

Memorandum #08-134

To: City Commission
From: Finance Officer
Date: 7/9/2008
Subject: Memorandum and Discussion of New Liquor Legislation Effective July 1, 2008

Attached to this memorandum is a letter from Carol Logan of the South Dakota Department of Revenue & Regulation, Special Tax Division, outlining most of the main changes to the South Dakota Codified Laws that pertain to alcohol licensing and consumption. Numbers 1, 2, 4, and 6 of her letter are automatic changes that don't require anything on the municipality's part other than educating ourselves to the changes. If you have questions on these changes, we can discuss these at this Monday night, July 14th, City Commission meeting. Numbers 3 and 5 require a local ordinance to be adopted to implement these changes. Please note that **this process could not begin until after the law went into effect (July 1, 2008)**. The purpose of this memo is to discuss the changes and get direction from the Commission on whether or not you desire staff to introduce future ordinances to adopt and or implement any changes to our Yankton Code of Ordinances.

We will begin by discussing the easier (to understand and interpret, that is) of the two changes listed in the letter (number 5). Inserted below is the new SDCL that pertains to this number 5:

SDCL 35-4-77.1. Sale or consumption of alcoholic beverages on sidewalk abutting licensed premises permitted by ordinance. Notwithstanding the provisions of § 35-4-75, the governing body of the municipality charged with the approval of alcoholic beverage license issuance may, by ordinance, permit the sale and consumption of alcoholic beverages on a sidewalk or walkway subject to a public right-of-way abutting a licensed premises, provided that the license holder derives more than fifty percent of its gross receipts from the sale of prepared food for consumption on the licensed premises. The sidewalk or walkway subject to a public right-of-way shall be immediately adjacent to and abutting the licensed premises. This section does not apply to any federal-aid eligible highway unless approved in accordance with the applicable requirements for the receipt of federal aid.

Nothing contained in this section prevents the governing body from imposing conditions or restrictions that it deems appropriate.

The sidewalk or walkway subject to a public right-of-way where the sale and consumption of alcoholic beverages is permitted does not constitute a public place as defined in § 35-1-5.3, if the sidewalk or walkway subject to a public right-of-way has been properly authorized for sale and consumption of alcoholic beverages pursuant to this section. The hours of authorized sale and consumption on the sidewalk or walkway subject to a public right-of-way as provided by this section shall be consistent with the hours permitted for the on-sale license.

A violation of any provision of Title 35 by an alcoholic beverage license holder conducting business on a sidewalk or walkway subject to a public right-of-way pursuant to

this section constitutes a violation of Title 35 as if the violation had occurred in or on the licensed premises.

Source: SL 2008, ch 187, § 1.

These are the two sections referred to above:

SDCL 35-4-75. Service by on-sale licensees restricted to premises--Violation as misdemeanor. No on-sale licensee may serve alcoholic beverages except on the premises authorized by the license. A violation of this section is a Class 2 misdemeanor.

Source: SDC 1939, § 5.0226 (5); SL 1953, ch 10; SL 1963, ch 15; SL 1971, ch 211, § 69; SL 1992, ch 158, § 58; SL 2008, ch 37, § 182.

SDCL 35-1-5.3. Misdemeanor to consume or mix alcoholic beverages in public place other than licensed on-sale premises--Exception. It is a Class 2 misdemeanor for any person to consume any intoxicating liquor or to mix or blend any alcoholic beverage with any other beverage, regardless of whether the beverage is an alcoholic beverage, in any public place, other than upon the premises of a licensed on-sale dealer where the alcoholic beverage was purchased from the dealer for on-sale purposes. For purposes of this section, the term, public place, means any place, whether in or out of a building, commonly and customarily open to or used by the general public and any street or highway. However, this section does not apply if the county commissioners or the governing body of the municipality, charged with the approval of alcoholic beverage license issuance, in their respective jurisdictions, give prior authorization for persons to consume or blend alcoholic beverages, but not to engage in the sale of the alcoholic beverages, in or upon property described by the authorizing governmental subdivision, and if the property is publicly owned, or owned by a nonprofit corporation. The permit period may not exceed twenty-four hours, and hours of authorized consumption may not exceed those permitted for on-sale licensees.

Source: SL 1973, ch 234; SL 1977, ch 190, § 122; SL 1984, ch 246; SL 2008, ch 37, § 134.

If the Commission wishes to allow the sale and consumption of alcoholic beverages on adjacent public sidewalks, an ordinance will have to be introduced and adopted. A couple of points to note:

1. The sidewalk has to be immediately abutting the licensed premise.
2. The licensee has to derive more than 50% of its gross receipts from the sale of prepared food for consumption on the licensed premise (not take-out sales).
3. The licensee is still responsible if a violation of any provision of Title 35 occurs on the sidewalk.
4. The City can further impose conditions or restrictions that it deems appropriate but it can't lift or ease any of the SDCL provisions.

Does the City Commission desire to have staff introduce an Ordinance allowing sales and consumption of alcoholic beverages on sidewalks abutting licensed premises?

Also attached to this letter is the SDCL that pertains to number 3 of the letter from SD Dept. of Revenue. This is a separate attachment as it is much longer than the simple insert above. Rather than list "points to note", I would suggest we use the attachment to discuss this legislation section by section. I have had a couple of phone conversations with Carol Logan to clarify questions I had about this legislation, and Jim Goetz and I have also met and discussed this. Hopefully we can answer most of your questions and if not we will certainly call the Department of Revenue to get further clarification.

After having this discussion, does the City Commission desire to have staff introduce an Ordinance allowing the City of Yankton to issue new full-service restaurant on-sale licenses?

Thank you,

Al Viereck
Finance Officer

TO: ALL CITIES AND COUNTIES

FROM: SD DEPT. OF REVENUE & REGULATION
SPECIAL TAX DIVISION
CAROL LOGAN

RE: CHANGES TO THE ALCOHOL LAWS
EFFECTIVE 07-01-2008

DATE: APRIL 8, 2008

There were plenty of changes to the alcohol laws during the 2008 Legislative session. This memo is to inform you of most of those changes. If you have any questions please feel free to give me a call.

1. One of the changes that might affect the malt beverage renewals is a new type of license. **HB-1269 has created a package off-sale malt beverage & SD farm winery wines license.** The cost is \$175.00, all of the money stays with the local governing body. This license allows the business to sell any type of malt beverage and also sell South Dakota farm winery wines on their place of business. The license allows no other type of wine to be sold. Some of your licensees that currently have the PB (package beer) license may want to change to the new license. I am including applications that have the new type of license on them; you can use the revised applications or make a note on the renewal application telling me of the new choice of license. **Licensees should know of one disadvantage to this license, they are not eligible to have employees under the age of 21 sell the alcohol, a person must be at least 21 years of age to sell either the malt beverages or the farm winery wines.** SDCL 35-4-79.1 limits the underage sellers to businesses with just a package beer license.
2. The current **on-sale wine license** is undergoing a major change, effective July 1, 2008. **This license will automatically become an on & off sale wine license on July 1.** All types of wines may be sold with this license. The current "restaurant" restrictions on the type of business eligible to receive this license will be eliminated. The hours will change to 7:00 a.m. to 2 a.m. The clerks and wait staff will still have to be 21 years of age to sell - no exceptions. The bill making these changes is **HB-1126.**
3. **SB 126** will make changes in the number of **on-sale liquor licenses** a town or county may issue. You will need to have an ordinance in place prior to any of these licenses being issued. **You will not be able to start the ordinance process for these licenses until after the law goes into effect – 7-1-2008.** These licenses will only be available to restaurants with no smoking and only 40% of their business from alcohol. There are **MANY** additional restrictions with this bill and not all of them have been worked out. I will continue to keep you updated on this issue.
4. New temporary package off-sale wine license. **HB-1118** creates a **temporary package off-sale wine** license that may be issued to a **fair board or public, civic, charitable, educational or fraternal organization in conjunction with a special event.** This license only allows South Dakota farm winery wines to be sold at the special event (by the bottle). The cost may be no more than \$50.00 per day and no more than 15 consecutive days. The fee must accompany the application and stays with the city/county.
5. **HB-1203** allows a city or county to allow an on-sale licensee to have the sale and consumption of alcoholic beverages on **sidewalks and walkways** that abut the building of the licensed premise. **There must be an ordinance done before allowing any licensee to sell on the sidewalk. You will not be able to start the ordinance process for this until after the law goes into effect – 7-1-2008.** The city/county may impose any conditions or restrictions that they deem appropriate. All alcohol rules and regulations will apply to the sidewalk or walkway areas and it will be legal for the business to allow sales and consumption on those areas.
6. **HB-1321** makes changes to 35-4-14.1 which is the convention facility license attached to an airport license. That will no longer be allowed and any city with a population of over 35,000 may issue a regular on-sale liquor license to the convention facility and qualifies under SDCL 9-52 or 9-53. The selling, serving or dispensing may occur 1 hour before an event and during the event but nothing after the event is done. This license is not transferable. The cost would be the same as a regular liquor license.

SDCL 35-4-2.10. Report to municipality of on-sale license transferred between January 1, 2003 and January 1, 2008. Each licensee who owns an on-sale license issued pursuant to subdivision 35-4-2(4) or (6) as of January 1, 2008, and who purchased the license or had the license transferred to such licensee at any time between January 1, 2003, and January 1, 2008, shall report the amount originally paid for the on-sale license to the municipality or county that issued the license. The declared purchase price shall be made under oath and shall include the documents establishing the amount paid for the on-sale license to the municipality or county that issued the license. If the transaction for the purchase of the on-sale license included real or personal property, the full market value of the real or personal property on the date of the original sale shall be deducted from the total transaction price to determine the amount paid by the licensee for the on-sale license. The burden of establishing the amount paid for the license shall be on the licensee. Any licensee contesting the fair market value of the real and personal property may appeal the valuation to circuit court.

Source: SL 2008, ch 189, § 8.

SDCL 35-4-110. Definition of terms pertaining to full-service restaurant on-sale licenses. Terms used in this section and §§ 35-4-111 to 35-4-119, inclusive, mean:

(1) "Bar," any permanently installed counter within the restaurant area from which alcoholic beverages are regularly served to customers by a person who is tending bar or drawing or mixing alcoholic beverages;

(2) "Full-service restaurant," any restaurant at which a waiter or waitress delivers food and drink offered from a printed food menu to patrons at tables, booths, or the bar. Any restaurant that only serves fry orders or food and victuals such as sandwiches, hamburgers, or salads is not a full-service restaurant;

(3) "Restaurant," any area in a building maintained, advertised, and held out to the public as a place where individually priced meals are prepared and served primarily for consumption in such area and where not more than forty percent of the gross revenue of the restaurant is derived from the sale of alcohol or alcoholic beverages. The restaurant shall have a dining room or rooms, a kitchen, and the number and kinds of employees necessary for the preparing, cooking, and serving of meals.

Source: SL 2008, ch 189, § 2.

SDCL 35-4-111. Full-service restaurant on-sale licenses. Notwithstanding the provisions of § 35-4- 11 or 35-4-11.1 or the on-sale license fees established pursuant to subdivisions 35-4-2(4) and (6), the governing board of any incorporated municipality or the board of county commissioners of any county may, by ordinance, issue additional on-sale licenses for full-service restaurants if the municipality or county charges at least the minimum fee required by § 35-4-116.

Source: SL 2008, ch 189, § 1.

SDCL 35-4-112. Documentation in support of application for full-service restaurant on-sale license. An applicant for a full-service restaurant on-sale

license shall provide sufficient documentation to the municipality to prove that the primary source of revenue from the operation of the restaurant will be derived from the sale of prepared food and nonalcoholic beverages and not from the sale of alcoholic beverages. The supporting documentation concerning the primary source of revenue submitted pursuant to this section is confidential.

Source: SL 2008, ch 189, § 3.

SDCL 35-4-113. Renewal of full-service restaurant on-sale license--Annual report. When the municipality is renewing a full-service restaurant on-sale license, the municipality shall condition the license renewal upon receiving documentation that not more than forty percent of gross sales from the preceding twelve months operation of the full-service restaurant is derived from the sale of alcohol or alcoholic beverages. The full-service restaurant on-sale licensee shall submit an annual report to the municipality on the sales for the full-service restaurant that includes an oath verifying the validity of the information provided in the report. The report and the supporting documentation submitted pursuant to this section are confidential. The report shall contain the annual gross sales of the licensee for the following two categories:

- (1) Food and nonalcoholic beverage sales; and
- (2) Alcoholic beverage sales.

Source: SL 2008, ch 189, § 4.

SDCL 35-4-114. On-premise consumption required. A full-service restaurant on-sale licensee may only serve alcoholic beverages for on-premise consumption in the bar and dining room area of the restaurant.

Source: SL 2008, ch 189, § 5.

SDCL 35-4-115. Advertisement of full-service restaurant. A restaurant that has a full-service restaurant on-sale license may only be advertised or held out to the public as primarily a food eating establishment. No licensee that has a full-service restaurant on-sale license may allow smoking on the licensed premises.

Source: SL 2008, ch 189, § 6.

SDCL 35-4-116. Fees for additional on-sale licenses to full-service restaurants. Any municipality or county adopting the ordinance pursuant to § 35-4-111 may issue additional on-sale licenses to full-service restaurants. Any municipality adopting such ordinance shall charge at least one dollar for each person residing within the municipality as measured by the last preceding decennial federal census. Any county adopting such ordinance shall charge at least one dollar for each person residing within the county but outside the boundary of any municipality as measured by the last preceding decennial federal census.

Each municipality or county shall set the on-sale license fee within ninety days of adopting the ordinance pursuant § 35-4-111 or within thirty days after the resolution of any appeal pursuant to § 35-4-112. After the fee for an on-sale license issued pursuant to §§ 35-4-110 to 35-4-119, inclusive, has been determined, no municipality or county may change the fee for a period of ten years unless a growth

in population reported by the federal decennial census requires an increase in the fee.

Source: SL 2008, ch 189, § 7.

SDCL 35-4-117. Price of full-service restaurant on-sale license set at or above current fair market value. Any municipality or county adopting the ordinance pursuant to § 35-4-111 shall set the price of a new full-service restaurant on-sale license, pursuant to § 35-4-116, at or above the current fair market value. However, such full-service restaurant on-sale license fee may not be less than the minimum on-sale license fee established pursuant to subdivision 35-4-2(4) or (6). For purposes of this section, the term, current fair market value, means the documented price of the on-sale license most recently sold between January 1, 2003, and January 1, 2008, through an arm's-length transaction, less the value of any real or personal property included in the transaction. Each on-sale license holder as of January 1, 2008, who acquired the on-sale license within the last five years shall report to the municipality or county the date and price paid for its on-sale license.

Source: SL 2008, ch 189, § 9.

SDCL 35-4-118. Registry of full-service restaurant on-sale licenses. Each municipality or county adopting an ordinance pursuant to § 35-4-111 shall maintain a registry of each on-sale license that is being offered for sale at the price established in § 35-4-117 and furnish a copy of the registry to anyone who requests a new full-service restaurant on-sale license. The municipality or county may only issue a new license pursuant to §§ 35-4-110 to 35-4-119, inclusive, if no on-sale license is on the registry or a person desiring to purchase an on-sale license listed on the registry provides documentation showing that the person is unable to purchase the on-sale license at the price established in § 35-4-117 and on terms satisfactory to both the potential buyer and seller. The price of any on-sale license registered as, for sale, with the municipality or county shall be sold at the current fair market price set by the municipality or county pursuant to § 35-4-117. Nothing in §§ 35-4-110 to 35-4-119, inclusive, precludes the sale of an on-sale license by a licensee not listed on the registry.

Source: SL 2008, ch 189, § 10.

SDCL 35-4-119. Registration that full-service restaurant on-sale license is for sale. The existing on-sale license holder is responsible for registering with the municipality or county that the on-sale license is for sale pursuant to § 35-4-118.

Source: SL 2008, ch 189, § 11.