

Comments of the Independent Regulatory Review Commission



Pennsylvania Liquor Control Board Regulation #54-104 (IRRC #3372)

Duties and Rights of Licensees

July 19, 2023

We submit for your consideration the following comments on the proposed rulemaking published in the May 20, 2023 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Pennsylvania Liquor Control Board (Board) to respond to all comments received from us or any other source.

1. RRA Section 5.2(a) - Legislative comments.

In determining whether a proposed, final-form, final-omitted or existing regulation is in the public interest, the commission shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intent of the General Assembly in the enactment of the statute upon which the regulation is based. In making its determination, IRRC shall consider written comments submitted by the committees and current members of the General Assembly, pertinent opinions of Pennsylvania's courts and formal opinions of the Attorney General. 71.P.S. § 745.5b.

Representative John Lawrence submitted comments expressing support for the majority of the proposed changes contained in this rulemaking. The legislative comments note, most of the amendments are either technical in nature or in direct response to actions of the General Assembly. They agree that these proposed changes are appropriate and necessary. However, they observe that the Board's proposal to delete Section 5.32(e)(1), regarding lewd, immoral or improper conduct at a licensed premises, does not fit into either previously mentioned category. The proposed repeal of this section, they argue, goes beyond a "housekeeping" measure and instead represents a substantive regulatory change for which the Board fails to provide justification.

In the Preamble and its response to Regulatory Analysis Form (RAF) question #10, the Board, regarding the deletion of Section 5.32(e)(1), states that:

This proposed rulemaking deletes subsection (e)(1), which prohibits "lewd, immoral or improper conduct by the licensee, its servants, agents, employees, patrons or event, contest or tournament participants." The case of *Conchatta, Inc. v. Miller*, 458 F.3d 258 (3d Cir. 2006), held that the prohibition on "lewd, immoral or improper conduct" was

unconstitutional on the basis that it is substantially overbroad. *Conchatta* was not based on subsection (e)(1) of the Board's regulation, but a different subsection—subsection (b)—that has since been reserved. See 43 Pa.B. 7082 (December 7, 2013). Since the phrase "lewd, immoral or improper conduct" is legally unenforceable, this proposed rulemaking deletes it from subsection (e)(1).

The legislative comments disagree strongly with the Board's statement that the phrase "lewd, immoral or improper conduct" is legally unenforceable. The Board, as asserted in the legislative comments, fails to provide any basis for *Conchatta*'s applicability to the proposed repeal of Section 5.32(e)(1). They contend that the Board's opinion is unsupported and has no basis in fact or law. They further assert that recent court rulings that suggest courts have taken a more agreeable view toward the types of restrictions envisioned in Section 5.32(b) have been ignored by the Board.

The legislative comments also identify the following Board's responses in the proposed rulemaking's RAF as deficient:

- RAF question #9 asks if the regulation is mandated by any court order or federal regulation. The Board replies that it is not mandated by a federal or state law, court order or federal regulation. These legislative comments assert that the Board's response to RAF question #9 is inconsistent with its attempt to justify the deletion of Section 5.32(e)(1) with the court's holding in *Conchatta* (RAF question #10).
- RAF question #10 asks the promulgating agency to state why the regulation is needed and to explain the compelling public interest that justifies the regulation, to describe who will benefit from the regulation and to quantify the benefits. The Board, according to the legislative comments, fails to address these key elements.
- RAF question #17 requires the promulgating agency to identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. The Board states that it anticipates that the regulated community will not sustain a financial, economic or social impact because of the regulation. A discussion of the social impact of the proposed regulatory change on individuals or other public and private organizations is not included in the Board's response.
- RAF question #18 directs the promulgating agency to explain how the benefits of the regulation outweigh any cost and adverse effects. The Board reports that there are no costs or adverse effects anticipated with this proposed rulemaking. The legislative comments disagree with the Board's assertion. They object to what is perceived as the Board's dismissal of this important question and claim that even a cursory review of the subject matter would suggest otherwise. They suggest that there has been significant community interest and debate over potential adverse effects associated with this subject matter for years, including legislation and litigation across the country.

We will review the Board's responses to all of the issues raised in the legislative comments in our determination of whether the final-form regulation is in the public interest.

2. Section 5.32. Restrictions/ exceptions. – Whether the regulation is in the public interest; and Protection of the public health, safety and welfare.

The Board proposes to delete paragraph (e)(1), which prohibits lewd, immoral or improper conduct by the licensee, its servants, agents, employees, patrons or event, contest or tournament participants for activities conducted under the subchapter, on the basis that is legally unenforceable.

The Independence Law Center (ILC) submitted comments contrary to the Board's position. It declares that "such conduct is most assuredly able to be prohibited" and that paragraph (e)(1) is constitutional and useful. The ILC writes that:

"To be clear, it was not the words "lewd," "immoral," or "improper" that were unenforceable, but the section 5.32(b) as a whole that did not have limiting text. By contrast to the phrase "lewd, immoral, improper or unlawful *purpose*" in section 5.32(b)(emphasis added), section 5.32(e) states, "There may not be lewd, immoral or improper *conduct* by the licensee, its servants, agents, employees, patrons or event, contest or tournament participants." (Emphasis added.)

The ILC further states that "open lewdness" is prohibited by Pennsylvania law. The offense is defined as follows: "A person commits a misdemeanor of the third degree if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed." 18 Pa.C.S.A. § 5901. The ILC argues that liquor licensed establishments should continue to prohibit this kind of conduct on its premises. Removing this provision, it contends, is a change that is not in the interest of either visitors to liquor licensed establishments or communities as a whole. Based on the concerns expressed in the legislative comments and the ILC, we ask the Board to submit a revised Preamble and RAF to final-form regulation that includes a detailed explanation of how the proposed regulatory change protects the public health, safety and welfare. Furthermore, we will review the Board's responses to all of the issues raised by Representative Lawrence and the ILC in our determination of whether the final version of this rulemaking is in the public interest.