

Date of Hearing: June 21, 2017

ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION

Adam Gray, Chair

SB 378 (Portantino) – As Amended June 12, 2017

SENATE VOTE: 37-0

SUBJECT: Alcoholic beverages: licenses: emergency orders

SUMMARY: Authorizes the Department of Alcoholic Beverage Control (ABC), by temporary restraining order, to temporarily suspend or condition a license, as defined, when, in the opinion of ABC, and supported by a preponderance of the evidence indicating a pattern of behavior, the action is urgent and necessary to protect against an immediate threat to health or safety, as defined, that is reasonably related to the operation of the licensed business, as defined, including provisions related to notice and judicial review. Specifically, this bill:

- 1) Provides ABC may temporarily suspend or condition any license issued by temporary restraining order (TRO) when, in the opinion of ABC, and supported by a preponderance of the evidence indicating a pattern of behavior, the action is urgent and necessary to protect against an immediate threat to health or safety that is reasonably related to the operation of the licensed business.
- 2) Provides that a “Temporary restraining order” and “preliminary injunction” mean a temporary or interim emergency order issued by ABC.
- 3) Provides “Immediate threat to health and safety” means any of the following that occurs on the premises of a licensee:
 - a) Child endangerment.
 - b) Extortion.
 - c) Human trafficking.
 - d) Illegal use, manufacture, or distribution of controlled substances.
 - e) Prostitution.
 - f) Sexual assault.
 - g) Violence resulting in great bodily injury or death.
- 4) States unless initiated by ABC, evidence of the threat must be presented prior to the issuance of TRO and shall include an affidavit describing the basis for the request signed by the city’s chief of police, or county sheriff of that region, and the city manager or mayor requesting the order.
- 5) States “Evidence” includes, but is not limited to, police reports, citations from the relevant local civil authority, photographs, and video footage provided by law enforcement or another public official acting in his or her official capacity.
- 6) States a petition may be initiated by ABC, a city attorney, or a city counsel.
- 7) Provides the licensee shall be granted the opportunity to present affidavits and other documentary evidence and to present oral argument at the initial hearing. The licensee may be

represented by counsel. If the order is granted without notice, ABC shall accept affidavits and other documentary evidence from the licensee into the record.

8) Provides that the decision of ABC on the petition for the TRO is final, subject only to judicial review, as specified.

9) States no TRO shall be granted without notice to the opposing party, unless both of the following requirements are satisfied:

i) It appears from facts shown by affidavit or by the petition, that great or irreparable injury will result before the matter can be heard on notice.

ii) Unless initiated by ABC, the petitioner or the petitioner's attorney certifies one of the following to ABC by affidavit:

a) That within a reasonable time prior to the petition, the petitioner informed the licensee or the licensee's attorney at what time and where the petition would be made.

b) That the petitioner in good faith attempted but was unable to inform the licensee or the licensee's attorney, specifying the efforts made to contact them.

10) States upon the granting of a TRO, with or without notice to the licensee or the licensee's attorney, the following shall occur:

a) The matter shall be made returnable on an order requiring cause to be shown why a preliminary injunction should not be granted, on the earliest day that the business of ABC will admit of, but not later than 15 days or, if good cause is appears to ABC, 22 days from the date the TRO is issued.

b) The party who obtained the TRO shall, within five days from the date the temporary restraining order is issued or two days prior to the hearing, whichever is earlier, serve on the licensee or the licensee's attorney a copy of the petition if not previously served, the order to show cause stating the date, time, and place of the hearing, any affidavits to be used in the application, and a copy of the points and authorities in support of the petition. The court may for good cause, on motion of the petitioner or on its own motion, shorten the time required, as specified for service on the licensee or the licensee's attorney.

c) When the matter comes up for hearing, if the party who obtained the TRO is not ready to proceed, or if the party has failed to effect service as defined, ABC shall dissolve the TRO.

d) The licensee is entitled to one continuance for a reasonable period of not less than 15 days or any shorter period requested by the licensee, to enable it to respond to the petition for a preliminary injunction. If the licensee obtains a continuance, as specified, the TRO shall remain in effect until the date of the continued hearing.

e) Upon the filing of an affidavit by the petitioner that the licensee or the licensee's attorney could not be served within the time, as defined, ABC may reissue any TRO previously issued, as specified.

11) Provides a TRO or temporary injunction issued under this section shall be subject to judicial review pursuant to the California Code of Civil Procedure (CCP) §1094.5. Generally, a Petition

for Writ of Administrative Mandamus is a request that a Superior Court review and reverse the final decision or order of an administrative agency.

12) States the order may be modified or dissolved by ABC upon a showing that there has been a material change in the facts upon which the TRO was granted, that the law upon which the injunction or TRO was granted has changed, or that the ends of justice would be served by the modification or dissolution of the TRO.

13) Provides that following the issuance of the TRO and prior to the hearing, an accusation alleging cause for discipline of the license shall be filed with ABC.

14) Specifies that failure to comply with an order issued shall constitute a separate cause for disciplinary action against the license, as specified.

15) Provides if the order issued by ABC provides for anything less than a complete suspension of the license and the licensee violates the order prior to the hearing on the accusation as defined, ABC may, upon notice to the licensee and proof of violation, modify or expand the order. Orders provided for by this bill shall be in addition to, and not a limitation on, the authority to seek injunctive relief provided in any other provision of law.

16) Provides that upon order of ABC, the initial hearing conducted pursuant to this section can be conducted electronically, including by telephone or by video. The hearing need not be held in the county in which the premises or licensee are located.

17) Requires ABC to adopt regulations to develop the procedures necessary to implement the bill's provisions.

18) Defines "License" as a retail license, issued pursuant to the Act, which authorizes consumption of alcoholic beverages on the premises of a licensee, excluding licenses issued for the manufacturing, production, rectification, importation, distribution, or wholesaling of alcoholic beverages. "License" does not include a retail license for the premises of a federally recognized Indian tribe operating a casino.

EXISTING LAW:

1) Establishes ABC and grants it exclusive authority to administer the provisions of the Alcoholic Beverage Control Act (Act) in accordance with laws enacted by the Legislature (California Constitution Article XX, Section 22). This involves licensing individuals and businesses associated with the manufacture, importation and sale of alcoholic beverages in this state and the collection of license fees or occupation taxes for this purpose.

2) Authorizes ABC to investigate potential violations of the Act and grants the director authority to bring an action to enjoin a violation or the threatened violation of the Act, and provides for a hearing process held on a protest, accusation, or petition for a license.

3) Provides that the ABC may place reasonable conditions upon any licensee in certain situations, including, but not limited to, the following: (a) where grounds exist for the denial of an application for a license or where a protest against the issuance of a license has been filed; (b) where findings are made by the ABC which would justify suspension or revocation of the license, and imposition of the conditions is reasonably related to those findings; and, (c) where

findings are made by the ABC that the licensee has failed to correct objectionable conditions within a reasonable period of time. Furthermore, the law provides that the ABC may suspend or revoke a license for failure to take reasonable steps to correct objectionable conditions, as described.

4) Authorizes ABC, in its discretion, to suspend or revoke any license to sell alcoholic beverages if it determines for good cause that the continuance of such license would be contrary to the public welfare or morals. ABC may use a range of progressive and proportional penalties, as specified.

5) Provides that if an accusation is filed against a licensee, the licensee is entitled to have a public hearing on the accusation to present a defense against the charges made. The hearing will be presided over by an Administrative Law Judge of the Administrative Hearing Office. At the hearing, the licensee is entitled to the issuance of subpoenas to compel the attendance of witnesses and materials and may be represented by counsel (but not at public expense), may present relevant evidence and may cross-examine all witnesses. The Administrative Law Judge makes a proposed decision, which is filed with the ABC Director. (Government Code Sections 11500 to 11528)

6) Generally provides that the ABC shall deny an application for a license if the issuance or transfer of the license would tend to create a law enforcement problem or add to undue concentration of licenses, unless issuing the license would serve a public convenience or necessity. The law defines "undue concentration" in terms of a specified ratio of licensed premises-to-population within a census tract or a crime-reporting district in which the reported crime rate exceeds the crime rate of the entire local law enforcement jurisdiction by more than 20%.

7) Requires that notice of an application for a license be conspicuously posted on applicant premises and requires ABC to notify various local officials in the jurisdictions in which the premise is located that an application has been received. The law also sets out procedures by which public agencies or public officials may protest the issuance of a license.

8) Empowers the Alcoholic Beverage Control Appeals Board to exercise such powers as are vested in it by Section 22 of Article XX of the Constitution and may adopt such rules pertaining to appeals and other matters within its jurisdiction as may be required. The board and its duly authorized representatives in the performance of its duties, as defined, shall have the powers of a head of a department. (Bus. & Prof. Code Sec. 23077.)

9) Defines an "*on-sale*" license as authorizing the sale of all types of alcoholic beverages: namely, beer, wine and distilled spirits, *for consumption on the premises* (such as at a restaurant or bar). An "*off-sale*" license authorizes the sale of all types of alcoholic beverages for consumption *off the premises* in original, sealed containers.

FISCAL EFFECT: Unknown

COMMENTS:

Purpose of the bill. The author's office states, "in recent years, California cities have increased their efforts to address the issues of human trafficking, gang activity, and violent crimes. However, in the limited situations when these activities run in conjunction with a business

holding a liquor license, local law enforcement and city officials often lack the tools necessary to quickly shut down the establishment despite the urgent threat to the safety of their communities.”

Additionally, the author’s office states currently, the Department of Consumer Affairs, the Bureau of Gambling Control, and the Department of Public Health have the authority to pull licenses or close down businesses swiftly if they are found to be engaged in illegal activities that endanger the health and safety of individuals.”

The author’s office provided several examples of alcohol establishments that have continued to operate despite repeated violations of the law. The author’s office contends that illegal activities in such businesses may go unpunished for weeks, months, or even years, while local law enforcement and ABC officials build a case against the business.

In addition, there are a number of states that enable the department overseeing alcoholic beverage control to issue emergency orders similar to those that would be authorized by this bill. In addition, there are other contexts in California whereby boards or departments can act on a more timely basis in emergency situations. For instance, Business and Professions Code Section 494 provides a process for an interim suspension of licentiates. This bill incorporates various provisions from Section 494.

In support: The sponsor of this bill, the California Police Chiefs Association states, “this bill would give the ABC the authority to quickly deal with problem businesses that pose an immediate danger to the health and safety of individuals, while at the same time protecting the businesses’ due process rights. By doing so, this bill closes a problematic enforcement gap by allowing the ABC to address problem liquor stores within the timeframe expected by the neighborhoods surrounding these licensees.”

The League of California Cities states, “SB 378 establishes a mechanism for local officials to formally request that the Director of ABC seek a temporary restraining order under this act, thereby providing an avenue for city law enforcement and city government to help identify the most egregious cases.”

The California Council on Alcohol Problems states in support that “we are aware of many unfortunate examples of ABC licenses being given to businesses that claim to be eating places or bars but morph— often in the late evening hours—into commercial enterprises that mix alcohol (including after-hour drinking) with prohibited business activities. This bill would provide the state the authority to assist local law enforcement in their efforts to protect the citizens of the communities negatively impacted by these ‘morphing’ business ventures.”

Background:

Overview of ABC: The enactment of the 21st Amendment to the U.S. Constitution in 1933 repealed the 18th Amendment and ended the era of Prohibition. Accordingly, states were granted the authority to establish alcoholic beverage laws and administrative structures to regulate the sale and distribution of alcoholic beverages. In California, this responsibility was originally entrusted to the State Board of Equalization. In 1955, however, the State Constitution was amended to shift this responsibility to the newly established ABC. The intent in establishing the ABC was to create a governmental organization, which would ensure strict, honest, impartial, and uniform administration and enforcement of the state’s liquor laws. The ABC is vested with

the exclusive authority to license and regulate the manufacture, distribution and sale of alcoholic beverages within California.

ABC has the authority to suspend, revoke or deny a license if it determines that granting or continuance of the license would be contrary to public welfare or morals. ABC has a clearly delineated disciplinary process for its licensees. The process usually begins with a reported violation then proceeds through an investigation after which an accusation can be filed. ABC conducts administrative hearings with decisions generally proposed by administrative law judges. The process can also include appeals to the ABC Appeals Board and, if necessary and requested, an appeal directly to the California Appellate Courts. However, there is wide variance in the period from the discovery of a violation to a final order of suspension or revocation.

State v. Local Control of Alcohol Policy: Much to local government's frustration, both the state Constitution and the Act generally prohibit local governments from regulating the sale of alcoholic beverages within their jurisdictions. Exacerbating this sentiment is the perception that ABC is under-funded and understaffed with less than 200 enforcement agents available to police the almost 70,000 retail licenses in the state. Further compounding this situation is the inability of ABC to receive any funding increases. The ABC is a special fund department that receives funding from fees imposed upon alcoholic beverage licensees.

Over the years, local governments have often petitioned the Legislature for greater authority to directly regulate establishments that sell alcohol (e.g., restricting the hours of operation of problem premises, or limiting the sale of certain products such as fortified wines or high alcohol content malt beverages). Much of this activity has been centered on local government's use of zoning laws and conditional use permits that place operating conditions on new businesses that sell alcohol. While current law prohibits the ABC from issuing a new license in an area not locally zoned for that type of business activity, those establishments in existence prior to any local zoning action are "grandfathered" and therefore beyond the reach of the local government – a source of contention for local governments.

Historically, the alcohol industry and retailers have opposed ceding to local government any measure of the state's exclusive authority to regulate alcohol. The industry has advocated that matters relating to the regulation of alcohol should be determined at the state level, as opposed to an assortment of local regulations, which may vary from local jurisdiction to local jurisdiction.

ABC licensing: There are currently more than 85,000 alcoholic beverage licenses throughout the state – this includes both on-sale and off-sale establishments that sell beer and wine, and on-sale and off-sale general licensees that are authorized to sell distilled spirits, including beer and wine. The ABC is required to investigate both the applicant and the premises for which a license is applied to determine if the public would be adversely affected by the license issuance. These investigations include an evaluation of the moral character of the applicant and the suitability of the proposed premises.

The ABC must deny an application for a license if issuance would create a law enforcement problem or if issuance would result in, or add to, an undue concentration of licenses in the area where the license is desired. For liquor stores and other specified retail licenses, however, the ABC is authorized to issue a license if the respective local government determines that public convenience or necessity would be served by granting the license.

State law caps the number of new on-sale and off-sale general licenses issued by the ABC at one for every 2,500 inhabitants of the county where the establishment is located (2,000:1 for on-sale licenses). If no licenses are available from the state due to the population restrictions, those people interested in obtaining a liquor license may purchase one from an existing licensee, for “whatever price the market bears.”

Disorderly house law: A disorderly house is a licensed premises that disturbs the neighborhood or is maintained for purposes that are injurious to the public morals, health, convenience or safety. For example, a licensed outlet that 1) disturbs the neighborhood with noise, loud music, loitering, littering, vandalism, urination or defecation by patrons, graffiti, etc.; or 2) has many crimes ongoing inside, such as drunks, fights, assaults, prostitution, narcotics, etc. The licensed premise includes the parking lot. Any licensee, or employee of any licensee, who keeps or permits such a disorderly house is guilty of a misdemeanor, and the license is subject to disciplinary action. (B&P Code Sections 25601 and 24200)

Penalty for selling an alcoholic beverage to a minor or permitting a minor to consume an alcoholic beverage in an on-sale premises: The law requires the suspension of a license for a second or subsequent violation within a 36-month period. The law also authorizes the revocation of a license for a third violation within a 36-month period. ABC may revoke a license prior to a third violation when the circumstances warrant it. (B&P Code Section 25658.1)

Double-referral: This bill is double-referred to the Assembly Judiciary Committee, where it will be heard if passed by this Committee.

Author amendment: The author will be offering an amendment in committee to correct a drafting error. On page 4, line 21 ... ~~strikeout "temporary"~~ and add "*preliminary*". Since SB 378 is double-referred, the amendment will be adopted in the Assembly Judiciary Committee, contingent upon passage in this Committee.

Policy consideration: The author might consider an amendment that would better define "controlled substance" contained on page 5 in lines 35-36. Does this mean a federally recognized control substance or state controlled substance? This ambiguity could interfere with how the state perceives recreational marijuana and how the federal government perceives marijuana and the usage of this definition by localities that may not be favorable to recreational marijuana.

Additionally, the author might consider an amendment, which would further define and clarify the various instances of what constitutes an “Immediate threat to health and safety,” as stated in the bill.

In addition, should language be amended in the bill which would authorize a licensee to bring a cause of action seeking damages against a local civil authority, law enforcement, or another public official acting in his or her official capacity, if the licensee can establish that the direct evidence offered to ABC to support the existence of an immediate threat to health or safety was false and presented with malicious intent?

Prior legislation: AB 2082 (Campos of 2016). Would have granted the Director of ABC the authority, by emergency order, to temporarily suspend, limit, or condition any license that

authorizes the consumption of alcohol on the premises of the licensee. (Held in Senate Governmental Organization Committee)

AB 2893 (Hancock), Chapter 253, Statutes of 2008. Granted ABC the authority to impose restrictions on retail license transfers in instances where the license transferor has been cited for multiple violations of the Act during his/her ownership of the license.

AB 2151 (Jones of 2008). Among other things, would have granted ABC the authority to deny the issuance or transfer of an off-sale retail license where the department determines that the issuance or transfer of the license will contribute to conditions of blight, as provided. This bill was vetoed by the Governor.

SB 148 (Scott), Chapter 625, Statutes of 2006. Provided additional basis for the suspension or revocation of an alcoholic beverage license, when a licensee fails to take reasonable steps to correct objectionable conditions on the licensed premises or any public sidewalk abutting a licensed premise, as provided, after specified notice from the district attorney, city attorney, or a county counsel.

AB 624 (Oropeza), Chapter 931, Statutes of 2001. Permitted ABC to take into account neighboring crime statistics in the area of the site of the establishment when transferring an alcohol license.

AB 1092 (Lowenthal), Chapter 499, Statutes of 1999. Authorized ABC to place reasonable restrictions upon retail licenses or any licensee in the exercise of retail privileges if ABC adopts conditions requested by a local governing body.

AB 2897 (Caldera), Chapter 630, Statutes of 1994. Granted ABC the authority to deny an application for a license if issuance would tend to create a law enforcement problem, or would result in or add to an undue concentration of licenses.

AB 463 (Tucker), Chapter 627, Statutes of 1994. Authorized ABC to suspend or impose new conditions on a licensee who has failed to correct "reasonable conditions" as noticed by a local official.

AB 2742 (Lee, Chapter 629, Statutes of 1994). Made a series of changes relating to ABC licensing and standards, including: establishing general operating standards with respect to the licensed premise of retailers of alcoholic beverages; providing that the existing 30-day review process shall be extended by 20 days to give the local jurisdictions more authority and opportunity for related input; requiring the ABC to notify the entity or official in writing as to why they recommend that a license be issued after a protest has been made by an entity or official, as specified; and, providing additional regulation of a licensee, as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

California Police Chiefs Association (source)
Alcohol Justice
California Alcohol Policy Alliance

California Council on Alcohol Problems
City of Beverly Hills
City of Indio
City of Thousand Oaks
City of Vista
League of California Cities

Opposition

None on file

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