Kentucky's distilleries and small farm wineries. They have all agreed in principle with Department of Revenue on developing language to address these concerns.

Mr. Watson discussed self-distribution so microbreweries would have privileges similar to those being sought by small farm wineries. He noted this legislative change would enable better service to markets, meet customer demands, and relieve distribution partners of the most demanding and least profitable delivery tasks. A microbrewery could deliver a limited amount of its annual production directly to retail partners. This limited amount would allow the very smallest brewers to survive and grow to the point that the services of a distributor would become necessary and will allow distributors to focus on brands that are large enough to actually be profitable for them. It would allow more advanced microbreweries to hotshot or provide rapid delivery of a small amount of product directly to a single retailer who has found their stock insufficient for demands, which usually occurs on nights and weekends. He stressed they are not seeking full self-distribution to retail accounts.

Finally, craft breweries would like to establish contract equality between microbrewers and distributors. Currently, it is the only alcohol sector in Kentucky for which there is no true freedom of contract. Instead a Kentucky statute dictates many of the terms of the private contract between the microbreweries and the distributors, both private entities. The statute was written before the Guild existed, and before there were microbreweries across the Commonwealth. They are only seeking changes to the existing language so that the terms, rights, and responsibilities are equally applied to both parties: brewers and beer distributors. As private companies, it is believed that they can freely negotiate the terms of the relationship in a contract. The part of the contract that is determined by statute should equally apply to both parties.

### **BR 468 AN ACT relating to vapor products**

Jerry Miller, State Representative, said this bill is not a complete ban on vaping products. It does not make it more difficult or expensive for those using e-cigarette and vapor products to get off tobacco cigarettes. Tobacco flavored vapor products may still be sold at every outlet now legally able to sell these product. The bill seeks to regulate the sale of a product that is being abused by underage users. A ban on flavors could drive those seeking them into the black market, which has been the source of critically acute health issues.

Representative Miller said the bill requires retail sales of vapor enhanced products, or flavored products, to be limited to stores where only those 18 years of age and older are allowed. Stores must also be registered with the Department of ABC. It bans online and catalog sales of vapor liquids and Juul pods. It administers fines and other penalties to minors not in compliance, and violations by a retailer or manufacturer may result in loss of license.

Dr. Marty Pollio, Superintendent, Jefferson County Public Schools, said since 2014, there has been a reduction of smoking among teenagers. Pre-teens and teens have access and have turned to vaping products instead of tobacco, however they are getting addicted

to the high levels of nicotine in the e-cigarettes. Juul has been marketing to teenagers, and it targets all students in public and private schools in rural and urban areas. Dr. Pollio supports BR 468 and encouraged its passage in the 2020 Regular Session of the General Assembly.

Tony Florence, Kentucky Smoke Free Association, represents the mom and pop shops and supports the bill. He said there are 5,000,000 children vaping, and 3,000,000 use Juul products. He emphasized that access needs to be limited, and 86 percent of complaints lodged were against convenient stores, not the vape stores. The product needs to be sold in the appropriate venue and it would reduce the access issues to minors. He said 22 percent like flavored vapors, and he believe it is not a flavor problem, but a Juul problem.

Representative Miller noted that this bill moves flavored vapes to age appropriate, adult only stores that are registered with the ABC. He said it also bans catalog and on-line orders, and identifies bulk orders that can end up in our middle and high schools.

Responding to a question from Senator Thomas, Dr. Pollio said Jefferson County Public Schools has joined the lawsuit in coordination with Fayette County Schools against Juul. Jessamine County schools has also joined the lawsuit.

Representative Wheatley has filed a vaping bill that is similar to BR 468 and it bans all flavors. He said research shows 97 percent of pre-teens and teenagers used flavored vapes, which is equivalent to 10,000 middle school students in Kentucky. He is hopeful all four bills related to vaping have a chance for passage in the 2020 General Assembly Regular Session.

### **Sampling and Rebate Coupons for Malt Beverages**

Scott Corbitt, Regional Vice President for State Affairs, Anheuser-Busch, said they are asking the General Assembly to allow in-state and out-of-state breweries, and microbreweries, the same privileges regarding sampling and couponing that wine and spirits have in the state of Kentucky. He said they have worked with the malt beverage distributor associations and the guild of brewers on the language for the bill, and all parties are supportive of passage in the 2020 General Assembly Regular Session.

Chairman Koenig said he supports parity among all the alcohol industry. He said there will be a bill addressing sampling and rebate coupons for malt beverages, as well as addressing the one-year limitation for a private entity or corporation before they can have alcohol sales issue.

### **Opticians' Association of Kentucky**

Representative Walker Thomas said there are two bill drafts relating to ophthalmic dispensers. He said they are looking to increase their fees as budgets are getting very tight. Mr. Curt Duff, Executive Director, Optician Association of Kentucky, said the reason for

the licensing fee increase from \$75.00 to \$150.00 is to cover a cost increase from \$35,000 to \$68,000 imposed by the Department of Licensing on the board. Mr. Duff said they will have no money by June 2021 if they are not allowed to increase their fees.

Chairman Koenig said there is a prefiled bill that raises opticians' licensing fees from \$75.00 to \$150.00 and keeps it in statute. He said they are also open to allowing it to be in regulation. Representative Thomas said they are looking for guidance as to which way the committee would like them to proceed and they will adjust accordingly.

### **Therapeutic Massage of Animals**

Representative Matthew Koch said the veterinary board asked to look into this issue. A new board is not being created and it should reduce barriers to work, however, they are open to critique and suggestions from all parties involved to produce a bill that is favorable for passage. He said equine massage is growing and is a major part of caring for the animals.

Ms. Denise Logsdon, MS, LMT, AMTA-KY, Government Relations Committee Member, said the vet board did not want to oversee a license for animal massage therapy. They are trying to work together to remove barriers for someone to become an animal massage therapist without being a human massage therapist. Ann Boone, LMT, AMTA-KY, Government Relations Chair, thanked Representative Koch for sponsoring the legislation. Senator Schickel urged them to continue reaching out to the veterinary board to iron out the issues before session.

### **Professional Licensure of Veterans**

Steven Bullard, Executive Director, Kentucky Commission on Military Affairs, said they are working very closely with the Council on State Governments to make life better for Kentucky's military families. Zach Morgan, Executive Assistant, Kentucky Commission on Military Affairs, is a military veteran, but also a former military spouse. Military spouse unemployment is around 24 percent, and spouse underemployment is a major problem for the military as well. This is such a problem, the Pentagon is indicating it has become a natural security issue because it divides the attention of military families. Military families move every two to three years, and obtaining a new license in each state is a preposterous requirement, especially when some license process can take two years to complete. Kentucky has already joined several multi-state compacts for industry-specific reciprocity, and should seek to join others as they come available.

Mr. Morgan said they are asking the Legislative Research Commission (LRC) to require annual reports from all of the boards, and compile a report for legislators. This requirement will establish a baseline of clear information on the whole licensing environment in Kentucky. This information would be collected by the LRC and at the fingertips of legislators. The intention is not to create burdensome paperwork, but to establish clear information from which the legislators can make decisions about licensing,

and improve the process for military families. This follows a national trend of streamlining licensing processes. Currently, there is no centralized reporting of licensing approvals and/or disapprovals.

### **Retail Sales of Alcoholic Beverages**

Co-chair Schickel assumed the chair and Co-chair Adam Koenig testified in support of the bill. The bill supports parity among the alcohol industry. All of the affected stakeholders have been involved in meetings and they have taken into consideration input from all parties. He believes the bill will create a level playing field for the direct shipment of alcohol.

Chairman Koenig said the bill allows in-state license holders to provide alcohol directly to Kentucky consumers and out-of-state consumers. It requires licensure and carrier reporting, and requires compliance with all Kentucky substantive and tax laws and regulations, while maintaining the 3-tier system in Kentucky.

Chairman Koenig said the legislation creates parity and is based on consumer demand and modernization. It removes artificial barriers to competition and makes Kentucky competitive nationally. Other significant items include: allowing any license holder to ship alcohol to a consumer in or out-of-state; but only ship to territories where alcohol is lawful; ensures public protection by labeling the packages “ALCOHOL” and “21 YEARS OLD” and requires a signature upon delivery; requires the shipper to implement a system to verify ID and payment; requires all taxes and fees (state and local) to be collected and remitted to Department of Revenue; carrier reporting allows for proper regulatory enforcement and oversight; maintains limits on the amount of alcohol shipped; creates penalties for local jurisdictions which abuse the use of regulatory license fees; and allows retailers to purchase from other retailers on a limited basis.

Chairman Koenig said malt beverage manufacturers from another state may ship to Kentucky consumers, as this is already allowed for in wine and distilled spirits. It allows “dock sales” for malt beverages. Retailer may transport and purchase from the distributor’s premises (currently allowed for distilled spirits and wine). The wholesaler must sell or offer reasonable service to authorized recipients during its normal business hours (matches existing rule for distributors of malt beverages), and allows distillers and malt beverages to ship (currently for small farm wineries).

Responding to a question from Senator Thayer, Christy Trout Van Tatenhove, Special Counsel, House Majority Speaker’s Office, said that all groups, including retailers, were consulted, but no groups were asked for support as information is still being disseminated. All entities were provided with google docs and allowed for comments. Chairman Koenig has a list of all meeting attendees. Senator Thayer said the 3-tier system should be protected and enhanced in Kentucky. Chairman Koenig said it provides parity in that all stakeholders in the three tiers can ship alcohol. Co-chair Schickel said he disagrees

that all alcohol is viewed in the same light. He does not feel wine and beer are considered the same as distilled spirits.

Responding to a question from Senator Buford, Ms. Van Tatenhove said an individual would not be able to pick up an order at a wholesaler as a consumer, however it could be delivered to the person. Currently, an individual cannot pick up the order at the wholesaler, but the retailer could pick up an order from the wholesaler. The retailer would have to have a licensed vehicle as no licensing laws have changed for retailers. She said there is technology available to keep shippers in compliance with tax laws and they will face penalties and/or removal if not in compliance with local laws. She said taxes are difficult as they are all different fees and vary across the state.

Responding to a question from Representative Burch, Chairman Koenig said the license fee to ship into Kentucky would be \$100, and there would be a percentage fee of the overall cost of every shipment made. Ms. Van Tatenhove said if an individual is already licensed in Kentucky, he or she will not have to pay anything additional to have the privilege to ship out-of-state and deliver in-state. She said someone has to physically sign for a delivery, they cannot leave packages behind at the home.

Responding to a question by Representative Miller, Ms. Van Tatenhove said there are limits on amounts that can be shipped to consumers and retailers. She said the intent of the bill was not to allow shipment to retailers in and out-of-state. Representative Miller said the bill might need some language tightened.

Responding to a question from Representative Wheatley, Ms. Van Tatenhove said the shipping permit is required of out-of-state suppliers. He said the language needs to be strengthened with shipping permits to make it clear that it is shipments coming into Kentucky and not other states.

Doug Gallenstein, Owner, Stadium Liquor, is against the legislation as written. As a retailer in Northern Kentucky, he said this bill hurts the retail industry as the wholesaler can ship directly to the consumer. Chairman Koenig said that is correct, and his customers can work with him to order. He can order it from the wholesale company for the consumer if he does not have the product. Mr. Gallenstein said this process will not work with rare bourbons.

Karen Thomas Lentz, Executive Director, Kentucky Association of Beverage Retailers, said the bill as written states wholesalers cannot refuse to sell a product to a consumer if they show up to buy it, and completely bypasses the need for retailers. She also said this legislation allows people to pay \$100 for the shipper's license to sell products, while retailers pay \$2,000 a year. She believes this cost difference is unfair to retailers. She also said there is a local fee that can be added of four to eight percent for establishments located in the community. The local retailers would be on the hook for paying that fee to

offset the cost of DUI's, domestic violence, and other incidents that occur from alcohol being shipped in from out-of-state.

Chairman Koenig said this is an open process and he encouraged all interested parties to bring concerns and suggested changes to the bill.

With no further business, the meeting adjourned at 11:35 a.m.