

## MINUTES OF OLCC ADVISORY COMMITTEE MEETING

### Prohibited Conduct OAR 845-006-0345

Tuesday, November 18, 2008 at 9:00 AM in Room 103A,  
Commission Offices, Portland

Present: Hobie Pearson (Elk Rock Bar & Grill/Action Server Education); Pamela Erickson (Public Action Management); Nola Hoepfner (Portland Police Bureau); Theresa Marchetti (ONI); Bill Perry (Oregon Restaurant Association); Linda Ignowski, Donna Vandall, Christie Scott, Laura Paul, and Jennifer Huntsman (OLCC Staff).

Invited but not Present: Brian McMenamain (McMenamins); Janice Krem (Attorney); Judy Craine (Holman Bar & Grill); Dan Lenzen (Gypsy, Barracuda); Randy Kaiser (Stars Cabaret); Tsaki Tzantarmas (New Copper Penny); Paul Kuck (M'jai Restaurant Management – Eugene); Pete Schulberg (Oregon Partnership); Officer Sara Clark (Portland Police Bureau); Juan Molina (MADD), Judy Cushing (Oregon Partnership); Jeff Ruscoe (Mental Health & Addictions Services); Gretchen McKenzie (ODOT); Stephanie Soares-Pump (Governor's Council on Alcohol & Drug Abuse Programs); Janice Kindrick, Dan Croy (OLCC Staff).

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The meeting began at approximately 9:05 a.m. in Room 103A of the OLCC's Milwaukie office. Jennifer Huntsman, OLCC Rules Coordinator, moderated the discussion and opened the meeting with a review of the process, history of how this rulemaking came about and introductions of those in attendance and their interest in this rule. Ms. Huntsman reminded everyone of the purpose of this meeting.

Ms. Huntsman explained that the Legislature has said (through Oregon's Administrative Procedures Act) that it wants agencies to involve interested parties in policy development. Rulemaking is one way agencies develop policies and Advisory Committees are a good way to hear from people or groups likely to have an interest in a particular issue - or who are likely to be impacted by a policy or change an agency is considering. She explained that Advisory Committees are just that: advisory. The purpose of an Advisory Committee is to give everyone a chance to express their thoughts on issues. The Commissioners are not bound by what we discuss or decide in these meetings. They are the policy-makers, and will make the final decision on whether to adopt the proposed amendments. Under Oregon's Public Meeting Law, this meeting is open to the public. We will take and retain minutes of the meeting. The discussion today will be informal; the minutes will

reflect the main points that are made. We do not identify who said what, except for Ms. Huntsman. Everyone on the mailing list for this rule will be sent a copy of the minutes; attendees were reminded to record their name and email address on the sign-in sheet.

Ms. Huntsman noted that members of this advisory committee would discuss the possible amendments of OAR 845-006-0345 Prohibited Conduct. Ms. Huntsman then explained the history of how this rulemaking came about.

This rule describes a variety of acts which both licensees (including their employees or agents) and service permittees are prohibited from engaging in. Due to recent case history, staff is recommending the amendment of section (11) covering promotions, to specifically tighten the rule language prohibiting drinking contests (a)(D) and free-pouring alcohol (a)(E). Also, staff is recommending additional rule language in section (11) Promotions which would prevent the current practice of a cover charge and then penny drinks and clarify that no drink discounts are allowed after midnight (a)(C), as well as prohibiting on-premises sales of distilled spirits by the bottle (a)(B) and alcohol vaporization devices (a)(F). Staff also recommends making further clarifying amendments. These additional amendments include: an introductory paragraph clarifying that licensees are held accountable for the acts of their agents and employees; the addition to each section of the sanction level for violation of that section; and clarifying amendments to section (6) Liquor on Premises, section (7) Drive-up window, and section (10) related to kegs and minor patronage.

Ms. Huntsman explained that we would be discussing the rule language in detail and that this discussion and suggestions will be used in the permanent rulemaking process.

There will be a formal rulemaking hearing on this matter on Tuesday, February 3, 2009 at 10:00 am in Room 103A. Ms. Huntsman advised that she will repeat that information at the end of the meeting, but asked everyone to please note the dates on their agendas for the hearing and public comment period.

Ms. Huntsman asked members to introduce themselves before proceeding to discuss the proposed amendments.

Introductory paragraph: All were in support of the addition of this rule language which clarifies that all the prohibitions in this rule apply to not only licensees and service permittees, but also to a licensee's employees or agents, and that licensees will be held accountable for the acts of their employees or agents.

Violation levels: All members were in agreement regarding the addition of the violation category level at the end of each rule section where it is not already included.

Section (6) – Liquor on Premises: There was some discussion of the proposed amendment to add rule language clarifying the circumstances under which distilled spirits are allowed on the premises of both Limited On-Premises and Brewery-Public House licensed premises for cooking only. The possibility of adding a quantity limit was discussed. It was pointed out that large quantities might be purchased on sale for future use, and the group didn't know where to set such a limit, so all agreed to the proposed language as is.

Section (7) – Drive-up Window: All were in agreement regarding the proposed amendments cleaning up language to clarify that no licensee can sell alcohol through a drive-up window.

Section (8) Liquor as a Prize: There was a suggestion to take out rule language that says the licensee cannot “permit” any alcoholic beverage as a prize. There was mention of a current practice by sponsors of golf tournaments. Staff thought that this practice was meant to be prohibited.

Section (10): All were in agreement regarding the proposed amendments which would clarify that all licensees who are allowed to sell kegs, not just Limited On-Premises licensees, must keep minors out of the areas where kegs are sold.

Section (11) – Promotions:

Subsection (a)(B) – There was a great deal of discussion regarding the proposed amendment to add a prohibition against selling bottles of distilled spirits for consumption on the premises. Staff clarified that constitutionally the Commission can only license on-premises establishments to sell distilled spirits by the drink. Several examples were raised that members believe would be included inadvertently in this prohibition as currently written, such as bottles in hotel minibars (which is allowed under a different rule), caterers selling bottles to an establishment for an event, and the buying of bottles for clients or guests in hotel hospitality suites. The committee recommends adding clarifying language to this subsection so that these examples continue to be allowed.

Subsection (a)(C) - The committee had a lengthy discussion regarding the proposed language prohibiting certain drink specials. Staff clarified that there are two parts to what we hoped to achieve with these rule amendments.

The first goal is to clarify that no drink specials are allowed after midnight, period. The current language in (b), proposed to be deleted, has been confusing as far as price reductions after midnight as compared to when. The committee members

were in support of this proposed amendment.

The second goal is to close the loop holes in the existing (a). There have been licensees who have gotten around the prohibition against unlimited alcohol during a set period of time for a fixed price by charging a cover charge and then penny drinks. The proposed language prohibiting alcohol price reductions of more than half came from other state examples and was meant to accomplish this.

One member pointed out that under the current proposed language two licensees could be selling an alcoholic beverage for the same price and only one would be in violation. If for one licensee that was their regular price they would be in compliance, but the licensee who is discounting the drink by more than half would be out of compliance. One member suggested an alternative to half price as being no less than cost, which is what Washington State uses (along with a mandatory 10% mark-up). There were concerns expressed over how we would estimate cost and also how we would enforce such a prohibition. Some members believe that whenever you set a level in rule, bad operators will find a way to wiggle around it, and many good operators get inadvertently punished with excessive restrictions. Some members believe there needs to be some kind of floor on pricing. Some felt that regulating pricing is not the solution and will squash creative and necessary marketing techniques.

All members were concerned about cheap drinks and excessive drink specials, and how that can lead to over consumption issues, but where to draw the line is the difficult part. The committee was generally open to building more flexibility into the rule language, and discussed the possibility of modeling language after other states like Texas by making the prohibition one against discounted drinks which are linked to a cover charge / “buy-in” price. The committee did not come up with a concrete suggestion for revised rule language, but all were in agreement that an alternative to the proposed half price language was needed.

Subsection (a)(D) - The committee was supportive of the new proposed language that would replace the current (c) and clarify that drinking contests, games, or performances of any kind are prohibited. Several members would like to see the proposed language revised so as to ensure that activities such as “21 for 21” are also clearly prohibited.

Subsection (a)(E) – All members were in agreement to add the new proposed language prohibiting the direct pour of alcohol into a person’s mouth.

Subsection (a)(F) – All members were in support of adding the new proposed rule language prohibiting AWOL (alcohol without liquid) machines or alcohol

vaporization devices.

### Fiscal Impact Statement

Ms. Huntsman led the committee through a discussion of the Fiscal Impact Statement and the need to quantify (if possible) fiscal impacts this rulemaking will have in general, as well as any adverse impact on small businesses. During the discussion on the Fiscal Impact Statement, the following points were made:

There is the potential for negative impact to on-premises licensees if pricing is overly restricted.

There is also the potential for some negative impact on consumers if the price of the alcoholic beverages they purchase is higher than the licensee would have charged but for our regulation.

The committee members foresaw the potential for positive impact on public safety with the proposed amendments that would tighten the restrictions on drink promotions. Because these practices can lead to over-consumption, prohibiting them could lead to decreased costs to society, including costs to families, and a decreased need for already under funded law enforcement and treatment resources.

Ms. Huntsman stated that a new draft of the proposed rule amendments will go out with the Advisory Committee minutes within the next few weeks. This will be the version of the proposed rule amendment that folks will be asked to comment on at the hearing and in this next written comment period.

Ms. Huntsman reminded members of the rest of the process: the rulemaking hearing is currently scheduled for Tuesday, February 3, 2009 at 10:00 am in Room 103A. Written comment would then be received into the rulemaking record until 5:00 pm on Tuesday, February 17, 2009. The tentative plan is to present a report to the Commissioners at their April 2009 meeting for possible final action on this matter.

Ms. Huntsman closed the meeting by thanking members for their attendance and participation. The meeting ended at 10:45 am.