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Ms. Monica Sanders, Chief Deputy City Clerk
City Hall, 22nd Floor
414 E. 12th Street
Kansas City, MO 64106

SENT VIA USPS & EMAIL

Re: Ordinance 210961

Dear Ms. Sanders:

Chapter 10 of the Kansas City Code of Ordinances came under fire several months ago, in part when there was a challenge to the process of securing consents from individuals in close proximity to a proposed location to be licensed. It's long been recognized that a person or entity could block the issuance of a liquor license if the applicant did not agree to unreasonable demands of a neighboring property owner on such matters as the brand of liquor to be carried or the hours of operation which were different than neighboring business, especially in the area immediately south of the "downtown loop". While the process of securing consents is often difficult, it has also fostered dialog between individuals who might be affected by businesses and the business operator. Rather than making minor tweaks to the consent process, the city elected to make sweeping changes to the Chapter which will hinder development, allow for arbitrary and capricious interpretation of the Chapter and license approval, and ultimately lead to litigation with allegations of violations of constitutional protections based on protected classification as well as arbitrary and capricious interpretation of a standardless Code.

It has always been the contention of some that there are liquor stores "on every corner" in some parts of the city. That contention is just not true. The provisions of Section 10-211(density) and 10-214 (consents) date back to ordinances passed as early as February 22, 2000. Density restrictions limit the number of liquor licensed locations based on the number of individuals living within a defined area. Not only must an operator have met density requirements when they have applied in the past, but then if there was a determination that the population basis permitted an applicant to proceed with the filing of an application, the applicant could not be granted a license until obtaining neighboring property approval. While the number of consents required has changed over the years, the consent of those arguably most impacted, has to be obtained.

It is interesting to note that provisions as to density have triggered exceptions over the years. Broad sweeping restrictions as to density have from time to time been unsuitable or unreasonable in various parts of the city. That said, I would suspect that if the manager of regulated industries was asked to conduct a study as to "over density" areas, after elimination of the exempted areas, over density locations would constitute less than a dozen areas within a city of 319 square miles.

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The provisions of the newly proposed ordinance were in theory approved by the ABAG committee members. In reality, meetings were called on an emergency basis so frequently that the members undoubtedly felt like their positions had become a full-time job. Often the meetings were announced with short notice, and without a doubt, participation of members diminished over time, to the point that quorums were barely established. Often members would miss a meeting then return for a later meeting only to learn that an objectionable section had been approved in their absence. The role of the ABAG members was not an advisory role, but rather they were presented with language by the city attorney's office and told what particular language was drafted and what was to be approved. Remember, the role of ABAG is advisory, so even if all the ABAG members had been present for every meeting and voted no, or suggested language that was contrary to that being suggested, their opinion would not carry the day. Interestingly there is language included in the proposed new Chapter 10 that even Jim Ready, the person charged with making standardless decisions about licensing, disagrees with. Even his opinion was disregarded.

One of the interesting changes to the new ordinance is the decision to change the definition of a restaurant. Historically, a business that had over $200,000.00 in food sales has been classified as a restaurant. Now, for a new business to be classified as a restaurant, that business will have to sell over 50% of its total consumable items in the form of food prepared and consumed on the premises. I read the ordinance to say that venues currently licensed as restaurants will not have to meet that standard, but new venues will have to meet that requirement. Why the increase? What is the overwhelming governmental interest?

On information and belief, venues like The Well, Lews, McFaddens or Granfalloon...all now restaurants...will continue to be treated as restaurants. If the operator of those businesses decided they wanted to open a similar business a block away from their existing business and sales turned out to be 49.5% food and 50.5% liquor, then the business would be classified as a tavern. Why is this important?

Well initially the city might determine that this business with $499,000.00 in food sales and $500,000.00 in liquor sales can't remain because there are too many taverns in the density area. The operator faces the loss of his multi-million-dollar investment in the community. Second, the classification of a business as a restaurant substantially reduces the cost of liability insurance for an operator versus what is charged for a tavern. Often, taverns cannot even secure coverage due to underwriting concerns or costs. Third, it impacts the ability for some residents to enjoy the venue. Under Missouri law anyone of any age can go into a tavern. Under the city ordinances a minor can only go into a tavern accompanied by a parent or "legal guardian". That means that if your children have friends over and you all decide you want to go to "McFaddens II" for a burger, your children's friends can't go. You're not their parent or guardian. What about prom night? You're all dressed up and now you get to go to McDonalds rather than "The Well #2", because they were $1.00 below that 50/50 threshold now contemplated by the city. They could however go to McFaddens I or "The Well I". Does that make sense? Leave the criteria alone. A business that does $200,000.00 should be deemed a restaurant.

I have been representing regulated industry clients for 45 years. I have a pretty good working knowledge of licensing here in Kansas City. The majority of licensing is not for new venues, but rather businesses where there is a change of ownership. The city now will ignore the complexity of these types of transactions. Generally, the sale of land and a convenience store business located on that land runs

between $1,000,000.00 and $3,000,000.00. Normally the land is purchased by one entity and operated by a separate entity for a variety of reasons. Sections 10-212 and 10-214, as proposed, work to the detriment of any person or entity that wants to sell or buy a business in the city.

Consider the complexity of such a transaction. First there is the always complicated process of the buyer and seller agreeing on a price. Next, there is the issue of financing the real estate transaction and trying to establish a closing date. Most buyers and sellers like to close within 45 to 60 days of their contract execution. The lender must weigh in on a variety of issues including quite often Phase I and Phase II environmental studies. The title company may want a survey and the company buying the business must coordinate with the seller on choosing an inventory company and scheduling a day for inventory count. Right now we can generally choose a date 45 to 60 days out, knowing a state application for liquor can be approved within 10 days and knowing that if we push hard enough the city will approve the license transfer close to the date chosen.

Now there is a new proposal. First, ignore the complexities of the transactions. The city has legislatively determined that all liquor licensed businesses are presumptively detrimental to a community. If you are a business, not in an exception area, and want to have a restaurant 100 feet from a church, you are the evil new neighbor. In a recent licensing project, Tailleur Restaurant (Taylor) at 39th and Main had the overwhelming support of the church community and the city was provided with several letters and emails of support until the regulated industries division ultimately accepted the application and then issued consents. Think about where the majority of licensed venues are located. Operators want to be close to customers (residential zones). They don't want to be in the middle of an industrial area, toxic waste site, corn field...they want to be in an area zoned for commercial uses as a restaurant or other licensed venue, and by city land use design, the vast majority of those areas are within 300 feet of a residence, church or school. Identifying facilities as a church has also been problematic in strip malls where a site is identified as a church, but which has virtually no congregation, blocking a CVS, grocery store or restaurant from having a liquor license.

When I drive down Wornall Road towards downtown, I look at the number of tattoo parlors, CBD stores, thrift shops, free phone stores and payday loan stores....and I wonder how none of these non-regulated businesses have been determined by the city to be "not detrimental to the neighboring community" but CVS, Walgreens, Corner Cocktail and Tommy's the Happy Place are evil and detrimental to the neighborhood. For that matter, did you know that regulated industries regulates smoke shops and tobacco stores. Don't those stores contribute to lung cancer and other health issues? They can be side-by-side...and on every corner...with the operator only required to pay the city regulated industries division ONE DOLLAR annually. How is a business that contributes to lung cancer not detrimental to the neighboring community?

Now to the problem of selecting a closing date on the transaction. Not only do you have the very real issues identified above between buyer and seller, but now the neighbors get to weigh in and nothing can happen for a minimum of 45 days from when a notice is sent by the city, 15 days after an application is processed by the city, which is generally 5 days after submission. Now, the manager of regulated industries, after the passage of all this time, gets to look at a magic 8 ball to decide whether a license will issue or not.

Under the proposed ordinance, the city sends out a form to the persons who used to be identified as eligible consenters. For purposes of your consideration, let's presume the city identifies that there are 40 eligible consenters. Under the current process, an applicant would be required to obtain 21 consents to move forward with their licensing of a NEW LOCATION. Now, whether you are a new location, a previously licensed location, a location seeking to add a patio or second floor or for that matter selling 49% of your member units to you cousin, brother, sister or best friend, the neighbors get a say some 60-75 days after your application is dropped off. Worse yet, if the city sends out 40 notices and one or two people send back their form saying they don't favor the licensing, the manager of regulated industries gets to decide if the applicant prevails or the neighbors rule the day after considering standardless, ambiguous provisions included in the new code.

We know historically that people just don't return consents when they are in favor of a project. The Capitol Grill project on the Plaza is a past example. Now, the licensing for First Watch in Westport is another example. Attempts to get consents by mail for something as non-controversial as First Watch just didn't work. Instead, I ended up going door to door talking with the consenters who in many instances said they had the form on their desk or somewhere in their mail and thought it was fantastic…they just hadn't got around to sending it back. In a licensing project in the north part of town, a concerned citizen, not within the consent zone, protested that a liquor license should not be issued to a location because her parents were buried across the street, and they would not want their final resting spot near a licensed location.

It is not 50% of the eligible consenters who give the supervisor input (which in fact was what the manager of regulated industries proposed), it is 50% of the responding consenters that dictate review of the proposed licensing. Having no clear, unambiguous standards to guide him, the manager now gets to decide whether the license gets approved. Have no fear, if the application is denied, the applicant can appeal to the Liquor Control Board of Review, which has NEVER voted to overturn a decision of the liquor division. By this time, the multi-million-dollar sale has become null and void as the due diligence period has long passed and the closing date has passed. Worse yet, this not only applies to a new license, or a sale of a business, it also applies to any change in membership of your LLC or shareholders of your corporation. So, in the case of the sale of my stock in my restaurant to my children, the neighbors could send back just one or two letters of objection and derail my estate and business planning. Keep in mind that at the state level, a change in ownership of less than 50% is merely a no-charge notification to the state, not a complex licensing project as contemplated by the city.

Can you imagine a person running unopposed for city council in a district with 20,000 voters and telling the votes to send back the card saying yes or no and 5 people respond saying no, we don't want you. Now another person relying on no articulated standards gets to decide if the unopposed council candidate gets to be a council member. Have no fear, if they say no too, even though 19,995 voters didn't respond at all, you can always resort to relief from the courts.

If you feared going to court over Tom's Town, rest assured that the first time one of my American clients of middle-east descent, or one of my Asian descent clients, or one of my black clients, or yes, even one of my white clients is denied a license we will be visiting this denial in US District Court where the manager of regulated industries will be explaining how he makes decisions using the magic 8 ball or ouija board, with provisions that make any applicant have to guess if their license will be approved or not.

There are a score of provisions that are just unconstitutional on their face, as they may be applied, and void for vagueness. For instance, 10-261 which provides: *Disapproval of application to renew.* The director shall disapprove an application for renewal of any license or permit on the following grounds:

"If any renewal application contains information which does not justify renewal."
What does that mean?

Section 10-266 treats LLC's and corporations differently. Equal protection issues? I believe so.

Section 10-266(d)(3)—frequency of entertainment is subject to approval by the liquor supervisor. So if I have live performances 2 days a week and want to go to 3 days a week the supervisor gets to weigh in with a yes or no----there is a clear First Amendment violation

There is also the issue of there being no time period established for the manager to make a decision on an application. A completed application could sit on the manager's desk for weeks if the manager was just unwilling to act on an application. That is also a constitutional deficiency, along with the absence of clear standards and criteria that allow an applicant to determine in advance whether a license application will be approved. When people of common intelligence must guess as to the meaning and application of an ordinance, that ordinance is susceptible to challenge. Finally, there is some relevancy to the Missouri doctrine of permitted continued use of property, free from governmental interference.

This ordinance, as proposed, should be tabled or voted down by committee. If the city truly wants to look at Chapter 10, then a task force made up of experienced individuals should look at the provisions with true participation from neighborhoods, those of us who actually do licensing, license holders and regulated industries and perhaps something less objectionable can be achieved. That is not what ABAG was allowed to do and comment from non-members in meetings fell on deaf ears resulting in this proposed ordinance that will result in judicial challenge.

Thank you for your consideration of these matters.

Sincerely,

Richard T. Bryant
For the Firm