DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

DAN FRIEDMAN
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 18, 2010

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 558

Dear Governor O'Malley:

We have reviewed House Bill 558, "Prince George's County - Alcoholic Beverages - Entertainment Permit," for constitutionality and legal sufficiency. While we approve the bill, we write to suggest that it be carefully administered to avoid violations of due process rights. We also write to discuss the interaction between the bill and current law and to discuss possibly unintended consequences of the bill.

House Bill 558 creates a special entertainment permit for holders of Class B alcoholic beverages licensees in Prince George's County. The permit authorizes the holder to impose a cover charge, offer facilities, and provide entertainment between the hours of 9 p.m. and 2 a.m. the following day.

Temporary Restraining Order

The bill requires that an applicant for an entertainment permit develop a security plan and requires that the plan be reviewed by the Chief of the Prince George's County Police Department and approved by the Board of License Commissioners as part of the permitting process. If the County establishes that the security plan "has not been implemented and that the public health, safety or welfare requires emergency action," the County may seek a temporary restraining order "to immediately close to the public the entire operation of the premises." The bill further provides that on "issuance of a temporary restraining order ... the County shall give the permit holder written notice of and reasons for the closure." The permit holder shall then "promptly" be given an

opportunity for a hearing in circuit court on the granting of the temporary restraining order.[1]

First, the Maryland Rules require notice to the party being restrained before the grant of a temporary restraining order unless "the applicant certifies to the court in writing, and the court finds, that specified efforts commensurate with the circumstances have been made to give notice." Maryland Rule 15-504(b). It is our view, therefore, that the hearing on the temporary restraining order can only be held in the absence of the party to be restrained to the extent permitted by the Maryland Rules.

Second, a temporary restraining order must be served promptly on the person to whom it is directed, but is binding on receipt of actual notice of it by any means. Maryland Rule 15-504(d). As a result, the notice from the County may be redundant, but could also serve to make the temporary restraining order binding on the permit holder in the event that the permit holder was unable to attend the hearing on the temporary restraining order, and had not yet been served with it.

Third, a party or person affected by a temporary restraining order may apply for modification or dissolution of the order on two days notice to the party who obtained it, or on such shorter notice as the court may prescribe. Maryland Rule 15-504(f). In this proceeding, the party who obtained the temporary restraining order has the burden of showing that it should be continued. *Id.* Presumably, this is the hearing to which the bill refers, and the existing rules effectively guarantee that it will be promptly held.

Finally, a temporary restraining order, is, as its name suggests, a temporary remedy. Maryland Rule 15-504(c)(5). The bill, however, makes no provision for what happens when a temporary restraining order expires. Presumably, if the Board of License Commissioners does not take action against the permit holder, the temporary restraining order will lapse and the permit holder will simply be able to resume business. For this reason, it may be advisable for the County to notify the Board of License Commissioners when the County seeks a temporary restraining order under this bill so that the Board may seek a long-term solution.

---

[1] The bill states that the hearing is to be held "in accordance with Chapter 500 of the Maryland Rules." The correct cite would appear to be to Title 15, Chapter 500 of the Maryland Rules, which relates to injunctions. This can be addressed in next year's corrective bill.

Emergency Suspension of the Permit

The bill permits the Board of License Commissioners to immediately suspend a permit if the Board reasonably believes that the permit holder violated the provisions of the bill.[2] The bill provides that when the Board immediately suspends a permit, it shall give the permit holder notice of the suspension, and hold a hearing within 30 days of the suspension at which the permit holder may be heard and present evidence. If a violation is found at this hearing, the Board may continue or end the suspension of the permit, and shall impose a penalty of at least $1,000 and not more than $12,500 for a first offense, and of at least $5,000 for each subsequent offense. In addition, the Board must revoke the permit if it finds that the permit holder has violated the provisions of the bill twice within a 24 month period. These penalties apply regardless of the severity of the violation.

A license or permit is a property right, of which a person cannot be deprived without due process. *Bell v. Burson*, 402 U.S. 535, 539 (1971); *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1311 (2d Cir.1994); *Jones v. City of Modesto*, 408 F.Supp.2d 935, 950-951 (E.D. Cal. 2005). "[T]he root requirement of the Due Process Clause [is] that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). Due process is, however, "not a technical conception with a fixed content unrelated to time, place and circumstances," but rather "is flexible and calls for such procedural protections as the particular situation demands." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). Thus, it has been held that where a state can demonstrate necessity for immediate action to protect a legitimate interest of its own, adequate post-deprivation hearings may satisfy due process standards. *Gilbert v. Homar*, 520 U.S. 924 (1997); *Barry v. Barchi*, 443 U.S. 55 (1979).

The adequacy of the process provided is judged based on the balancing of the three factors set out in *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976), which are:

---

[2] The bill does not expressly grant the Board of License Commissioners the authority to suspend or revoke a permit other than on an emergency basis, though it can "prohibit, condition or restrict the type of entertainment offered" if, after a hearing, the Board "determines that the entertainment adversely impacts or unduly disturbs the community and is not conducive to the peace, health, welfare, or safety of the residents of the County." It is our view that the power to suspend or revoke a permit after a hearing can be implied from the emergency suspension power and the authority to make changes in the permit after a hearing. It may be desirable to clarify this power in future legislation.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.

In cases where the deprivation precedes the hearing, this analysis is applied separately to the lack of predeprivation hearing, and to the postdeprivation process that is provided. *Gilbert v. Homar*, 520 U.S. 924, 935-936 (1997); *Nnebe v. Daus*, 665 F.Supp.2d 311, 335 (S.D.N.Y. 2009).

Unlike the temporary restraining order action discussed above, the immediate suspension does not close the entire operation of the premises, but would simply prevent the licensee from presenting entertainment during the period of suspension. Page 5, lines 31-34. Moreover, the bill authorizes only suspension on an immediate basis, not revocation. Nevertheless, courts have treated suspensions as implicating significant private interests. *Barry v. Barchi*, 443 U.S. 55 (1979) (suspension of horse trainer's license). House Bill 558 does not set any standard for immediate suspension of a permit, as opposed to suspension following notice and a hearing. Thus, it permits immediate suspension regardless of the weight of the governmental interest in a particular case. It is not hard to imagine, however, that entertainment at licensed premises could, in some situations, create conditions that need to be addressed on an emergency basis. We would advise that the exercise of the power to immediately suspend a permit be exercised only in such situations, and that the justification for the immediate suspension be set out in the document that reflects the immediate suspension. Similarly, because any violation of the bill can lead to a hearing, it is not possible to weigh the possibility of error in any given case. We would advise, however, that immediate suspension be limited to cases where the information on which the Board of License Commissioners acts is fairly strong. If these precautions are followed, it is our view that the immediate suspension provisions of the bill can be defended against constitutional challenge.

The bill requires that a hearing on the suspension of a permit be held within thirty days of the beginning of the suspension. As noted above, the suspension relates only to the entertainment permit, and not to the underlying alcoholic beverages license. As a result, the licensee is not completely foreclosed from the operation of the business, although with some premises, the effect may be the same. Nevertheless, delays longer than 30 days have been upheld, *Jones v. City of Gary*, 57 F.3d 1435 (7th Cir.1995) (three to six months for hearing after suspension of fire fighter); *Waltz v. Herlihy*, 682 F.Supp. 501 (S.D. Ala. 1988) (three months after suspension of license to practice medicine), and it is our view that, so long as the decision follows relatively quickly after the hearing, due

process would not be violated where hearings are held within the thirty days set by statute.

Standards for Impositions of Penalties

As noted above, in addition to suspension or revocation, the bill permits the imposition of fines of at least $1,000 and not more than $12,500 for a first offense, and of at least $5,000 for each subsequent offense. No upper boundary is provided for the fine for a second or subsequent offense. An "offense" is a violation of "this paragraph," Article 2B, § 6-201(r)(18). Most of this provision is taken up with the application process for an entertainment permit. It does, however, require that a permit holder "follow the approved security plan at all times when the permit holder exercises the privileges of the permit." It also prohibits the presence of an individual under the age of 21 years on the premises unless the individual is employed by, or is an immediate family member of the holder. The provision sets no standards for setting the amount of the penalties in particular case. It is well-established that a statute permitting an administrative agency to impose fines must provide such standards. *County Council v. Investors Funding*, 270 Md. 403, 442 (1973) ("We hold here that because of the complete lack of any legislative safeguards or standards, the grant of unlimited discretion to the Commission to fix civil penalties in any amount up to $1,000 is illegal.").

In a proactive effort to avoid the problems raised when authority to impose fines is delegated without adequate standards, the General Assembly in 1993 enacted State Government Article ("SG") § 10-1001(b), which applies to officers and other entities in the Executive Branch, and provides:

> Unless otherwise provided by statute or regulation, a unit of State government authorized by law to impose a civil penalty up to a specific dollar amount for violation of any statute or regulation shall consider the following in setting the amount of the penalty:
>
> (1) the severity of the violation for which the penalty is to be assessed;
>
> (2) the good faith of the violator; and
>
> (3) any history of prior violations.

This Office has previously advised that members of Boards of License Commissioners are officers in the executive branch for purposes of the application of the Code of Ethics. 64 *Opinions of the Attorney General* 151 (1979). This conclusion was based in part on the intention of the drafters of the Code of Ethics to give it broad application. It is our view that SG § 10-1001(b) was also intended to have broad application to give effect to the intention of the General Assembly to provide standards for this type of decision. As a result, although the matter is not completely clear,[3] it is our view that a Board of License Commissioners is an entity in the Executive Branch subject to SG § 10-1001.[4] Thus, it is our view that the Board of License Commissioners must use these standards in determining the amount of penalty to be imposed under the bill.

Unintended Consequences and Interactions with Existing Law

House Bill 558 will radically alter the options open to many alcoholic beverage licensees, making their current business models either difficult or impossible to maintain. Because the term "entertainment" is a broad one, the bill, read literally, would include not only live music and dancing, but many activities that are ordinarily held during the day and open to families, such as football and baseball games, and activities like bowling. Karaoke, juke boxes and pinball could also require a permit. While it may be possible for the Board of License Commissioners to narrow the term somewhat by regulation, this power is not boundless. As a result, with a few minor exceptions, entertainment on licensed premises will be limited to the hours between 9 p.m. and 2 a.m. the following morning. A jazz brunch, or matinee show will be impossible, as will early shows designed to avoid late night noise in quiet communities. Arguably, football games would have to either be played after 9 p.m. or not serve alcohol. Moreover, because a permit holder may not allow individuals under the age of 21 on the premises, a restaurant that would like to have wandering mariachis or other music after 9 p.m. would not be able to serve a 20 year old breakfast at 9 a.m. Persons under the age of 21 might have to be excluded from sporting events as well.

---

[3] It may be advisable to amend SG § 10-1001 to include all units of State government.

[4] It is our view that these standards apply to second and subsequent offenses under House Bill 558 even though no specific dollar amount is set as a maximum fine. It is also our view that it is at least arguable that failure to set a specific dollar amount as an upper limit is, in itself, a failure to set adequate legislative standards for application of these penalties. As a result, we would recommend that the Board of License Commissioners not impose fines that are disproportionate in relation to the fines that are expressly allowed. We would also encourage the Legislature to set an upper limit in a future session.

New § 9-217(n) provides:

> A holder of a license issued by the Board may not impose a cover charge, offer facilities of patron dancing, or provide entertainment unless the holder is specifically authorized under this article and meets all requirements under County law.

Some licenses issued under current law already expressly permit entertainment.[5] It is our view that those licensees retain the authority that they have and thus need not obtain an entertainment permit under House Bill 558 and are not subject to the time and age limits imposed by it. The vast majority of licensees, however, are subject to the requirements of the bill, including those who do not hold Class B licenses and thus do not qualify for an entertainment permit.[6]

While § 9-217(n) prohibits most licensees from charging a cover charge, providing facilities for patron dancing, or providing entertainment at all times, the permit created by House Bill 558 permits the permit holder to engage in these activities only between the hours of 9 p.m. and 2 a.m. the following day. The term "entertainment" is generally given a broad definition. In *Comptroller v. The Mandel, Lee, Goldstein, Burch, Re-Election Committee*, 280 Md. 573, 583 (1977), the Court of Appeals cited the Webster's New International Dictionary (2d Ed. 1959), which defined entertainment as "That which entertains, or with which one is entertained; as ... [t]hat which engages the attention agreeably, amuses or diverts, whether in private, as by conversation, etc., or in

---

[5] These licenses would include a convention center license under § 6-201(r)(17)(viii), which expressly authorizes dancing and live entertainment "throughout the licensed establishment;" a license for an agricultural association, agricultural fair association, or any other association authorized to conduct racing under § 6-201(r)(3), which authorizes serving of alcoholic beverages where the premises are used for a limited period of time for "legitimate theatrical productions, social receptions, and any bona fide entertainment conducted by any religious, fraternal, civic, war veterans, hospital or charitable organization;" and a theme park licensed under § 6-201(r)(16), as "an entertainment complex that includes roller coasters and other rides, shows, a water park, restaurants, and shops." It would also include special Class C beer and beer and wine licenses issued "for the use of any person holding any bona fide entertainment conducted by any club, society, or association at the place described in the license, for a period not exceeding seven consecutive days from the effective date thereof," under § 7-101(b)(1)(i).

[6] It is our understanding that some restaurants in the National Harbor Entertainment District have catering licenses rather than Class B licenses, and thus are prohibited from obtaining an entertainment permit.

public." Other courts have used similar definitions of the word in a variety of contexts. *See Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 431 (4th Cir. 2006) (A "place of entertainment" is one whose particular purpose is to entertain); *Adams County v. Business or Businesses Located at 2896 West 64th Avenue*, 937 P.2d 873, 876 (Colo. 1996) (According to Webster's Third New International Dictionary 757, the term "entertainment" means, among other things, "the act of entertaining: as ... the act of diverting, amusing, or causing someone's time to pass agreeably."); *Interurban Bar Ass'n v. City of New Orleans*, 652 So.2d 1038, 1041 (La. App. 1995) ("In its ordinary usage, 'entertainment' is something that diverts or amuses. See Webster's Third New International Dictionary, p. 757 (1971)"); *Beard v. Board of Education of North Summit School Dist.*, 16 P.2d 900, 905 (Utah 1932) ("The term 'recreational activity' includes in its general meaning games, sports, and plays, and dances. All such activities are included within the meaning of the term 'entertainment.'"); *Young v. Board of Trustees of Broadwater County High School*, 4 P.2d 725, 726 (Mont. 1931) ("Entertainment" is defined, in part, as "that which serves for amusement," and among the definitions of "amusement" is found "a pleasurable occupation of the senses, or that which furnishes it, as dancing, sports or music." Webster's Dictionary). In addition, courts have held that the term "entertainment" does not apply only to establishments where patrons are entertained as spectators or listeners, but also to those where entertainment takes the form of direct participation in some sport or activity. *Daniel v. Paul*, 395 U.S. 298, 305 (1969).

In short, the term "entertainment" is a broad one, and the bill's time limit applicable to permit holders would not only apply to concerts, plays, and dancing, but also to sporting events, bowling, bingo, pinball and a wide variety of other activities, many of which are customarily engaged in during the day. *See Taylor v. Bar MT LLC*, 2009 WL 5195982 (S.D. Tex. 2009) (stereo system and televisions); *Interurban Bar Ass'n v. City of New Orleans*, 652 So.2d 1038, 1041 (La. App. 1995) (live band or disc jockey); *Zanganeh v. Hymes*, 844 F.Supp. 1087 (D. Md. 1994) (pool, gaming, watching nude women dance); *Lambesis v. Town of Cicero*, 529 NE 2d 1081 (Ill. App. 1988) (juke box); *United States v. De Rosier*, 473 F.2d 749, 751-752 (5th Cir. 1973) (juke box, pool table and shuffle board); *United States v. Deyorio*, 473 F2d 1041, 1042 (5th Cir. 1973) (pinball machines); *Borough of Hanover v. Criswell*, 208 A.2d 39 (Pa. Super. 1965) (bowling).[7]

[7] *See also* Business Regulation Article § 17-1301 ("'State juke box license' means a license issued by the clerk to keep a juke box for public entertainment.").

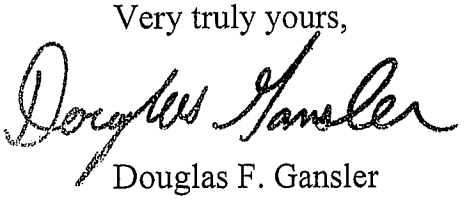
In addition, because the bill prohibits permit holders from admitting individuals under the age of 21, businesses like bowling alleys and sports venues, which traditionally welcome patrons of all ages, would have to choose between being able to serve alcohol and admitting anyone under 21. Restaurants wishing to have some entertainment would also be faced with this choice.

Finally, Article 2B, § 11-517(c) provides:

> Notwithstanding any other provisions of this article, if a Class B onsale licensee has live entertainment within the licensed premises on Friday, or Saturday nights, the licensee may sell or serve alcoholic beverages for consumption on the licensed premises, in accordance with his license, between the hours of 6:00 a.m. and 3:00 a.m. of the following day.

It is our view that, to the extent that this provision permits licensees to stay open *and* present entertainment past 2 a.m. it would be repealed by implication by the newer provisions of House Bill 558, prohibiting entertainment under an entertainment permit after 2 a.m. These licensees would, however, be permitted to stay open to 3 a.m. without entertainment.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable Melony G. Griffith
The Honorable John P. McDonough
Joseph Bryce
Karl Aro
Andrew M. Lantner, Esq.
Edmond B. O'Connell, Esq.