

March 22, 2015

Honorable Jane Rushford

Honorable Ruthann Kurose

Honorable Russ Hauge

3000 Pacific Ave SE

Olympia, WA 98501

Subject: City of Olympia’s Request to Expand the List of Banned Products in Downtown Alcohol Impact Area (AIA)

Dear Honorable Members of the Liquor Control Board:

The Washington Beer & Wine Distributors Association (WBWDA) was founded in 1934 as a trade association for the state’s beer and wine distributors. Our members include approximately 17 companies, representing nearly 50 distributor licensees, and 3,424 jobs in our state. It is a distributor’s responsibility to collect and remit state taxes and ensure that alcoholic beverages are delivered in an accountable and efficient manner from the breweries and wineries that produce them to the grocery stores, restaurants, convenience stores and other retail outlets that are properly licensed to sell them to the general public.

WBWDA is committed to pursuing a mission of choice, quality, and responsibility in the enjoyment of beer and wine by ensuring the independence of producers, distributors, and retailers. WBWDA has a long history of supporting state-based regulation of alcohol beverages as a means to ensure both responsible consumption and an orderly market for these products.

WBWDA appreciates the opportunity to comment on the City of Olympia’s request to expand the list of banned products in the Downtown alcohol impact area (AIA). Specifically, WBWDA believes the Olympia has proposed a list that is overly broad, unsupported by information about sales and litter in the AIA, and is not justified by the evidence provided in the city’s submission. WBWDA believes many of the deficiencies in the Olympia’s petition underscore the need to evaluate and amend the WAC.

WBWDA respectfully requests that the Liquor Control Board (LCB) reject the proposed expansion of the banned product list and defer action on this, and future, AIA requests until the WAC is revised to provide clear rules for the adoption of an AIA and evaluation of its success.

**Absence of Statutory Basis for AIAs**

There is no express statutory authority for the creation of an AIA. Instead, the LCB relies on its general police powers to regulate the sale of alcohol beverages, granted under section 2 of the 21st Amendment to the US Constitution, as the basis for the AIA program. Specifically, the LCB has promulgated WAC 314-12-215 to set standards for the creation and management of AIAs.

**Constitutional Standard for State Regulation of Alcohol, Including Adoption of AIAs**

The federal courts have spent a substantial amount of time evaluating the intersection between two provisions of the US Constitution governing interstate commerce, including anti-trust issues, and states’ authority to regulate alcohol. Costco Wholesale’s litigation against the LCB over the constitutionality of many of the regulations creating the three-tier system has provided some of the most recent opportunities for the court to consider these issues.

The Supreme Court has been clear that the 21st Amendment does not exempt state regulation from challenge under the Commerce Clause of the US Constitution. The state must show an interest linked to the 21st Amendment; demonstrate that the state’s regulation is effective in promoting temperance, and then the interests of the Commerce Clause and the 21st Amendment must be balanced. Specifically, a state has to show the regulation is clearly and affirmatively expressed as state policy and the policy must be actively supervised. To demonstrate this effort, the state must monitor the regulation and regularly engage in its evaluation to make sure it is successful in promoting temperance. Besides this analysis, state regulation cannot treat instate companies involved in alcohol production and sale differently than it treats those out of state.

WBWDA does not question the State’s authority to regulate the sale of alcohol beverages. To the contrary, the association and its members expended significant resources to join the LCB in the fight to protect the right of the State to maintain and enforce its regulatory structure. However, to be constitutional, WBWDA believes this regulation must be both effective and non-discriminatory.

**AIAs Don’t Work**

WBWDA agrees that Olympia, like a number of other communities, has a problem with chronic public inebriation (CPI). However, the association does not believe mandatory alcohol impact areas, and associated product bans, have been shown to be effective as a continuing means to address one of the most extreme examples of alcohol addiction.

Alcoholism is a disease of addiction. It is unreasonable to expect victims of this disease will be cured simply by banning the sale of selected products by a limited number of retailers within a certain geographic area. Especially for individuals who are suffering extreme consequences of the disease and are living as chronic public inebriates, AIA product bans will not cure their addiction. This point is underscored by information submitted by the City. The city admitted, both in media reports (Olympian, 1/14/2015) and in documents submitted with its petition (Wilson declaration, pg. 3, Lower declaration, pg. 2), that “public drinking did not significantly decrease after the AIA took effect”.

People living as CPIs will simply shift their behavior to purchase other products. This is demonstrated by both the most recent litter survey submitted by Olympia and an independent survey conducted on behalf of WBWDA using methodology similar to that outlined by the City. Contrary to the statement made in documents presented by the City (Wilson declaration, pg.2, Lower declaration, pg. 2), the litter surveys both showed a limited number of alcohol beverage containers were from high alcohol products that would be eligible for an additional ban under the rule (15% for both Olympia and WBWDA study). In other words, both of the litter surveys demonstrated that 85% of the containers discarded as litter were from products that are not eligible for a ban under Olympia’s petition.

Purchases of banned products will simply shift outside the boundaries of the AIA. In both litter surveys, discarded containers from banned products continued to be found in the AIA. Notably, one of the most frequently found containers during the survey, Steel Reserve, has already been banned under the existing AIA (#3 for Olympia, #2 for WBWDA). There is no evidence these products have been sold within the AIA since the ban was first adopted. However, containers from eight of nine banned products were identified in one, or both, litter surveys. It is most likely that these products were purchased outside the AIA and the product was brought back to the AIA. It is also likely that a number of these same product buyers elected to consume banned products in the area outside the AIA prior to returning to the AIA with the balance of their purchase.

**Unfounded Assumption of the Success of AIAs**

Olympia repeatedly cites the success of AIA product bans in other jurisdictions. Despite admitting that the AIA product ban has not been successful in Olympia, the City justifies its petition for a broader list by asserting that similar broader lists of banned products have continued to decrease problems associated with CPI. However, Olympia offers no evidence to support this assertion.

The effectiveness of AIAs has only been infrequently measured, and rarely by an impartial third party. Even reports submitted by other jurisdictions on the outcomes in their AIAs yield mixed evidence of success (LCB website, Alcohol Impact Areas-Existing Locations,). Seattle has repeatedly noted, “it is difficult to determine the direct impact of the AIA alone from the above data.” (Seattle Annual Report for 2011, and 2009-10, Pg. 3 of each.) Tacoma notes, “drunk in public incidents handled by TPD increased 46%” and “results are mixed regarding lowering alcohol related calls for service”. (2011 Lincoln District Annual Report, Pg. 2.) A true analysis of the effectiveness of AIAs has been hampered by the apparent failure of cities to prepare and file the annual reports required by the rule and by the absence of independent statistical analysis of the effects of individual AIAs.

**Regulatory Basis for Product Bans**

WAC 314-12-215 (3) governs the requirements for banning the sale of a product within an AIA. Subsection (c) of this section requires a local government to demonstrate a product is “reasonably linked” to problems associated with CPI. Further, subsection (d) of the same section only allows the banning of a beer product of five and seven-tenths percent alcohol by volume (ABV) or a wine product of twelve percent ABV. It is valid to note these thresholds are well below the ABV content of many beers and wines produced by local craft brewers and wineries, as well as national and international suppliers.

Olympia argues, in materials supporting its petition, that these standards for product bans should not apply to additions to its product ban list. (Wilson declaration, pg. 4) To support this position, Olympia cites WAC 314-12-215 (3)(e).

This section notes that, upon board approval and upon an individual product by individual product basis, a local authority may restrict a product that is already restricted in another board-recognized AIA or its own AIA provided that the product is “significantly materially similar” to products already restricted in its own alcohol impact area. However, the local authority has to demonstrate, in writing, the material similarities ***AND*** need for product inclusion.

WBWDA urges the LCB to reject this narrow reading of the rule.

**Requiring Demonstration of Product Link to CPI**

Abandoning demonstration of a clear linkage between sale of a product and CPI undermines the justification for the regulation. The regulation must be designed to advance a valid state interest, in this case addressing the causes of CPI. However, if the regulation allows the sale of a product to be banned, without demonstration of this critical link, it becomes an arbitrary action.

The LCB recognized this when Olympia first petitioned for recognition of the AIA. This petition was rejected and the LCB noted that the information provided failed to meet the standards of evidence required to justify adoption of an AIA. At least one member of the LCB later referred to the application as “shoddy” and “subjective”. (Olympian, 1/14/2015).

Olympia is now attempting to obtain the broad ban list it originally proposed without providing the evidence required by the LCB. Almost ninety percent of the current proposed product ban list was previously proposed by Olympia and rejected by the LCB. In the vast majority of these cases, the City has provided no additional evidence to support its request for a product ban.

Excusing Olympia from demonstrating this critical link now would allow the city, and future petitioners, to avoid the required burden of proof simply by establishing an AIA, with as little as a single product ban, and then justifying a much larger product ban list simply by citing product ban lists adopted by other jurisdictions at other times. The reading of the rule proposed by Olympia to justify its expanded product ban list would circumvent the requirement to show a linkage between sale of a product in the AIA and CPI.

**Recognizing Thresholds for Product Ban Eligibility**

Olympia is proposing to ban a number of products that do not meet the ABV thresholds established by section 3(d) of the rule. At least three products (Icehouse, Mikey’s and Molson Ice) all fall below the threshold allowing them to be included on a product ban list and are not eligible to be banned under section 3(d).

The proposal to ban these products underscores the risk of allowing one jurisdiction to ban, by reference, a product banned in another jurisdiction. Product formulation, including ABV, changes. These changes often materially alter the character of the product. This change may justify removal of the product from an AIA ban list. However, the current rule does not provide a mechanism for anyone other than the local jurisdiction to remove products for this reason. This exacerbates the challenges of simply allowing a product to be banned in one AIA because the product name is included on a ban list in another AIA.

**Failing to Meet the Requirements to Demonstrate Material Similarities and Need for Product Inclusion**

WAC 314-12-215 (3)(e) requires a jurisdiction to demonstrate, in writing, both material similarities of newly proposed products and the need to include these products in a product ban. This requirement exists even for products with a similar ABV to banned products or products that have been banned in other jurisdictions.

In many cases, Olympia has not fulfilled this requirement because the products are not sold in the AIA and have not been identified in the litter survey conducted by the City. Information included with this letter summarizes, by product proposed for a ban under the current petition from Olympia, whether the product has recently been sold within the AIA or was identified in any of the litter surveys completed. According to these surveys, only 11% of the products proposed for a ban under the current petition were actually identified in the litter survey. In addition, the container count was generally very low for products that are on the proposed list and were found in the litter surveys. In fact, these counts are frequently much lower than the container counts for products that met the threshold for the original ban proposed by Olympia. If there is no evidence presented by the City that a product was sold or used within the AIA, it should not be deemed “materially similar” nor is there a need to include it on a banned product list.

**Olympia Failed to Provide Effective Public Participation**

One of the reasons the LCB rejected the original AIA petition was the city’s failure to effectively engage with stakeholders, including manufacturers, distributors and retailers. (LCB letter to Olympia 7-2-2013) Unfortunately, Olympia elected to again advance its proposal without securing stakeholder input. To date, WBWDA, despite having actively participated in discussions regarding a voluntary AIA in the City and providing extensive comments on all information submitted by the City at the time the original AIA was approved, was not received any contact from the City. WBWDA is unaware any other stakeholders received contacts from the City. In fact, the first time WBWDA became aware of Olympia’s intent to request an expansion of the banned products list was when the resolution by the City Council approving the request was reported in the media (Olympia 9/11/2014). Without adequate notice or opportunity to participate, WBWDA was unable to raise any of these issues with the City prior to it electing to submit the current petition.

**Olympia AIA Expansion Petition Demonstrates the Need to Revisit the Rule**

The petition from Olympia raises a series of questions about the operation of the current AIA rule. As a result of unclear standards, local governments will continue to submit requests to the LCB without a complete understanding of the evidence required to support those petitions. This is both expensive and frustrating for these local governments. In addition, there is a lack of clarity on the effectiveness of AIAs or how they should be measured. Without this clarity, the value of AIAs, and their basis as a valid regulatory tool, is in question. Finally, the public has not been given full notice or opportunity for engagement in the creation or expansion of AIAs. As a result, communities do not have the types of opportunities useful in crafting results-based approaches to dealing with the harmful effects of alcohol addition and chronic public inebriation.

WBWDA hopes the LCB will reject this petition and use the occasion as an opportunity to revisit the process and evaluation of alcohol impact areas by continuing with a substantial revision of WAC 314-12-215.

Sincerely,

Scott Hazlegrove

Executive Director

enclosure