

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



ATTORNEY GENERAL

MEMORANDUM

TO: Fred P. Moosally
General Counsel
Alcoholic Beverage Regulation Administration

FROM: Peter J. Nickles
Attorney General

DATE: December 18, 2008

SUBJECT: Legal Opinion on Inaugural Celebration Extension of Hours and
Voluntary Agreements
(AL-08-868 A) (MID 244473)

This responds to your December 4, 2008 memorandum regarding certain application issues arising from the "Inaugural Celebration Extension of Hours Emergency Act of 2008", which was passed by the Council on December 2, 2008. The Bill would amend D.C. Official Code § 25-723 (2001) by adding a new subsection (d). The new subsection (d) would provide that on January 17, 2009 through January 21, 2009, the licensee under an on-premises retailer's license, or a temporary license, may sell or serve alcoholic beverages until 5 a.m. and operate 24 hours a day, without the approval of the Alcoholic Beverage Control Board (Board).

On December 16, 2008 the Council passed a revised version of the earlier bill, enrolled bill 17-1083, the "Inaugural Celebration Extension of Hours Public Safety Emergency Amendment Act of 2008". The revised version of the bill would, like the earlier bill, authorize establishments to operate and sell alcoholic beverages for 24 hours, but would require sales of alcoholic beverages to cease at 4 a.m. The revised version of the bill would condition the extended operation and hours of sales on the payment of fees (based upon the establishment's license class) and the submission of a written notification to the Board and the Metropolitan Police Department (MPD) no later than January 7, 2009. Nightclubs would be required to provide a public safety plan in addition to the written notification. In addition, the revised bill would authorize the Chief of Police to suspend a licensee's privilege of extended hours of operation, if the licensee's operation presents a

demonstrated danger to the health, safety, or welfare of the public. Finally, the revised bill would provide that a licensee with a manufacturer's license or a wholesaler's license may sell and deliver alcoholic beverages on January 18, 2009. This memorandum is based on the provisions of the revised bill which will hereafter be referred to as the Bill.

Because of the changes in the applicable law, the Board would like advice from this Office concerning whether the Board may, during the effective dates of the Bill, continue to enforce Board-approved voluntary agreements (hereafter, Agreements),¹ where the Agreement limits the sale of alcohol to a time before 4 a.m.²

QUESTION

Are Board-approved Agreements enforceable during the effective dates of the Bill?

RESPONSE

Yes, Board-approved Agreements are not changed by the Bill and are thus enforceable during the effective dates of the Bill.

BACKGROUND

In addition to the information provided in your December 4, 2008 memorandum, you provided additional background information as a result of a telephone conference with Pollie H. Goff, Senior Assistant Attorney General, Legal Counsel Division, and me on December 8, 2008, and in response to my additional questions posed on December 18, 2008.

During the telephone conference, you explained that Agreements,³ which have no uniform format, are entered into by the licensee and the community and approved by the Board. Agreements, which are authorized by D.C. Official Code § 25-446 (2006 Supp.), permit a licensee to operate in a designated manner in accordance with the terms of the Agreement. Agreements may cover any number of subjects including the nature of the business, the hours of operation, the square footage of the establishment, parking, trash removal, vermin control, security, noise control, type of permissible entertainment, and

¹ I note that substantial interest has been expressed in the pending Bill, including a December 8, 2008 letter from Senators Robert F. Bennett and Dianne Feinstein to the Mayor and the Council in which the Senators express concern about the safety and security consequences of the Bill and urge that the Bill not become law.

² You also requested advice on whether the Board could continue to enforce the existing hours restrictions contained in a licensee's entertainment endorsement application. I will respond to that question in a separate memorandum next week.

³ You also explained that some licensees do not have Agreements and that usually the absence of an Agreement is either because the establishment is in the downtown area and so there is no residential impact, or the community in which the establishment is located does not have actively involved community groups.

cooperation with the community. Most significantly, you stated that the Board has recognized Agreements for approximately 20 years and that it has always viewed them as contractual in nature. You provided five Agreements for our information. The Agreements that you provided are for the establishments doing business as: (1) Third Edition; (2) Asylum; (3) Park Place; (4) Dream; and (5) Tony & Joe's Seafood Restaurant. Of primary concern to the public, with respect to the Bill, are the hours of operation and the hours for the sale of alcohol permitted under existing Agreements *vis-à-vis* the permissible hours under the Bill.

Significantly, you explained that the Bill does not apply to off-premises establishments such as grocery stores or liquor stores that sell alcoholic beverages. Instead, it only applies to those types of establishments where a customer is served alcoholic beverages. You stated that there are currently 1,027 on-premises establishments, the majority of which currently, without the authority provided in the bill, close by 2 a.m. on weekdays and 3 a.m. on weekends. In addition, of the 1,027 on-premises establishments, 58 (mostly consisting of hotels) currently have the authority to operate 24 hours a day and 28 others have the authority to operate until 4 or 5 a.m. However, these establishments that operate 24 hours a day, or until 4 or 5 a.m., are not currently authorized to sell and serve alcoholic beverages during those extended hours.

Of the total number of on-premises establishments, 345 (approximately 1/3) have Agreements. The establishments with Agreements consist of six hotels, 25 nightclubs, 233 restaurants, 72 taverns, and nine multipurpose facilities (such as the Black Cat and the Hillwood Museum). The number of on-premises establishments with Agreements break down as follows by wards: (1) Ward 1 – 88 establishments; (2) Ward 2 – 134 establishments; (3) Ward 3 – 38 establishments; (4) Ward 4 – 14 establishments; (5) Ward 5 – nine establishments; (6) Ward 6 – 60 establishments; (7) Ward 7 – one establishment; (8) Ward 8 – one establishment. Stated another way with respect to the establishments with Agreements, the Dupont Circle Area has 129; the Downtown Area (ANC 2C, 2F and 6C) has 152; the Georgetown Area has 66; and the Adams-Morgan Area has 57.

You have informed me that there is no way to know, at this time, how many establishments would take advantage of the Bill's provisions should it become law, but that the Board could ascertain that information by requiring licensees to give notice of their intent to operate under the Bill's provisions. In response to my public notification questions, you explained that the Board is capable of notifying all on-premises establishments of the effect of the Bill on their operations, and of enforcing its provisions, should it become law. You also stated that the Board is able to timely inform licensees of the limitations in carrying out the Bill based on the conclusions reached in this memorandum, as needed.

DISCUSSION

Your memorandum explains that some on-premises retailer licensees have Board-approved Agreements, pursuant to D.C. Official Code § 25-446 (2008 Supp.), that restrict

an establishment's permitted hours of operation and/or sale of alcohol. You state that one interpretation being considered by the Board for this statute, in view of the Bill, is that restrictions on an establishment's hours of operation and/or sale of alcohol would still be enforceable by the Board during the effective period of the Bill, because the conditions of a licensee's Board-approved agreement are inseparable from the term of the license under D.C. Official Code § 25-446 (d) (2006 Supp.).⁴ You state that the public policy rationale for this conclusion is that Advisory Neighborhood Commissions, community groups, and others who have entered into these Agreements with licensees are entitled to have the Agreements remain in place.

A second interpretation that the Board is considering is that a broad reading of the Bill, which relaxes the hours for operation and the sale of alcohol, would lead to a conclusion that the Council's intent was to also relax all attendant operational conditions such as the requirements of any voluntary Agreements. You state that the public policy rationale for this position is that the Council intended to treat all on-premises establishments the same and to allow them to participate in the inaugural celebration under the provisions set forth in the Bill. You state that this second interpretation is also consistent with the manner in which the Board handles the extra hours permitted for New Year's Eve, in D.C. Official Code § 25-723 (c) (2008 Supp.), where licensees are not required to obtain Board approval to sell alcohol and to stay open until 4 a.m.

The procedure for obtaining an Agreement is set forth in D.C. Official § 25-446 (2008 Supp.). That section provides that Agreements are negotiated between the parties (*i.e.*, the licensee and the community) and approved by the Board. We reviewed the exemplar Agreements that you provided to us. As a result of that review, we agree with the conclusion of the Board that these Agreements are contractual in nature.⁵ The Contracts Clause of the United States Constitution (Contracts Clause) (Article 1, Section 10) provides, in part, that, "No State shall ... pass any Bill... or Law impairing the Obligation of Contracts..." Section 302 of the District of Columbia Home Rule Act, effective December 24, 1973, Pub. L. 93-198, D.C. Official Code § 1-203.02 (2006 Repl.), states that the Council is bound by the Contracts Clause. Since the Council may not circumvent the Contracts Clause, it may not use the Bill to change the requirements set forth in an existing Agreement.⁶

⁴ D.C. Official Code § 25-446 (d) (1) (2008 Supp.) states:

- (1) Unless a shorter term is agreed upon by the parties, a voluntary agreement shall run for the term of a license, including renewal periods, unless it is terminated or amended in writing by the parties and the termination or amendment is approved by the Board.

⁵ In *South Lincoln Park Neighborhood Association and Capital Hill Restoration Society v. Alcoholic Beverage Control Board*, 666 A.2d 63, 66 (D.C. 1995), the Court stated that a breach of an Agreement constitutes a breach of the license itself.

⁶ See, *District of Columbia v. American Federation of Government Employees*, 619 A.2d 77 (D.C. 1993), *cert. denied*, 510 U.S. 933 (1993).

provides, in part, that, “No State shall ... pass any Bill... .. or Law impairing the Obligation of Contracts....” Section 302 of the District of Columbia Home Rule Act, effective December 24, 1973, Pub. L. 93-198, D.C. Official Code § 1-203.02 (2006 Repl.), states that the Council is bound by the Contracts Clause. Since the Council may not circumvent the Contracts Clause, it may not use the Bill to change the requirements set forth in an existing Agreement.⁶

In addition, under the rule of statutory construction known as *expressio unius est exclusio alterius* (the expression of one thing means the exclusion of other things on the same subject),⁷ the specific language of the Bill must control. The Bill provides a mechanism for applicable licensees to extend their hours of operation and for the sale of alcohol during the relevant time period from January 17, 2008 through January 21, 2008. It does not purport to change any other conditions, such as those contained in an applicable Agreement, for a particular licensee, nor can any specific exceptions be read into the Bill.

Thus, it is my opinion that a licensee with an Agreement would still be bound by its Agreement to the extent that the provisions of the Agreement are different from those in the Bill or any other law enacted by the Council. On the other hand, those establishments that do not have an Agreement will obtain the benefits of the Bill permitting them to sell alcohol until 4 a.m. during the effective period of the Bill.

Should you have questions regarding this memorandum, please contact either Wayne C. Witkowski, Deputy Attorney General, Legal Counsel Division, at 724-5524, or me.

PJN/phg

⁶ See, *District of Columbia v. American Federation of Government Employees*, 619 A.2d 77 (D.C. 1993), cert. denied, 510 U.S. 933 (1993).

⁷ *McCray v. McGee*, 504 A.2d 1128, 1130 (D.C. 1986).