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May 4, 2010

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

RE: Senate Bill 376 and House Bill 1326

Dear Governor O'Malley:

We have reviewed, and hereby approve for constitutionality and legal sufficiency, Senate Bill 376 and House Bill 1326, identical bills entitled "Baltimore City - Consumption of Alcoholic Beverages - Unlicensed Restaurants." While we approve the bills, we write to suggest that they be implemented carefully to avoid violations of due process rights.

Senate Bill 376 and House Bill 1326 repeal provisions of the law relating to the registration of bottle clubs in Baltimore City, and instead prohibit the consumption, possession, dispensing, or service of alcoholic beverages on the premises of an establishment that is not licensed by the Board of License Commissioners. An exception is made for restaurants with a seating capacity of 50 or less that do not charge an entry fee and permit patrons to consume alcoholic beverages brought by the patrons along with a meal served by the restaurant. Violation of the section is a misdemeanor punishable by a fine of up to $10,000 or imprisonment for up to 2 years, or both. The bills further provide:

> (1) The Baltimore City Police Department may immediately close all operations of an establishment if the Department determines that the establishment is in violation of this section and that the establishment is in violation of this section and that the public health, safety, or welfare requires emergency action.
>
> (2) The establishment shall be closed until the Baltimore City Police Department determines that the public health, safety, or welfare has been restored.
>
> (3) The owner or operator of the establishment shall be given an opportunity to request a prompt hearing in circuit court on when the establishment may reopen.

It is clear that police officers, on discovering that an establishment is operating in violation of this section, could close the establishment, and arrest and charge those who are in charge of its operation. The above provisions go far beyond this, however, and permit the Baltimore City Police Department ("the Department") to close "all operations" of an establishment, including its legal operations, indefinitely, without ever holding a hearing. Moreover, because the Department cannot create a cause of action for the owners or operators of these establishments, or require the courts to hear any cases that are brought in any particular time frame, the required "opportunity to request a prompt hearing in circuit court" amounts to informing the owner or operator of the closed establishment that they can file suit if they want to reopen their business.

Procedural due process generally requires a hearing prior to the State's interference with a protected property or liberty interest. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). "[W]here a State must act quickly," however, "or where it would be impractical to provide a pre-deprivation process, [a] post-deprivation process satisfies the requirements of the Due Process Clause." *See Gilbert v. Homar*, 520 U.S. 924, 930 (1997). Thus, "an important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *FDIC v. Mallen*, 486 U.S. 230, 240 (1988). Under the bills, the initial closing of an establishment requires the Department to find both that a violation of the statute is occurring and that there is a threat to the public health, safety, or welfare that requires emergency action. It is our view that, in this situation, closing without a predeprivation hearing meets the requirements of due process.

This conclusion does not, however, settle the issue of what post-deprivation process is required to justify the continued closing of "all operations" of an establishment. This determination must be made under the test set out in *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976), which looks to "the private interest that will be affected by the official action, ... 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." The private interest in continuing any legal activity of the establishment is strong. *See Spinelli v. City of New York*, 579 F.3d 160, 171 (2d Cir.2009) ("recognizing interest in continued operation of a business and, stated more broadly, pursuing a particular livelihood."). The State's initial interest in closing down the establishment on an emergency basis is also a strong one. It is less clear, however, that this interest would carry over to preventing the continuation of any legal operations of the establishment on the following day or beyond.[1] *Cf., Jones v. City of Modesto*, 408 F.Supp.2d

[1] While there may be establishments operated in violation of the section that have no legal operations, but function solely as an illegal place for the sale of alcoholic beverages, charges under this provision might be brought against many other types of businesses, including restaurants, art galleries, and laundromats.

935, 954 (E.D. Cal. 2005) (City failed to justify summary suspension of massage establishment license where licensee who had violated the law was suspended). Moreover, there is room for error in the initial decision. There may be a dispute, or insufficient information, about whether the establishment is actually licensed. *See People v. Rodriguez*, 529 N.Y.S.2d 688 (N.Y. City Crim. Ct. 1988). A restaurant may have served a table of patrons a meal, then cleaned away the plates before they finished the bottle of wine they brought with them, making it appear that they are in violation of the statute. Moreover, facts could be presented in mitigation of the conclusion that the danger to the public health, safety, or welfare would continue if the establishment continued in business. The combination of these factors lead us to conclude that the law should be implemented in a way that guarantees a prompt hearing for a business that has been closed. As a result, we would recommend that the Department seek a court order if it believes that an establishment should be closed for more than two days.[2]

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable George W. Della, Jr.
The Honorable Barbara A. Robinson
The Honorable John P. McDonough
Joseph Bryce
Karl Aro

[2] This practice would bring the statute more in line with laws permitting the closing of establishments found to be a nuisance that have been upheld against legal challenge. *See Rental Property Owners Ass'n of Kent County v. City of Grand Rapids*, 566 N.W.2d 514, 522 (Mich. 1997) (ordinance permitting closure of property if it is found to be used repeatedly for illegal drugs or prostitution); *Lenario v. Ward*, 492 N.Y.S.2d 985 (N.Y. Sup. 1985) (ordinance authorizing the Police Commissioner to impose sanctions for public nuisances by barring the use of property in violation of penal laws, such as those relating to prostitution, gambling and drugs); *State ex rel. Boli v. Richardson*, 24 Ohio N.P.(N.S.) 540, 1923 WL 2472 (Ohio Com. Pl. 1923) (ordinance permitting closing of property where intoxicating liquor is manufactured, sold, bartered, possessed or kept in violation of law).