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## Constitutional Safeguards and the Licensing Procedure of the City of Chicago, 3 J. Marshall J. of Prac. & Proc. 137 (1969)

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# CONSTITUTIONAL SAFEGUARDS AND THE LICENSING PROCEDURE OF THE CITY OF CHICAGO

## INTRODUCTION

When a municipality exercises its power to regulate the economic life of an individual by requiring licenses and establishing standards to be met in order that he participate in a trade, business or occupation, the municipal government is exercising its derivative police power. This power has been defined by the Illinois Supreme Court as the inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society.<sup>1</sup> Under the police power, things which are injurious to the public may be suppressed or prohibited.<sup>2</sup> However, this power is not without restrictions, so that a city or state legislature is limited in its invasion of property rights under the guise of police regulations.<sup>3</sup> A statute or ordinance based on the police power must tend in some degree toward the prevention of offenses or the preservation of the public health, morals, safety or welfare.<sup>4</sup> Where the relationship between the business or occupation and the danger to the public does not exist, the business sought to be regulated has been held not a proper subject for the exercise of the police power.<sup>5</sup> As was pointed out in *People v. Weiner*.<sup>6</sup>

Under the Federal or state constitutions the individual may pursue, without let or hinderance, all such callings or pursuits as are innocent in themselves and not injurious to the public. These are fundamental rights of every person living under this government and the legislature by its enactment cannot interfere with such rights.<sup>7</sup>

Furthermore, where the conduct of the business is legitimate and

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<sup>1</sup> *Lasdon v. Hallihan*, 377 Ill. 187, 36 N.E.2d 227 (1941). The Court went on to discuss the necessity of regulating professions under the exercise of the police power, stating:

[T]he services customarily rendered by those engaged in such professions are so closely related to the public health, welfare and general good of the people, that regulation is deemed necessary to protect such interests. It has been held a proper exercise of police power to legislate and protect the professions performing such services against commercialization and exploitation.

*Id.* at 193, 36 N.E.2d at 230.

<sup>2</sup> *City of Chicago v. Arbuckle Bros.*, 344 Ill. 597, 176 N.E. 761 (1931), wherein the court further noted: "Other things which may or may not be injurious to the public, according to the way in which they are managed, conducted or regulated, may be licensed for the purpose of regulation." *Id.* at 604, 176 N.E. at 764.

<sup>3</sup> *People v. Weiner*, 271 Ill. 74, 110 N.E. 870 (1915).

<sup>4</sup> *Lasdon v. Hallihan*, 377 Ill. 187, 36 N.E.2d 227 (1941); *City of Chicago v. Arbuckle Bros.*, 344 Ill. 597, 176 N.E. 761 (1931); *People v. Weiner*, 271 Ill. 74, 110 N.E. 870 (1915).

<sup>5</sup> *Lowenthal v. City of Chicago*, 313 Ill. 190, 144 N.E. 829 (1924).

<sup>6</sup> *People v. Weiner*, 271 Ill. 74, 110 N.E. 870 (1915).

<sup>7</sup> *Id.* at 79, 110 N.E. at 873.

harmless in its essential character, neither the state nor the municipality may interfere with the liberty of the citizen and it is for the judiciary to ascertain and declare the limitations.<sup>8</sup> This comment is concerned with the procedural problems involved in the conflict between the rights of the individual and the exercise of the police power by the municipality to regulate and license certain businesses and occupations.

#### THE POWER TO LICENSE

The power of a municipal corporation to regulate an occupation and exact a license fee comes from the state, so that the city of Chicago has no inherent power to license.<sup>9</sup> This power has been delegated to the city by statute<sup>10</sup> which grants the city the police power required to enforce its own licensing provisions. The scope and effect of this power cannot be fully understood without first understanding the nature and objects of licensing. The object of granting and revoking a license is to exclude an incompetent or untrustworthy person from the practice of his profession<sup>11</sup> in the interest of protecting the public health, morals and general welfare of the community. In Illinois, a license has been judicially defined as a grant which confers authority to do something which would be illegal without the grant.<sup>12</sup> Licensing has also been defined as an administrative act authorizing the doing of a thing which is subject to police

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<sup>8</sup> *Lowenthal v. City of Chicago*, 313 Ill. 190, 144 N.E. 829 (1924).

<sup>9</sup> *Wilkie v. City of Chicago*, 188 Ill. 444, 58 N.E. 1004 (1900). In *Father Basil's Lodge, Inc. v. City of Chicago*, 393 Ill. 246, 65 N.E.2d 805 (1946), the Illinois Supreme Court in discussing the source of the power to license, stated:

It is well settled that a city, like all other municipal corporations, derives its existence and its powers from the General Assembly; that it possesses no inherent power; that in order to legislate upon, or with reference to, a particular subject or occupation, it must be able to point to the statute which gives it the power to do so; that statutes granting powers to municipal corporations are strictly construed, and any fair or reasonable doubt of the existence of an asserted power is resolved against the municipality which claims the right to exercise it; that the only implied powers which a municipal corporation possesses and can exercise are those which are necessarily incident to powers expressly granted; and that since a city has no power except by delegation from the General Assembly, in order for it to license or regulate any occupation, the power to do so must be expressly granted or be necessarily implied in, or incident to, other powers which are expressly granted.

*Id.* at 252, 65 N.E.2d at 810-11.

<sup>10</sup> ILL. REV. STAT. ch. 24, §11-60-1 (1967), states: "The corporate authorities of such municipality may fix the amount, terms and manner of issuing and revoking licenses." The statute also provides for the regulation of certain businesses and sporting events. ILL. REV. STAT. ch. 24, §11-42 to 11-54-1 (1967). For a more complete discussion of this power see Kneier, *The Licensing Power of Local Governments in Illinois*, 1957 ILL. L. FORUM 1, 3.

<sup>11</sup> *Klafter v. State Bd. of Examiners of Architects*, 259 Ill. 15, 102 N.E. 193 (1913).

<sup>12</sup> *City of Chicago v. Collins*, 175 Ill. 445, 51 N.E. 907 (1898).

regulations and restraints.<sup>13</sup> Therefore, a license is granted if the proper authority is satisfied that the regulations have been or will be complied with.<sup>14</sup> The effect of a license is,

[T]o confer a right or power which does not exist without it, and it may be to regulate and control the occupation or privilege for which the license is granted, so as to subserve the public good or prevent its being conducted in a manner injurious to the public welfare, or to raise revenue.<sup>15</sup>

Thus, there is a direct correlation between the object and effect of a license and the exercise of the delegated police power by the municipality.

There is no question that a municipal corporation, acting in accordance with the statutory grant, has the power to regulate and control certain business in the exercise of its police power. However, the public and the licensees share a common interest in the availability of the licensed activities. It seems fundamental that the municipality in exercising this licensing power must not only protect the public interest, but must bear the responsibility of dealing fairly with those whose businesses are subject to regulation.<sup>16</sup> The problems involved in this delicate balance lead directly to the issue of the extent to which the procedural safeguards provided by the federal and state constitutions are applicable to local licensing procedure.

#### CONSTITUTIONAL SAFEGUARDS AND LOCAL LICENSING

The applicability of constitutional safeguards to licensing procedures in general has long been a subject of controversy within the courts, with the state and federal courts varied in their approaches. Subtle distinctions as to whether licensing involves a right or a privilege<sup>17</sup> and whether licensing involves legislative or adjudicative facts<sup>18</sup> have frequently formed the bases of court opinions, giving rise to major difficulties in applying those distinctions. A right is an activity which the state cannot completely prohibit,<sup>19</sup> and a privilege is an activity which may be excluded completely by a state if it chooses to do so.<sup>20</sup> Accordingly, when a privilege is involved, the interest of the licensee

<sup>13</sup> E. FREUND, *CONSTITUTIONAL RIGHTS AND PUBLIC POLICY*, §36 (1904).

<sup>14</sup> *Id.*

<sup>15</sup> *Town of Cicero v. Weiland*, 35 Ill. App. 2d 456, 461, 183 N.E.2d 40, 43 (1962).

<sup>16</sup> *See* *People v. Weiner*, 271 Ill. 74, 110 N.E. 870 (1915). This case involved the police power of the State being utilized to require the sterilization of second hand felt mattresses.

<sup>17</sup> For an excellent discussion of this problem, see Comment, *The Use and Misuse of the Right-Privilege Distinction in License Revocations: What's So Hot About Cosmetology School?* 31 U. CHI. L. REV. 577 (1964).

<sup>18</sup> *See* 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §7 (1958).

<sup>19</sup> *Id.* §7.12 at 456.

<sup>20</sup> *Id.*

alone is insufficient to entitle him to notice and a hearing. However, as Professor Davis has pointed out:

[O]ne who has no "right" to sell liquor in the sense that the state may prohibit the sale of liquor altogether, may nevertheless have a "right" to fair treatment when state officers grant, deny, suspend, or revoke liquor licenses. The State need not grant any such licenses, but if it does so, it must do so fairly — without racial or religious discrimination and without unfair procedure.<sup>21</sup>

The United States Supreme Court has been rather consistent in finding that due process should be applicable whether the case involves a right or a privilege. In *Goldsmith v. United States Board of Tax Appeals*,<sup>22</sup> the plaintiff applied for admission to practice before the tax board as an accountant. Without being given an opportunity to be heard, the plaintiff was rejected on charges of unfitness. There was a rule in force which gave the board the discretionary power to deny admission, suspend or disbar any person.<sup>23</sup> The Court interpreted this rule and held that procedural safeguards must be provided, stating:

[T]his must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process.<sup>24</sup>

Using similar rationale, the Supreme Court in *Schwartz v. Board of Bar Examiners*,<sup>25</sup> held:

A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection clause of the Fourteenth Amendment.<sup>26</sup>

Significantly, the recent federal decision of *Hornsby v. Allen*,<sup>27</sup> involved an action by an applicant for a retail liquor store license against the mayor and others for deprivation of the applicant's civil rights. No discrimination was alleged in the complaint. The court held for the plaintiff, stating:<sup>28</sup>

[M]erely calling a liquor license a privilege [would] not free the

<sup>21</sup> *Id.*

<sup>22</sup> *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117 (1926).

<sup>23</sup> *Id.* at 123.

<sup>24</sup> *Id.* Professor Davis has stated that this case deserves to be the cornerstone of the law and has too often been overlooked. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §7.18 at 495 (1958).

<sup>25</sup> *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232 (1957).

<sup>26</sup> *Id.* at 239. The Court went on to note:

We need not enter into a discussion whether the practice of law is a "right" or a "privilege." Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly, the practice of law is not a matter of the State's grace.

*Id.* n. 105.

<sup>27</sup> 326 F.2d 605 (5th Cir. 1964).

<sup>28</sup> The Court held that one whose license is denied or revoked may obtain relief in the Federal Courts under the Civil Rights Act. *Id.* at 609.

municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled discretion.<sup>29</sup>

The court then proceeded to set forth the fundamental requirements of due process in administrative hearings. These included: 1) adequate notice, 2) a fair hearing, 3) an opportunity to know the claims of the opposing party, 4) an opportunity for the parties to present evidence to support their contentions and cross-examine witnesses of the other side, and 5) inadmissibility of *ex parte* evidence.<sup>30</sup> This holding may severely restrict the application of the privilege doctrine by the various states, as it requires procedural safeguards in all licensing proceedings regardless of whether a license is deemed a right or a privilege.

The Illinois courts have maintained the right-privilege distinction and most often applied it to liquor license cases. In *Hornstein v. Illinois Liquor Control Commission*,<sup>31</sup> the Illinois Supreme Court was faced with the problem of construing the Illinois Liquor Control Act. The statute involved in that case did not expressly require a hearing as a condition precedent to an order of revocation. Rather, licenses were to be revoked for cause.<sup>32</sup> The licensee contended that the statute violated the due process clause of the Federal and State Constitutions. In rejecting this contention the court noted:

The right to deal in intoxicating liquors is not an inherent right, but is always subject to the control of the State in the legitimate exercise of its police power . . . .<sup>33</sup>

The court went on to hold that "the liquor control act, in providing for summary revocation of a liquor license by a local officer, with a right to an appeal . . . violates no constitutional rights."<sup>34</sup> Similarly, it has been held that a license to sell liquor is a privilege rather than a contract creating vested rights, the license being merely a temporary permit to do what would otherwise be an offense against the law.<sup>35</sup> In Illinois, the law has always

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 608. Professor Davis agrees that these procedural safeguards must be present in any licensing proceeding. He sees the rare circumstance of national security overriding the interest of a fair hearing as the only exception.

The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and meet, with the weapons of rebuttal evidence, cross-examination, and argument unfavorable evidence of adjudicative facts . . . .

1 K. DAVIS ADMINISTRATIVE LAW TREATISE §7.02 at 412 (1958).

<sup>31</sup> 412 Ill. 365, 106 N.E.2d 354 (1952).

<sup>32</sup> The statute in question provided further that a license was purely a personal privilege and should not constitute property.

<sup>33</sup> *Hornstein v. Illinois Liquor Control Comm'n*, 412 Ill. 365, 369, 106 N.E.2d 354, 357 (1952).

<sup>34</sup> *Id.* at 371, 106 N.E.2d at 358. The Court relied primarily upon the nature of the business being regulated and the necessity for summary action.

<sup>35</sup> *People v. Kaelber*, 253 Ill. 552, 97 N.E. 1068 (1912); *People v. McBride*, 234 Ill. 146, 84 N.E. 865 (1908); *City of Chicago v. Schayne*, 46 Ill. App. 2d 33, 196 N.E.2d 521 (1964).

looked upon the business of selling alcoholic beverages with disfavor,<sup>36</sup> and engaging in liquor traffic is neither a right of citizenship nor one of the privileges and immunities of a United States citizen.<sup>37</sup> In contrast, in Illinois the privilege doctrine has been rejected in cases involving the revocation of an architect's license,<sup>38</sup> a doctor's license,<sup>39</sup> a dentist's license<sup>40</sup> and in disbarment proceedings.<sup>41</sup> It is to be observed that the nature of the business or occupation entered into is often decisive in determining whether a licensee is entitled to any procedural safeguards when his license is revoked. Where a business or occupation is deemed to be dangerous or harmful to the public and summary action is required to protect the public welfare, a license may be revoked without notice or a fair hearing.<sup>42</sup>

Legal scholars have long advocated the abolition of the right-privilege distinction. Professor Davis has renounced it upon the basis that "the courts should reject the notion that valuable businesses may be administratively destroyed without giving their owners a chance to be heard on disputed facts."<sup>43</sup> Furthermore, where the distinction is in force it has been suggested that "an advocate attacking the use of the distinction must start with a more accurate definition of a privilege:

An occupation which the state, if it chose, could exclude but one which the legislature has decided to permit, presumably because it is of value to the community.<sup>44</sup>

In view of this the courts should avoid determining the procedural rights of a licensee by relying on a concept as nebulous as the right-privilege distinction.

Another distinction frequently employed by the judiciary in determining whether or not constitutional safeguards are applicable to licensing procedures is whether licensing involves legislative or adjudicative facts. Legislative facts do not concern the immediate parties but are general facts which aid the tribunal in deciding questions of law, policy and discretion.<sup>45</sup> Ad-

<sup>36</sup> *Saladino v. City of S. Beloit*, 9 Ill. 2d 320, 120 N.E.2d 364 (1956); *Hayes v. Civil Service Comm'n*, 348 Ill. App. 146, 108 N.E.2d 505 (1952); *People ex rel. Fitzgerald v. Harrison*, 256 Ill. 102, 99 N.E. 903 (1912).

<sup>37</sup> *Oak Park Nat'l Bank v. Village of Broadview*, 27 Ill. 2d 151, 188 N.E.2d 679 (1963); *Schreiber v. Illinois Liquor Control Comm'n*, 12 Ill. 2d 118, 145 N.E.2d 50 (1957); *Saladino v. City of S. Beloit*, 9 Ill. 2d 320, 120 N.E.2d 364 (1956).

<sup>38</sup> *Klafter v. State Bd. of Examiners of Architects*, 259 Ill. 15, 102 N.E. 193 (1913).

<sup>39</sup> *People v. McCoy*, 125 Ill. 289, 17 N.E. 786 (1888).

<sup>40</sup> *Kalman v. Walsh*, 355 Ill. 341, 189 N.E. 315 (1934).

<sup>41</sup> *Phipps v. Wilson*, 186 F.2d 748 (7th Cir. 1951).

<sup>42</sup> *Hornstein v. Illinois Liquor Control Comm'n*, 412 Ill. 365, 106 N.E.2d 354 (1952).

<sup>43</sup> 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §7-19 at 499 (1958).

<sup>44</sup> Comment, *The Use and Misuse of The Right-Privilege Distinction in License Revocations: What's So Hot About Cosmetology School?* 31 U. CHI. L. REV. 589-90 (1964).

<sup>45</sup> 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* §7.02 at 413 (1958).

judicative facts are facts about the parties, their activities, businesses and properties.<sup>46</sup> Constitutional safeguards are required only when adjudicative facts are in dispute.<sup>47</sup> The distinction is well founded but difficult to apply, especially in the licensing area. In *Hornsby v. Allen*,<sup>48</sup> the circuit court of appeals concluded that the licensing power was an adjudicative process and that the denial of a license application was not an act of legislation. Consequently, procedural safeguards were required. This holding is completely consistent with the Federal Administrative Procedure Act.<sup>49</sup>

In Illinois, due process, as required by the bill of rights, is mandatory in every proceeding by which a citizen may be deprived of life, liberty or property whether the proceeding be judicial, administrative or executive.<sup>50</sup> The Illinois Supreme Court has defined due process as: "A general law, administered in its regular course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right and affecting all persons alike."<sup>51</sup> The case of *People v. McCoy*,<sup>52</sup> presented the Illinois Supreme Court with the problem of a revocation proceeding of a medical license without notice. The court held that the licensee was entitled to notice as well as an opportunity to defend against the charges since the right to practice medicine is a valuable franchise. Similarly, in *Kalman v. Walsh*,<sup>53</sup> the Illinois Supreme Court held:

The right to practise [sic] dentistry is a valuable right. It is a property right within the due process of law clause of the constitution. Revocation of the license of a professional man to practice his chosen profession carries with it not only disgrace and humiliation but deprives him of his means of earning his livelihood. It is the death of his professional life, and there is usually no resurrection after such a death. The right to proper notice and a sufficient and explicit charge is not procedural but substantive.<sup>54</sup>

In addition, before revocation can take place, the defendant's guilt must be proved by competent evidence. The burden of proof remains upon the department or administrative agency throughout the hearing.<sup>55</sup> It is to be observed that there should be no distinction between the refusal to grant a license and the revocation of a license previously granted.<sup>56</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> See *Yakus v. United States*, 321 U.S. 414 (1944).

<sup>48</sup> *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

<sup>49</sup> 5 U.S.C. §554 (1965-67).

<sup>50</sup> *City of Carbondale v. Wade*, 106 Ill. App. 654 (1908).

<sup>51</sup> *Klafter v. State Bd. of Examiners of Architects*, 259 Ill. 15, 18, 102 N.E. 193, 194 (1913).

<sup>52</sup> 125 Ill. 289, 17 N.E. 786 (1888).

<sup>53</sup> 355 Ill. 341, 189 N.E. 315 (1934).

<sup>54</sup> *Id.* at 346, 189 N.E. at 317.

<sup>55</sup> *Schireson v. Walsh*, 354 Ill. 40, 187 N.E. 921 (1933).

<sup>56</sup> *People v. Apfelbaum*, 251 Ill. 18, 95 N.E. 995 (1911).



Again, the nature of the business regulated may determine whether a license may be revoked without notice or a fair hearing.<sup>57</sup> This in itself may determine whether the licensee is entitled to any procedural safeguards when his license is denied or revoked.<sup>58</sup> Still, the power to revoke the license of any professional man is not exercisable according to the pleasure or whim of any board or commission.<sup>59</sup> In *Audia v. City of Chicago*,<sup>60</sup> a bill in equity was filed by the complainant who had been engaged in the business of cobbling and repairing shoes and boots. The complaint charged that two uniformed policemen entered the complainant's place of business and accused him of selling liquor without a license. They proceeded to unlawfully search the premises and discovered a pint bottle partly filled with a liquid which the police claimed was whiskey. The complainant denied the charge. On the following day his license was revoked. The complaint prayed that the court enjoin the defendant from closing his place of business. The Illinois Appellate Court held that the plaintiff made out a case for equitable relief by charging the arbitrary revocation of his license without cause.

It is suggested that one method for preventing arbitrary action on the part of an administrative officer would be to enact a State Administrative Procedure Act.<sup>61</sup> This would necessitate the implementation of procedural safeguards in all local licensing affairs. In Illinois, this has not yet been done.

#### LICENSING PROCEDURES OF THE CITY OF CHICAGO

As has been noted before, the City of Chicago derives its power to grant and revoke licenses from the state legislature.<sup>62</sup> The statute provides that "the corporate authorities of each municipality may fix the amount, terms, and manner of issuing and revoking licenses."<sup>63</sup> The Municipal Code of Chicago establishes the general procedures to be followed in the issuance and revocation of licenses.<sup>64</sup> The Code provides that where licenses are required they shall be granted by the mayor.<sup>65</sup> All applica-

<sup>57</sup> *Hornstein v. Illinois Liquor Control Comm'n*, 412 Ill. 365, 106 N.E.2d 354 (1952).

<sup>58</sup> This problem is discussed in Mortimer & Dunne, *Grant and Revocation of Licenses* 57 ILL. L. FORUM 28, 50.

<sup>59</sup> *Schireson v. Walsh*, 354 Ill. 40, 187 N.E. 921 (1933).

<sup>60</sup> *Audia v. City of Chicago*, 236 Ill. App. 613 (1925); See *Weinstein v. Daley*, 85 Ill. App. 2d 470, 229 N.E.2d 357 (1967).

<sup>61</sup> See text at conclusion for a discussion of the MODEL STATE ADMINISTRATIVE PROCEDURE ACT.

<sup>62</sup> See text at note 10 *supra*.

<sup>63</sup> ILL. REV. STAT. ch. 24, §11-60-1 (1967).

<sup>64</sup> CHICAGO, ILL., MUNICIPAL CODE, ch. 101 (1967).

<sup>65</sup> CHICAGO, ILL., MUNICIPAL CODE, ch. 101 (1967). Chapter 101-2 of the Code provides: "In all cases where licenses are required to be procured, such licenses shall be granted by the mayor . . . ."

tions must be in writing on a form provided for that purpose and must be sent to the city collector.<sup>66</sup> Where an investigation or inspection is required by the Code,<sup>67</sup> or the licensee's character or fitness must be approved,<sup>68</sup> each department head or president of a board is charged with causing an investigation or inspection to be made upon receipt of all necessary information from the city collector.<sup>69</sup> Within ten days of receipt of the necessary information, the department head or board president must approve or disapprove the issuance of the license and he must also notify the city collector.<sup>70</sup> In several instances, the mayor himself is vested with the power of approving the moral character and responsibility of the applicant.<sup>71</sup>

Following this general procedure, the mayor has the discretion of granting or refusing the license even where satisfactory proof is submitted that the applicant is a fit and proper person and that all the provisions of the Code have been complied with.<sup>72</sup> There is no indication on the face of the Code as to what stan-

<sup>66</sup> CHICAGO, ILL., MUNICIPAL CODE, ch. 101-4 (1967).

<sup>67</sup> The Municipal Code requires an investigation or inspection in all cases where licenses are required (over 120 in all) except motor vehicle repair shops, ch. 156; general brokers, ch. 113; insurance brokers, ch. 113; real estate brokers, ch. 113; passenger ticket brokers, ch. 113; junk dealers and peddlers, ch. 143; wheel tax license, ch. 29; peddlers, ch. 160; photographers, ch. 161; tickers, ch. 177; and window cleaners, ch. 184.

<sup>68</sup> A certificate of fitness is required for drivers of motor vehicles conveying flammable liquids, ch. 129-54.1; compressors or sellers of acetylene gas, ch. 129-26; fume hazard gasses in single unit tank cars, ch. 129-71.5; operators of self service coin operated laundry establishments, ch. 145-24.3; and photographers using flashlight powders, ch. 161-6.

<sup>69</sup> CHICAGO, ILL., MUNICIPAL CODE, ch. 101-5 (1967).

The department heads and boards mentioned throughout the Code include the Fire Marshal, Commissioner of Buildings, Police Commissioner, Public Vehicle Inspector, Department of Streets and Sanitation, City Collector, Board of Examiners and Plumbers, Board of Health, Inspector of Weights and Measures, the Mayor, Board of Examiners of Mason Contractors, Board of Examiners of Motion Picture Machine Operators, Department of Water and Sewers, Board of Examiners of Stationary Engineers, Chief Inspector of Steam Boilers, Steam Kettles, Pressure Tanks, Superheaters and Generators, and the Bureau of Heating, Ventilation and Industrial Sanitation.

<sup>70</sup> CHICAGO, ILL., MUNICIPAL CODE, ch. 101-5 (1967).

<sup>71</sup> These include operators of sale stables for horse sales, ch. 105-23; jewelry auction sales, ch. 106.1-6; bathing beach operators, ch. 108-2; natorium operators, ch. 157-3.

<sup>72</sup> CHICAGO, ILL., MUNICIPAL CODE, ch. 101-5 (1967).

This section states that "upon receiving satisfactory proof from the City collector . . . the mayor *may* authorize the said issuance." (emphasis added). It is curious that in section 1-10 of the Municipal Code concerning the construction of words used in the Code, it is stated that "[t]he word 'shall' as used in this Code is mandatory." There is no construction whatsoever for the word "may."

The Supreme Court of Montana in *State ex rel. Griffin v. Green*, 104 Mont. 460, 67 P.2d 995 (1937), was presented with an ordinance which stated that the State Board may, if the application is found satisfactory, and if the prescribed license fees were paid, issue a license. The Court held that *may* means *must* if the conditions have been complied with. The only discretion in the board was to ascertain whether the application was satisfactory.

dards the mayor might apply in reaching his decisions. If the mayor ultimately determines that the license should be granted, it is issued by the city clerk.<sup>73</sup> Once a license has been issued, the mayor is vested with the power of revocation for good and sufficient cause.<sup>74</sup>

The general licensing provisions of the Code make no allowance for a hearing if a licensee's application is rejected nor does it provide for notice and a hearing when a license is revoked.<sup>75</sup> This is in striking contrast to the Fair Housing Ordinance of Chicago,<sup>76</sup> and the municipal regulations of jewelry and auction sales,<sup>77</sup> nursing homes, sheltered care homes and homes for the aged,<sup>78</sup> and day care centers,<sup>79</sup> which allow several due process safeguards. It should be noted, however, that despite the absence of any statutory right to procedural safeguards, in actual practice licensees in every case are afforded notice and a full hearing so that such safeguards do exist.<sup>80</sup> The problem then is that the licensee is uninformed of his rights when consulting the ordinance.<sup>81</sup>

#### THE CONSTITUTIONALITY OF THE LICENSING PROVISIONS OF THE MUNICIPAL CODE OF CHICAGO

It is a well established proposition of law that a licensing ordinance must not violate any constitutional provision for protecting the rights of persons and property.<sup>82</sup> However, this does not mean that a licensee has the unlimited right to operate his business in a certain manner when regulation is required in the public interest, even though the individual subject to the regulation finds compliance difficult.<sup>83</sup> A regulation will generally be upheld where it confers no special privilege and applies

<sup>73</sup> CHICAGO, ILL., MUNICIPAL CODE, ch. 101-5 (1967).

<sup>74</sup> CHICAGO, ILL., MUNICIPAL CODE, ch. 101-27 (1967).

<sup>75</sup> This should be compared with Federal laws which provide strict rules requiring notice and hearings, and which limit the powers of administrative officers. 60 Stat. 237 (1946).

<sup>76</sup> CHICAGO, ILL., MUNICIPAL CODE, ch. 198-78 (1967).

<sup>77</sup> CHICAGO, ILL., MUNICIPAL CODE, ch. 106.1-5 (1967).

<sup>78</sup> CHICAGO, ILL., MUNICIPAL CODE, ch. 136-8 (1967).

<sup>79</sup> CHICAGO, ILL., MUNICIPAL CODE, ch. 158-8, 10 (1967).

<sup>80</sup> The licensee in reality is granted 1) the right to legal counsel, 2) the right to cross-examine witnesses, and 3) he is informed of the nature of the charges against him. Although these proceedings are a common practice in every case, the licensee does not have a right to them as they have not been incorporated into the municipal code.

<sup>81</sup> This in itself may constitute a violation of due process as a licensee whose application is rejected or whose license is revoked has no notice of what rights he is entitled to. In the absence of legal counsel he may never be informed of his rights.

<sup>82</sup> *City of Blue Island v. Kozul*, 379 Ill. 11, 41 N.E.2d 515 (1942); *Village of Kincaid v. Vecchi*, 332 Ill. 586, 164 N.E. 199 (1928); *Frazer v. Shelton*, 320 Ill. 253, 150 N.E. 696 (1926).

<sup>83</sup> *City of Decatur v. Chasteen*, 19 Ill. 2d 204, 166 N.E.2d 29 (1960).

equally to the same class.<sup>84</sup> It may not be so vague, indefinite or uncertain<sup>85</sup> as amounting to an invalid delegation of legislative authority. Furthermore, all distinctions in the ordinance must have a rational basis and not be arbitrary.<sup>86</sup>

In *Father Basil's Lodge v. City of Chicago*,<sup>87</sup> the plaintiff brought an action to restrain the city and its officials from enforcing two ordinances dealing with the licensing and regulation of nursing homes. The plaintiff contended that the ordinances were unreasonable and discriminatory. The court upheld the ordinance and noted that there must be a reasonable connection between the business or occupation regulated and the danger to the public in order that a reasonable ground for regulation be presented. The court then held:

Whether there exists any connection between a given ordinance and any police power claimed to be exercised thereby, and whether such ordinance is a proper exercise of such power or whether the ordinance is unreasonable and arbitrary are primarily questions for legislative determination. The city council is the judge, in the first instance, of those matters, and unless the exercise of its judgment and discretion is manifestly unreasonable, the courts will not declare the ordinance invalid.<sup>88</sup>

As previously noted,<sup>89</sup> an ordinance is invalid if it constitutes a delegation of legislative authority. For example, when it provides that a license shall not be issued until approval by an executive without specifying the circumstances under which this approval must be given,<sup>90</sup> the ordinance is unconstitutional. However, where an administrative board or officer is granted the power to determine whether the legally required standards have been complied with, the ordinance is valid.<sup>91</sup>

In *Klafter v. State Board of Examiners of Architects*,<sup>92</sup> a bill was filed for an injunction restraining the board from proceeding with a trial against the plaintiff. He contended that the act providing for the licensing of architects was void for uncertainty. The act provided that any license granted could be revoked by unanimous vote of the State Board of Examiners of Architects for "gross incompetency or recklessness in the construction of buildings." The plaintiff contended that this

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<sup>84</sup> *Frazer v. Shelton*, 320 Ill. 253, 150 N.E. 696 (1926); *Father Basil's Lodge v. City of Chicago*, 393 Ill. 246, 65 N.E.2d 805 (1946).

<sup>85</sup> *Chicagoland Agencies, Inc. v. Palmer*, 364 Ill. 13, 2 N.E.2d 910 (1936).

<sup>86</sup> *Id.* See *Father Basil's Lodge v. City of Chicago*, 393 Ill. 246, 65 N.E.2d 805 (1946); See also *Kalman v. Walsh*, 355 Ill. 341, 189 N.E. 315 (1934).

<sup>87</sup> 393 Ill. 246, 65 N.E.2d 805 (1946).

<sup>88</sup> *Id.* at 257, 65 N.E.2d at 813.

<sup>89</sup> See text at notes 85 & 88 *supra*.

<sup>90</sup> *Dean Milk Co. v. City of Aurora*, 404 Ill. 331, 88 N.E.2d 827 (1949).

<sup>91</sup> See *People v. Roth*, 249 Ill. 532, 94 N.E. 953 (1911); *Gundling v. City of Chicago*, 176 Ill. 340, 52 N.E. 44 (1898), *aff'd* 177 U.S. 183 (1900).

<sup>92</sup> 259 Ill. 15, 102 N.E. 193 (1913).

amounted to a delegation of legislative power to the defendant. The Illinois Supreme Court disagreed and held the act was valid.

The true distinction is between delegation of power to make the law, which involves a discretion as to what the law should be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law.<sup>93</sup>

Similar rationale was used in upholding a medical licensing act which provided for license revocation for "unprofessional and dishonorable conduct."<sup>94</sup> Also an act requiring dentists to graduate from a "reputable" dental college was found constitutional,<sup>95</sup> as was an act prohibiting foreign corporations from obtaining a certificate of authority where they used names "deceptively similar" to that of a domestic corporation.<sup>96</sup> Furthermore, where an examining board and superintendent were vested with the power of determining the licensee's good moral character, no delegation of power was found to be involved.<sup>97</sup>

In the City of Chicago, the mayor has the power to grant licenses<sup>98</sup> and to revoke them for good and sufficient cause.<sup>99</sup> It is beyond question that the city has this power. It existed at common law<sup>100</sup> and now exists by statute.<sup>101</sup> However, it is clear that a license revocation may not result from a trivial cause,<sup>102</sup> and revocation should not be used as a form of punishment, but as an exercise of the police power.<sup>103</sup> Since there is no distinction between refusing to grant a license and revoking an existing license,<sup>104</sup> these standards should also be applicable to the proceedings involved in the granting of a license.

In view of the past judicial interpretations of licensing pro-

<sup>93</sup> *Id.* at 20-21, 102 N.E. at 195. See also *People ex rel. Rice v. Wilson*, 364 Ill. 406, 4 N.E.2d 847 (1936).

<sup>94</sup> *People v. Apfelbaum*, 251 Ill. 18, 95 N.E. 995 (1911).

<sup>95</sup> *People v. Board of Dental Examiners*, 110 Ill. 180 (1884).

<sup>96</sup> *Investor's Syndicate v. Hughes*, 378 Ill. 413, 38 N.E.2d 754 (1942).

<sup>97</sup> *People v. Flannigan*, 347 Ill. 328, 179 N.E. 823 (1932). However, where a legislative act confers upon a department the power to determine for itself in the first instance a prima facie case authorizing the revocation or suspension of a license, this amounts to an unconstitutional delegation of power. *Schireson v. Walsh*, 354 Ill. 40, 187 N.E. 921 (1933).

<sup>98</sup> CHICAGO, ILL., MUNICIPAL CODE, ch. 101-27 (1967).

<sup>99</sup> The Supreme Court of New Jersey in *In re Berardi*, 23 N.J. 485, 129 A.2d 705 (1957), interpreted a licensing ordinance which provided for revocation "for cause." The Court there held:

The phrase "For Cause" . . . gathers its full meaning from the overall objectives of the law and it means *such cause as would render the person unfit to engage in the business or profession* in the light of the potential evil and mischief which the legislature sought to regulate and eradicate.

*Id.* at 493, 129 A.2d at 709 (emphasis added).

<sup>100</sup> *Hibbard & Co. v. City of Chicago*, 173 Ill. 91, 50 N.E. 256 (1898).

<sup>101</sup> ILL. REV. STAT. ch. 24, §11-60-1 (1967).

<sup>102</sup> *Klafter v. State Bd. of Examiners of Architects*, 259 Ill. 15, 102 N.E. 193 (1913).

<sup>103</sup> *Id.* at 18, 102 N.E. at 194.

<sup>104</sup> *People v. Apfelbaum*, 251 Ill. 18, 95 N.E. 995 (1911).

visions it would appear that the Municipal Code regulations would be susceptible to constitutional attack. The standards are not sufficiently explicit, as the Code does not delineate the circumstances under which the mayor must grant a license.<sup>105</sup> The mayor may not exercise his discretion arbitrarily,<sup>106</sup> and may not unjustly or irrationally discriminate against any class of people, as such action is prohibited by the Illinois Constitution.<sup>107</sup> In the last analysis, the Code provisions on their face permit the mayor, as well as the various boards and departments, the latitude to act in a manner that has been judicially and legislatively proscribed. Adequate safeguards are not guaranteed.

A licensee or applicant who wishes to legally protect his rights is faced with insurmountable problems. Primarily, he is not informed of his rights under the Municipal Code.<sup>108</sup> His alternatives are to attack the constitutionality of the ordinance, challenge the action of the mayor, or seek equitable relief.<sup>109</sup> In either case, the burden of proof is shifted to the licensee. In *Klafter*,<sup>110</sup> the Illinois Supreme Court noted that "if the discretionary power of the board is exercised with manifest injustice, the courts will interfere when it is clearly shown that the discretion has been abused."<sup>111</sup> Under this standard a licensee or applicant bears the onerous task of proving manifest injustice and clear abuse of discretion. This situation has prompted one legal scholar to comment:

In the absence of a statute providing a clearly defined course of procedure, it is difficult for a court to find (even though it believes that the procedure followed failed to meet the standard of fairness required in judicial proceedings) that conclusions based largely on *ex parte* investigation can be branded so clearly erroneous as to

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<sup>105</sup> However, in *Weinstein v. Daley*, 85 Ill. App. 2d 470, 229 N.E.2d 357 (1967), the Illinois Appellate Court upheld the provision of the Municipal Code empowering the mayor to revoke a license for violation of a state statute against the charge that it was in excess of the authority delegated to the city council.

<sup>106</sup> *Klafter v. State Bd. of Examiners of Architects*, 259 Ill. 15, 102 N.E. 193 (1913); *Audia v. City of Chicago*, 236 Ill. App. 613 (1925).

<sup>107</sup> ILL. CONST. art. IV, §22 (1870). See *People v. Love*, 298 Ill. 304, 131 N.E. 809 (1921). However, it should be noted that it is a well established principle of judicial construction that municipal ordinances are presumed valid and will be interpreted in such a manner as to uphold their constitutionality. *Kleeveer Karpet Kleaners v. City of Chicago*, 323 Ill. 368 (1926).

<sup>108</sup> See text at note 81 *supra*.

<sup>109</sup> At this point it should be noted that such an action would be virtually impossible. Since a hearing is granted in every case, an aggrieved licensee or applicant could not attain the standing required to bring such an action, as he would not technically be suffering immediate harm.

<sup>110</sup> 259 Ill. 15, 102 N.E. 193 (1913).

<sup>111</sup> The court reached a similar holding in *Block v. City of Chicago*, 239 Ill. 251, 87 N.E. 1011 (1909) stating: "If there should be an abuse of power on the part of either the chief of police or the mayor, the ordinance does not prevent an application to a court to compel either officer to perform his duty . . ." *Id.* at 264, 87 N.E. at 1016.

justify reversal of the administrative decision revoking a license.<sup>112</sup>

The proper remedy for any licensee is either mandamus<sup>113</sup> or injunction.<sup>114</sup> He is not however entitled to a judicial review of the proceedings. The State Administrative Review Act<sup>115</sup> only applies "to final decisions of an administrative agency where the act creating or conferring power on such agency by express reference adopts the provisions of [the] act."<sup>116</sup> With regard to licensing in Chicago, no such adoption has been made.<sup>117</sup> This results in the rather anomolous situation of a state licensee whose license is revoked being entitled to a review of the proceedings, while local licensee under similar circumstances has no right to a review at all. Furthermore, the courts dislike entering into the sphere of other governmental departments in matters of policy.<sup>118</sup> They won't act unless the discretion was exercised on clearly untenable grounds and was clearly unreasonable.<sup>119</sup> Since there is no state Administrative Procedure Act to which local officials must conform and since judicial review is not available the local licensee or applicant finds himself completely at the mercy of local officials. This problem is of course alleviated where due process is afforded at the outset, and would be solved by the adoption of a State Administrative Procedure Act.

The Revised Model State Administrative Procedure Act requires procedural safeguards in all licensing affairs. This includes notice of specific facts which warrant the intended action.<sup>120</sup> The Act further provides that revocation proceedings conform to the procedural safeguards required in contested cases,<sup>121</sup> specifically an opportunity for a hearing and reasonable

<sup>112</sup> F. COOPER, *STATE ADMINISTRATIVE LAW* 499 (1965).

<sup>113</sup> *United Artists Corp. v. Thompson*, 339 Ill. 595, 171 N.E. 742 (1930).

<sup>114</sup> *Audia v. City of Chicago*, 236 Ill. App. 613 (1925). See *Yellow Cab v. City of Chicago*, 186 F.2d 946 (7th Cir. 1951), wherein the court held that in Illinois it is well settled that enforcement of illegal ordinances may be enjoined.

<sup>115</sup> ILL. REV. STAT. ch. 110, §264 (1967).

<sup>116</sup> ILL. REV. STAT. ch. 110, §264-2 (1967).

<sup>117</sup> The only exception is chapter 147-6 of the code which is made subject to the Liquor Control Act.

<sup>118</sup> *Fidelity Inv. Ass'n v. Emmerson*, 235 Ill. App. 9 (1924). The court stated: "[C]ourts will not hear proofs and attempt to determine whether the discretion is exercised wisely or not. [I]nterference in such a case would be to interfere in the functions of government." *Id.* at 20.

<sup>119</sup> *Id.* at 20.

<sup>120</sup> REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT §14c [hereinafter cited as REV. MODEL STATE A.P.A. §14c.] The Illinois Supreme Court in *Smith v. Department of Registration & Educ.*, 412 Ill. 332, 106 N.E.2d 722 (1952), indicated that the complaint in a license revocation proceeding must specify the alleged causes for revocation with sufficient particularity so that the licensee is informed of the charges he must meet and is able to prepare his defense.

<sup>121</sup> REV. MODEL STATE A.P.A. §§9 & 14.

notice.<sup>122</sup> Finally, the Act provides that a licensee who is about to lose his license be given an opportunity to show compliance with all requirements for the retention of his license.<sup>123</sup> This would grant the licensee an opportunity to correct the deficiencies charged and retain his license. These requirements are indispensable to afford protection to a licensee who is about to be deprived of the source of his economic livelihood. In the interest of fairness and uniformity, Illinois must adopt an Administrative Procedure Act with provisions comparable to those of the Revised Model State Act.

### CONCLUSION

It is clear that since the issuance and revocation of licenses affects the very essence of our social and economic existence, basic procedural safeguards are essential. Surely, where a substantial economic interest is involved, the courts should not be influenced by the highly technical right-privilege distinction. Cases should not be decided on an ad hoc basis. A certain element of uniformity of procedure is desirable and the licensee or applicant should be made aware of his rights. The revised Model State Administrative Procedure Act should be adopted and the Municipal Code itself should be revised with an eye towards uniformity and more definite standards. Perhaps an independent licensing commission should be created in the interest of fair administration and economic and social stability. The power now vested in the mayor and the various local boards is, by its very nature, inconsistent with the concept of due process. Licensees and applicants must be afforded 1) adequate notice, 2) a fair hearing, 3) a right to know and rebut the charges made against them, 4) the burden of proof should remain with the city throughout all the stages of the proceeding.

As was noted by Justice Frankfurter in *McNabb v. United States*: "The history of liberty has largely been the history of procedural safeguards."<sup>124</sup> Similarly, Justice Douglas has stated:

It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim and caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under the law.<sup>125</sup>

Surely, where an individual may be deprived of the means

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<sup>122</sup> There is, however, no similar requirement in connection with applications.

<sup>123</sup> REV. MODEL STATE A.P.A. §14c.

<sup>124</sup> *McNabb v. United States*, 318 U.S. 332, 344 (1942).

<sup>125</sup> *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 179 (1951).



for his livelihood, he should be entitled to fundamental procedural protections not now afforded. This principle is entirely justifiable from the foregoing consideration of the licensing procedures that exist in the City of Chicago.

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