

**TO:** Members of Troy City Council  
**FROM:** Lori Grigg Bluhm, City Attorney  
**DATE:** July 2, 2007  
**SUBJECT:** Liquor License Article in Oakland County Bar Association Publication

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Enclosed please find a feature article titled *A Mayor, A Commissioner, and a Judge Walk Into A Bar... Municipal Authority to Approve, Object to Renewal, and Revoke a Liquor License*. Troy Assistant City Attorneys Chris Forsyth and Allan Motzny wrote the attached article, which was based, in part, on the research for the Hooters v. City of Troy case. The article is a feature in the June 2007 issue of *Laches*, which is the monthly publication of the Oakland County Bar Association (OCBA). This publication was distributed to all of the 3,000+ members of the OCBA, as well as to any other subscribers, including the universities and law libraries. It provides an overview of the municipal powers in liquor licensing matters.

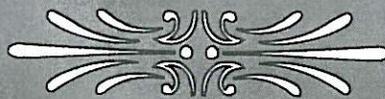
As always, if you have any questions concerning the above, please let me know.

# LACHES



OAKLAND COUNTY BAR ASSOCIATION

## 73rd Annual Meeting



*Wednesday, June 13, 2007*

*Womersley Inn*

*2601 West Big Beaver Road, Troy, Michigan*

*5:30 pm Cocktail Reception  
Womersley Foyer*

*6:30 pm Dinner  
Ballroom*

**Municipal Law Issue**

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# A Mayor, a Commissioner, and a Judge Walk Into a Bar...

## Municipal Authority to Approve, Object to Renewal, and Revoke a Liquor License

by Christopher J. Forsyth and  
Allan T. Motzny

The municipality plays an important role in the licensing of businesses engaged in the retail sale of alcoholic liquor. Under the Michigan Liquor Control Code,<sup>1</sup> a municipality's role in the administration and control of liquor licenses is primarily three functions: (1) approving applications for new or transferred licenses, (2) objecting to renewal of an existing license, or (3) requesting the revocation of a liquor license. Since the Liquor Control Code first came into existence in 1933, Michigan appellate courts have examined a municipality's discretion in the exercise of these functions. At first, courts were quite reluctant to review a municipality's decision concerning liquor licenses. However, by the mid-seventies, starting with the Supreme Court's decision in *Bundo v. Walled Lake*,<sup>2</sup> jurisprudence changed, and Michigan appellate courts were more willing to review, and even interfere, with a municipality's exercise of discretion in this area of the law.

### On-Premises and Off-Premises Licenses

Under the current provisions of the Michigan Liquor Control Code,<sup>3</sup> the Michigan Liquor Control Commission (MLCC) licenses retail sellers, wholesalers, and manufacturers of alcoholic liquor. Retail liquor licenses that may be granted by the MLCC include both on-premises licenses and off-premises licenses. On-premises licenses are issued to allow alcoholic beverages to be sold, served and consumed on the premises of the licensed business. The on-premises licenses allowed under the Michigan Liquor Control Code include: Class C,<sup>4</sup> Club,<sup>5</sup> B Hotel,<sup>6</sup> A Hotel,<sup>7</sup> Tavern,<sup>8</sup> Brewpub,<sup>9</sup> Micro brewer,<sup>10</sup> Special License,<sup>11</sup> Resort,<sup>12</sup> Class G-1,<sup>13</sup> Class G-2,<sup>14</sup> and Wine Maker.<sup>15</sup>

The MLCC also may issue off-premises licenses to allow businesses such as party stores, supermarkets and convenience stores to sell alcoholic beverages for consumption off the premises.

The types of off-premises licenses include: Specially Designated Distributor (SDD),<sup>16</sup> Specially Designated Merchant (SDM),<sup>17</sup> and SDD Resort.<sup>18</sup>

### The Quota System

Under the Michigan Liquor Control Code, there are a limited number of retail licenses that may be issued based on the population of the municipality. For on-premises licenses, only one license for each 1,500 of population or major fraction thereof may be granted.<sup>19</sup> For SDD licenses, the MLCC may only issue one license for each 3,000 of population, or fraction thereof.<sup>20</sup> The quota requirement may be waived for an SDD license if there is no existing SDD license within two miles of the applicant.<sup>21</sup> SDM licenses are not subject to a quota requirement. The number of licenses available under the quota system is based on the latest decennial census. However, a special state census of a local unit of government may be taken at the expense of the local governmental unit to implement a change in the number of quota licenses available.<sup>22</sup> A municipality is not required by statute to approve or authorize issuance of all licenses available under the quota. There also are some statutory exemptions to the quota requirement.<sup>23</sup>

### Municipal Approval of Licenses and Permits

An on-premises license may not be granted by the MLCC unless the legislative body of the municipality in which the applicant's place of business is located first approves it.<sup>24</sup> Local legislative approval is required for both new and transferred applications.<sup>25</sup> An exception to this requirement is when the applicant's place of business is located within a city with a population of 750,000 or more.<sup>26</sup> Approval of the local legislative body is also not required for Club or Special licenses.<sup>27</sup> However, the legislative body of the municipality must approve all Dance, Entertainment, Topless Activity, and Banquet Facility permits before they can be issued to any licensee.<sup>28</sup>

Approval of the local legislative body is not required for off-premises licenses. However, the approval of the chief local law enforcement officer having jurisdiction is required for all licenses and permits<sup>29</sup>. An application for a new license, a transfer of an existing license, or a transfer of the location of an existing license must be denied by the MLCC if the commission receives written notification that the application does not meet all appropriate state and local building, plumbing, zoning, fire, sanitation and health laws and ordinances as certified by the appropriate law enforcement officials.<sup>30</sup>

### *Renewals and Revocations - The Role of the Municipality*

All full year liquor licenses issued by the MLCC expire on April 30<sup>31</sup>. An on-premises license will be renewed by the MLCC without local approval except when a local legislative body files an objection to renewal not less than 30 days before the expiration of the license.<sup>32</sup> If the MLCC is satisfied with the documentation provided by the municipality in support of its objection to renewal, the license will not be renewed. The license will be placed in escrow for one year, and may be canceled after the one-year period unless the local legislative body adopts a resolution approving the renewal.<sup>33</sup>

Municipalities also have the authority to request revocation of on-premises licenses.<sup>34</sup> Upon receipt of a request of a local legislative body to revoke a license, and after due notice and proper hearing by the local legislative body and the MLCC, an on-premises license and all permits held in conjunction with the license will be revoked.<sup>35</sup> Although the MLCC is required to have a separate hearing after receipt of the municipality's request for revocation, the sole purpose of the MLCC hearing is to determine if the licensee was afforded rudimentary due process.<sup>36</sup> Revocation is permanent, resulting in the licensee losing all ownership rights to a license.<sup>37</sup>

The authority of a municipality to request revocation of off-premises SDD or SDM licenses is limited by statute. A local legislative body, by resolution, may request the MLCC revoke an off-premises license, if it has been determined pursuant to MLCC violation hearings, that the licensee has sold or furnished alcohol to a minor on three separate occasions during a single calendar year, and those violations did not involve the use of falsified or fraudulent identification.<sup>38</sup>

### *Court Decisions Discussion on Approval, Renewal, and Revocation*

Approximately a year after the Liquor Control Code came into being, its local control provisions were attacked as unconstitutional. In *Johnson v. Liquor Control Commission*,<sup>39</sup> the plaintiff challenged the validity of the revocation provision of the Liquor Control Code.

The plaintiff argued that this section improperly delegated power of the legislature, impaired a right to contract, and deprived a person of due process. The Supreme Court rejected these arguments. Critical to the Supreme Court's holding was the idea that "local communities, as a matter of policy, should be permitted to regulate the traffic [of alcohol] within their own bounds."<sup>40</sup>

Soon after *Johnson* was published, the Supreme Court decided a case involving a township's refusal to approve the application for a liquor license. In *Scott v. Arcada Township*,<sup>41</sup> the township board rejected the plaintiff's request to approve a new on-premises beer and wine license. The plaintiff then filed a writ of mandamus, asking the court to compel the board to approve his application. The trial court refused to issue a writ, and the plaintiff appealed, arguing that the board acted arbitrarily and capriciously.

In ruling against the plaintiff, the Michigan Supreme Court began by looking at the provisions of the Liquor Control Code, which states in part "all applications for licenses to sell beer and/or wine and/or spirits for consumption on the premises shall be approved by the local legislative body."<sup>42</sup>

Looking at this provision of the statute, the *Scott* Court opined that the statute gives a municipality broad discretion in liquor licensing matters. The statute does not limit a local community's discretion nor does it provide for any criteria that a municipality should follow in exercising its discretion. Therefore, the Court held a municipality's refusal to approve a liquor license is not subject to review by a court.

The *Scott* Court pointed out the difference between an application for a new liquor license and the revocation of an existing one. If the case involved revocation of a license, then the plaintiff's claim that the action of the board was arbitrary and capricious may have merit. However, the township board was not seeking to revoke an existing liquor license. Instead, the plaintiff was asking the board to approve a new license.

The holding of *Scott*, that courts will not review denials of applications for liquor licenses, became controlling precedent and was applied in subsequent Supreme Court decisions where plaintiffs sought review of municipalities' refusal to approve applications for new liquor licenses.<sup>43</sup> In *Hanson v. Village Council of Romeo*,<sup>44</sup> the plaintiff sought approval of an application for Class B Hotel license. The Romeo Village Council did not grant approval. The plaintiff filed a lawsuit seeking a review of the Village's decision, and ultimately appealed to the Michigan Supreme Court. Relying on *Scott*, the Supreme Court refused to review the Village's decision, stating, "Even though exercised in an arbitrary and capricious manner we do not review it."<sup>45</sup>

In 1976, the Michigan Supreme Court criticized the holding of *Scott* and *Hanson* in *Bundo v. City of Walled Lake*.<sup>46</sup> In *Bundo*, the plaintiff obtained a Class C Liquor License and Entertainment Permit in 1967. Walled Lake approved the issuance of the permit with the condition that the plaintiff not allow adult entertainment.

However, in 1971, the plaintiff began to offer topless entertainment. Shortly thereafter, the Walled Lake City Council recommended that the plaintiff's liquor license not be renewed. The plaintiff was never notified of this recommendation, nor did the city provide plaintiff with a hearing.

The plaintiff filed suit in the Oakland County Circuit Court. The defendants, Walled Lake and the MLCC, asked for summary disposition, which the court granted. The Court of Appeals affirmed.

The Supreme Court granted leave. At the outset, the Court limited the case to three issues: "1) whether an individual seeking renewal of a Class C Resort License has an interest in property such that it is entitled to due process; 2) if such an interest exists, what process is due the individual; and 3) whether arbitrary and capricious actions by local legislative bodies in recommending...that... licenses not be renewed are subject to judicial review."<sup>47</sup>

The Court reversed and remanded. Relying on United States Supreme Court precedent<sup>48</sup> the *Bundo* Court recognized that the possession of an existing liquor license was a property interest that entitled the plaintiff to due process before a municipality could recommend nonrenewal. The *Bundo* Court opined that once a license has been granted, a licensee is required to make a significant investment into a building or the business. Once a licensee has an existing business and has expended start-up costs, a licensee has a property interest, and due process must be afforded before a license can be taken away.

Finding that a holder of a liquor license has a property interest protected by the Due Process Clause, the Court next discussed what process is due. Weighing the public's interest in regulating the harmful affects of alcohol with the individual's interest in operating a business, the Court determined that a municipality only needs to provide rudimentary due process. This means that a municipality must provide written notice detailing the reasons for the objection, an opportunity for the liquor license holder to present witnesses, evidence or arguments, and an informal written statement of findings.

The *Bundo* Court then turned to the third issue in the case and held that Courts will review a local legislative body's recommendation only if the plaintiff can show that the municipality's decision was arbitrary and capricious.

As part of the opinion, the Court reviewed *Scott* and *Hanson*. The Supreme Court criticized these cases even though they addressed applications for new licenses, and not objections to renewal of liquor licenses, which was the issue in *Bundo*. As noted above, the opinion at the outset limited the issues to renewal of a license. The case, Justice Williams wrote, "concerns neither revocation ...nor application of a new license."<sup>49</sup> It is quite puzzling, therefore, that *Bundo* questioned the validity of *Scott* and *Hanson* without distinguishing these cases.

*Bundo* was the last case in which the Supreme Court reviewed a municipality's role in administering and controlling liquor licenses.

The Court of Appeals, however, applied *Bundo* in subsequent cases where both renewal of existing licenses and applications for new or transferred licenses were at issue.

In *Roseland Inn v. McClain*<sup>50</sup> the Court of Appeals reviewed a township's recommendation of nonrenewal. In this decision, the court expanded the holding of *Bundo*, by ruling that municipalities must provide "notice of standards that guide a local body's decision-making." The court held that the "absence of standards promotes arbitrary and capricious actions on the part of the local legislative body and the lack of fair notice of such standards violates a licensee's right to due process."<sup>51</sup>

In *Barr v. Pontiac City Commission*<sup>52</sup>, the Court of Appeals held that the plaintiff, who was a previous bar owner, was entitled to a due process hearing even though he was technically seeking approval of a transfer of a liquor license and not renewal. The court held that his reversionary interest in the requested liquor license entitled him to due process as provided in *Bundo* on his application to have a license transferred back to him.

The Court of Appeals in other decisions expanded *Bundo's* "arbitrary and capricious" standard to applications for new and transferred liquor licenses.<sup>53</sup> For example, in *Wong v. City of Riverview*<sup>54</sup> the court stated: "...even though the... applicant has no right to... due process, this Court will review the city's decision."

The last published case concerning local control of a liquor license was issued in 1983.<sup>55</sup> Whether *Wong* or other decisions that permit judicial review of applications for new or transferred licenses are valid today is questionable. Subsequent jurisprudence shows a renewed respect for local control. In the area of zoning for example, the Michigan Supreme Court in *Schwartz v. City of Flint*<sup>56</sup> reaffirmed the long-held principle that a court should not "sit as a superzoning commission," and should not interfere with a municipality's legislative function of rezoning property unless "unconstitutionality has been alleged and proven."

More recently, the Supreme Court in *Warda v. City of Flushing*<sup>57</sup> held that when a statute gives a municipality discretionary decision-making authority and the statute does not limit or provide guidance in exercising that discretion, or provide guidance to a reviewing court, there is no judicial review of the municipality's decision. In this case, a Flushing police officer was a defendant in a criminal case in which he was ultimately acquitted. After his acquittal, he requested that the City Council reimburse him for all attorney fees incurred in his defense, which is authorized by MCL 691.1408 (2). The City Council denied this request, and the plaintiff filed suit, contending the council abused its discretion in failing to pay his attorney fees. After a bench trial, the court agreed with the plaintiff and awarded attorney fees. The Court of Appeals affirmed.

The Michigan Supreme Court reversed. In reviewing the language of MCL 691.1408(2), the Court determined that "this statute uses the word "may," which means that the decision to pay an officer attorney fees is a matter left to the discretion of the municipality."<sup>58</sup>

The Supreme Court also held that there was no statutory language, words, or phrases that would otherwise limit or qualify the discretion of the City Council. As such, the council had complete discretion in deciding whether to pay attorney fees.

The Court next turned to whether a court has power to review a purely discretionary action taken by a governmental agency. The Court concluded that there is no judicial review of this decision, based on the language of the statute. The statute uses the word "may," and does not limit the agency's discretion. Based on this, the Court decided that the decision of the City Council could not be reviewed by the Court. It would be reviewable only when there is some allegation that the municipality violated the Constitution. Because the plaintiff did not allege a constitutional violation, nor was there any proof of such violation, the plaintiff's complaint that the council abused its discretion should not have been reviewed. "Whether the council acted wisely or unwisely, prudently or imprudently, is not for the consideration or determination of this court."<sup>59</sup> *Warda's* holding breathes new life into the *Scott* case and other earlier cases that prohibited judicial review of denials of applications for new or transferred liquor licenses.

### *In Re Hooters of Troy*

In early 2006, Hooters filed an application with the MLCC requesting the transfer of a Class C Liquor License owned by the Sign of the Beefcarver. On June 19, 2006, the Troy City Council refused to approve Hooters' request. Hooters filed suit, seeking an order of superintending control in the Oakland County Circuit Court. On July 26, 2006, the court entertained Hooters' motion for an order for superintending control. The circuit court judge denied Hooters' motion and dismissed its case. The case was pending in the Court of Appeals. However, on May 21, 2007, a settlement was reached in the case.

The litigation between Hooters and the City of Troy presented an opportunity to revisit *Scott*, and for Michigan's appellate courts to apply the principles of judicial restraint reaffirmed in *Warda*. With the Hooters case settled, it is unknown whether Michigan's appellate courts will ever reexamine *Scott*, *Bundo*, *Wong* and other Court of Appeals decisions that applied *Bundo*. However, a municipality's authority to administer and control liquor licenses was weakened by *Bundo* and subsequent Court of Appeals decisions.

**Christopher J. Forsyth** and **Allan T. Motzny** are Assistant City Attorneys for the City of Troy. They advise the City on a broad range of legal issues, including liquor licenses.

### Footnotes

1 Michigan Liquor Control Act, 1933 (Ex Sess) PA 8  
 2 395 Mich 679; 238 NW2d 154 (1976)  
 3 1998 PA 58, MCL 436.1101 *et seq.*  
 4 MCL 436.1107(2) – a Class C license allows the licensee to sell beer, wine, liquor and mixed spirit drinks for consumption on the premises

5 MCL 436.1532 – a Club license enables a private club to sell beer, wine, liquor and mixed spirit drinks to its members  
 6 MCL 436.1107(11) – a B Hotel license permits a hotel to sell beer, wine, liquor and mixed spirit drinks for consumption on the premises and in the rooms of guests  
 7 MCL 436.1107(10) – a A Hotel license allows a hotel to sell only beer and wine for consumption on the premises and in the rooms of guests  
 8 MCL 436.1113(1) – a Tavern license allows a business to sell beer and wine for consumption on the premises  
 9 MCL 436.1105(12) – a Brewpub license authorizes a licensee to manufacture up to 5,000 barrels of beer annually and sell the beer produced for consumption on or off the premises  
 10 MCL 436.1109(2) – a Micro brewer license allows a brewer to produce up to 30,000 barrels of beer per year and sell the beer produced to consumers for consumption on or off the premises  
 11 MCL 436.1111(10) – a Special license allows a non-profit organization to sell beer, wine and/or liquor for consumption on the premises for a limited period of time  
 12 MCL 436.1531 – the MLCC can issue Resort licenses for any on-premise classification except Club and special, which are limited based on criteria set forth in the statute  
 13 MCL 436.1107(3) – a Class G-1 license allows the sale of beer, wine and spirits at an 18 hole golf course  
 14 MCL 436.1107(4) – a Class G-2 license allows the sale of beer and wine only at an 18 hole golf course  
 15 MCL 436.1537 – a Wine Maker license allows the manufacturing of wine and for the sale of wine to a wholesaler, by direct shipment and at retail for consumption on or off the premises  
 16 MCL 436.1111(11) – an SDD license allows the licensee to sell packaged liquor for consumption off the licensed premises  
 17 MCL 436.1111(12) – an SDM license allows the sale of beer and wine only, for consumption off the premises  
 18 MCL 436.1531(5) – an SDD Resort license may be issued by the MLCC in municipalities having a population of 50,000 persons or less under limited circumstances set forth in the statute, which allows the sale of packaged liquor for consumption off the premises  
 19 MCL 436.1531(1)  
 20 MCL 436.1533  
 21 *Id.*  
 22 MCL 436.1531(11)  
 23 MCL 436.1521 and MCL 436.1521a (development districts and city redevelopment project areas), MCL 436.1531 (Resort Licenses), MCL 436.1507 (publicly owned airports), MCL 436.1531(10) (county airports), MCL 436.1515 (municipally owned golf courses), MCL 436.1509 (municipal civic centers or auditoriums), MCL 436.1537(c) (club license), MCL 436.1517 (international sporting event licenses), and MCL 436.1513 (college or university conference centers)  
 24 MCL 436.1501(2)  
 25 *Id.*  
 26 *Id.*  
 27 MCL 436.1107(3), MCL 436.1532, MCL 436.1111(10)  
 28 MCL 436.1916, MCL 436.1522  
 29 MCL 436.1501, MCL 436.1916  
 30 2004 MR 6, R 436.1105(3)  
 31 MCL 436.1501(2)  
 32 *Id.*  
 33 Michigan Department of Labor and Economic Growth, *The Michigan Liquor Control Commission and Local Units of Government*, (January 2004)  
 34 MCL 436.1501(2)  
 35 *Id.*  
 36 Michigan Department of Labor and Economic Growth, *The Michigan Liquor Control Commission and Local Units of Government*, (January 2004)  
 37 *Id.*  
 38 MCL 436.1501(3)  
 39 266 Mich 682; 254 NW 557 (1934)  
 40 *Id.*  
 41 268 Mich 170; 255 NW 557 (1934)  
 42 *Id.*  
 43 See *McCarthy v Leanton*, 324 Mich 293; 36 NW2d 923 (1949)  
 44 339 Mich 612; 64 NW2d 570 (1954)  
 45 *Id.* at 615  
 46 395 Mich 679; 238 NW2d 154 (1976)  
 47 *Id.* at 683  
 48 *Board of Regents v Roth*, 408 US 564; 92 S Ct 2701 (1972), and *Perry v Sindermann*, 408 US 593, 92 S Ct 2694 (1972)  
 49 *Bundo*, 395 Mich at 685  
 50 118 Mich App 724; 325 NW2d 551 (1982)  
 51 *Id.* at 731  
 52 90 Mich App 446; 282 NW2d 348  
 53 See *Stafford's Restaurant of Bloomfield Inc. v Doherty*, 82 Mich App 607; 267 NW2d 461 (1978); *Pease v City of Saint Clair Shores*, 85 Mich App 371; 271 NW2d 236 (1978); and *Fuller Central Park Properties v Birmingham*, 97 Mich App 517; 296 NW2d 88 (1980)  
 54 126 Mich App 589; 337 NW2d 589 (1983)  
 55 *Stafford's Restaurant v Oak Park*, 129 Mich App 84; 341 NW2d 235 (1983)  
 56 426 Mich 295; 395 NW2d 678 (1986)  
 57 472 Mich 326; 696 NW2d 671 (2005)  
 58 *Id.* at 331-332  
 59 *Id.* at 333