

**THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD**

In the Matter of:)	
)	
Walgreen Co.)	License No. 88579
t/a Walgreens #11408)	Order No. 2012-327
)	
<i>Request for an Advisory Opinion</i>)	
at premises)	
4225 Connecticut Avenue, N.W.)	
Washington, D.C. 20008)	

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Calvin Nophlin, Member
Mike Silverstein, Member

ALSO PRESENT: Walgreen Co., t/a Walgreens #11408, Licensee

Stephen O'Brien, Esq., of the firm Mallios & O'Brien, on behalf of the Licensee

Erin Neff, Esq., on behalf of the Licensee

Jin Kim, Manager, on behalf of the Licensee

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ADVISORY OPINION

INTRODUCTION

The Alcoholic Beverage Control Board (Board) advises District of Columbia Walgreen Co., t/a Walgreens #11408, (Licensee) that under the facts presented during the Fact Finding Hearing on April 18, 2012, its store meets the "primary business and purpose" criteria described in §§ 25-331(d)(1) and 25-332(c)(1) and qualifies as a full service grocery store under §§ 25-331(d)(4) and 25-332(c)(4), provided that it dedicates greater shelf and floor space to the sale of food items than its other products.

Procedural Background

Under § 1902 of Title 23 of the District of Columbia Municipal Regulations, the Licensee has requested that the Board determine whether it may qualify for the full-grocery store exception to the moratorium on Class B retailer's licenses contained in §§ 25-331(d) and 25-332(c). The Board held a Fact Finding Hearing on April 18, 2012, in order to gather additional information regarding the Licensee's request.

During the hearing, the Licensee requested that the Board determine whether the operations described during the hearing qualified the establishment as a full-service grocery store described in §§ 25-331(d)(4) and 25-332(c)(4), and whether it also satisfied the primary business and purpose test described in §§ 25-331(d)(1) and 25-332(c)(1). *Transcript (Tr.)*, April 18, 2012 at 5.

Based on the Licensee's presentation during the Fact Finding Hearing, the Board has deemed it necessary to clarify the full-service grocery store and primary business and purpose tests by issuing an advisory opinion as guidance to the Licensee and future applicants.

FINDINGS OF FACT

We base our advice on the following findings:

1. The Licensee, part of the national Walgreens chain, seeks a new Class B retailer's license for its store located at 4225 Connecticut Avenue, N.W., Washington, D.C. *Tr.*, 4/18/12 at 2-4, 7. Under District of Columbia Official Code §§ 25-331 and 25-332, the Board may not issue new Class B retailer licenses unless the licensee qualifies for one of the exceptions to the prohibition on the issuance of Class B retailer licenses. D.C. Code §§ 25-331(b), 25-332(a) (West Supp. 2012). In that vein, the Licensee seeks to rely on the full-service grocery store exception contained in §§ 25-331(d) and 25-332(c). *Tr.*, 4/18/12 at 3-4.
2. As part of the exception, the Licensee must demonstrate to the Board that "The primary business and purpose is the sale of a full range of fresh, canned, and frozen food items, and the sale of alcoholic beverages is incidental to the primary purpose." §§ 25-331(d)(1) and 25-332(c)(1). Furthermore, among other requirements, the Licensee must show that it "is a full service grocery store which is newly constructed with a certificate of occupancy issued after January 1, 2000, or is an existing store which has undergone renovations in excess of \$ 500,000 in the calendar year in which an application is made." D.C. Code §§ 25-331(d)(4), 25-332(c)(4). The Licensee asserts that its store meets these criteria.
3. Broadly speaking, the Licensee offers pharmacy products, health and beauty products, general merchandise, photography services, and consumables. *Tr.*, 4/18/12 at 31-35. The Licensee carries over 2,000 consumable items in its inventory. *Tr.*, 4/18/12

at 5. The Licensee categorizes 55 items carried by the store as fresh food, and purchases them locally. *Tr.*, 4/18/12 at 7. The establishment has 1700 square feet dedicated to the sale of food products. *Tr.*, 4/18/12 at 41. The store, in total, has approximately 20,000 square feet of retail space. *Tr.*, 4/18/12 at 42.

4. The Licensee showed a video of the store's consumables section. See generally, Walgreens's Regional Manager, Rick Conner, is featured in the video. *Tr.*, 4/18/12 at 9. The video shows Mr. Conner walk into the Licensee's store, and show the grocery sections of the store. See generally, Walgreens Video.

5. Upon entering, he walks to the right, and approaches a refrigerated "peninsula" display case. Id. at 00:45-00:52. The display contains pre-packaged sandwiches and salads, desserts, pre-cut vegetables and fruits, and ready-to-eat entrees. Id. at 00:56-02:30. According to Mr. Kim, the food in this display is delivered daily. *Tr.* 4/18/12 at 10.

6. The footage then shows Mr. Conner stand near an aisle "end cap" that contains fresh fruit. Id. at 02:33. The end cap has twelve baskets containing fruit and six shelves displaying individual bananas. Id. There are five baskets of apples, three baskets of pears, three baskets of mangoes, and one basket that appears empty. Id.

7. The footage then shows Mr. Conner stand near an aisle end cap that contains nut products. Id. at 02:47. The top four shelves contain cans of nuts. Id. In addition, the bottom two shells contain bags of mixed nut products. Id. at 02:51.

8. The next scene shows Mr. Conner opening a freezer door in a section that contains seven freezers. Id. at 02:52, 03:38-03:52. Mr. Conner takes a bag of frozen blueberries from the freezer and shows it to the camera. Id. at 02:55. The rest of the freezer contains ice cream. Id. at 03:03. Mr. Conner then walks past the other freezer doors containing ice cream products. Id. at 03:03-03:06.

9. The video then shows Mr. Conner open a freezer door containing frozen meals. Id. at 03:09. Mr. Conner takes a Healthy Choice Sesame Chicken entrée from the top of the freezer shelf and shows it to the camera. Id. at 03:12-03:14. The shelf also contains other frozen meal products. Id.

10. The next freezer shows additional frozen entrée products. Id. at 03:25. The freezer contains Good & Delish Orange Chicken, frozen lasagna entrees, and additional frozen entrée options. Id. at 03:35-03:38. The footage then shows two additional freezers containing frozen pizzas. Id. at 03:38.

11. The video then shows the Licensee's refrigerators. Id. at 04:09. The first refrigerator contains large bottles of soda. Id. at 04:11. The camera then sweeps to the left past a refrigerator containing large containers of bottled water, and another case containing iced tea and fruit juices in both single-serve and quart sizes. Id. at 04:14-

04:15. The camera then shows a refrigerator containing large containers of milk. Id. at 04:15.

12. The camera continues to sweep to the left, and Mr. Conner opens the refrigerator. Id. at 04:17-04:22. Mr. Conner pulls a package of sliced deli meat from one of the refrigerator's shelves. Id. at 04:28. Mr. Conner then places the meat back in the refrigerator, and he pulls out a carton of fresh eggs. Id. at 04:29-04:34.

13. The other seven refrigerators contain single-serve beverages. Id. at 04:44-04:56.

14. The camera then shows an aisle identification sign for Aisle 4. Id. at 05:04. The sign identifies Aisle 4 as containing "Groceries" and "Paper Goods." Id. at 05:07. The sign advertising groceries labels the products contained in the aisle as bread, cereal, and other groceries. Id. at 05:08.

15. The footage then shows Mr. Conner walk down Aisle 4. Id. at 05:15-05:18. Mr. Conner walks past an aisle shelf containing, among other products, a number of packages of pudding snacks, chocolate milk mixes, marshmallows, and raisins. Id. at 05:18.

16. Mr. Conner then approaches the neighboring shelf. Id. at 05:23. The camera then shows shelves containing, among other products, cans of tuna, peanut butter, jelly, Nutella, apple sauce, canned fruit, and Velveeta cheese. Id. at 05:22, 05:33.

17. Mr. Conner then walks to another shelf containing canned soup. Id. at 05:41. The shelf is full of soups by Progresso and Campbell's, among other manufacturers. Id. at 05:48-05:52. The shelf to the right of the canned soups, contains boxes of macaroni and cheese, taco kits, and pasta. Id. at 05:53.

18. Mr. Conner then continues down the aisle towards a number of shelves containing boxed cereals. Id. at 06:04-06:07. The video shows that the store offers various types of cereals, including, among other brands, Cheerios, Fiber One, and Kellogg's. Id. at 06:06-06:012. The video also shows another nearby shelf stocked with large containers of oatmeal. Id. at 06:08.

19. Mr. Conner then reaches the end of Aisle 4, and stops near a shelf containing packaged baked goods. Id. at 06:13. The video shows packages of breakfast bars and Pop Tarts on the shelves. Id. at 06:19. In addition, there are single-serve slices of cakes, donuts, and packages of various rolls. Id. at 06:19.

20. The video then jumps to an aisle containing juice products. Id. at 06:28. The shelf contains large containers and packages of fruit juices and sport drinks. Id. at 06:28-06:29. The camera then sweeps past hooks containing small bags of nuts, cookies, and other food products. Id. at 06:32. The camera then stops at a shelf containing packages of cookies, crackers, and canned cheese. Id. at 06:32.

21. The next scene shows a number of shelves dedicated to candy, chocolates, trail mixes, and mixed nuts. *Id.* at 06:42-06:59. The camera then jumps to shelves filled with large packages of beef jerky, small bags of seeds, microwave popcorn, potato chips, Chex Mix, corn chips, and pretzels. *Id.* at 07:02-07:21. Finally, the establishment also sells baby food, nutritional supplements, and diet products. *Tr.*, 4/18/12 at 12-13.

22. In February 2012, the License had total sales of approximately \$266,000.00. *Tr.*, 4/18/12 at 21. Of the total sales, \$78,000.00 came from the sale of pharmaceutical products. *Tr.*, 4/18/12 at 21. The sale of consumables in February 2012 was approximately \$37,000.00, which totaled 19 percent of the store's total sales. *Tr.*, 4/18/12 at 21, 36.

23. The Licensee projects that the store will sell \$50,000.00 worth of alcoholic beverages per year. *Tr.*, 4/18/12 at 22.

24. The Licensee must meet all the other criteria listed in §§ 25-331(d) and 25-332(c) to qualify for the exception. Sections 25-331(d) and 25-332(c), except for provisions discussed in paragraph 2 above, state,

- (2) The sale of alcoholic beverages constitutes no more than 15% of the total volume of gross receipts on an annual basis;
- (3) The establishment is located in a C-1, C-2, C-3, C-4, or C-5 zone or, if located within the Southeast Federal Center, in the SEFC/C-R zone;
- (5) The opinion of the ANC, if any, has been given great weight.

§§ 25-331(d) and 25-332(c). Therefore, the Licensee must meet the fifteen percent cap on alcohol sales contained in (c)(2) and (d)(2). We also note that the Licensee meets criteria (c)(3) and (d)(3), because it is located in a C-3-A zone. Finally, we note that ANC 3F has filed a protest against the Licensee's Application. Therefore, at present, we find no impediments to the Licensee obtaining the exception it seeks, although this conclusion may be subject to change depending on the evidence submitted during the protest process.

CONCLUSIONS OF LAW

25. The Board finds that, under these facts, so long as the Licensee proves it satisfies the other criteria described in §§ 25-331 and 25-332, the Licensee may proceed in its Application for a Retailer's Class B License, because it can meet the primary business and purpose test described in §§ 25-331(d)(1) and 25-332(c)(1), and qualifies as a full service grocery store under §§ 25-331(d)(4) and 25-332(c)(4), provided it complies with the conditions set forth below. We note that this conclusion does not consider any possible or potential evidence that ANC 3F or other protestants may submit during a protest against the application for a new Retailer's Class B License.

26. We note that §§ 25-331(d) and 25-332(c) state that, among other requirements, the prohibition on issuing new Retailers Class B Licenses shall not apply "if: . . . The

primary business and purpose is the sale of a full range of fresh, canned, and frozen food items, and the sale of alcoholic beverages is incidental to the primary purpose.” §§ 25-331(d), 25-332(c). Furthermore, among other requirements, the statutes state that the exception will only be granted to “a full service grocery store.” §§ 25-331(d)(4), 25-332(c)(4) (West Supp. 2012).

27. The Board previously addressed the issue raised by the Licensee in 2009. In Rainbow’s Touch, the licensee in that case requested that we issue the establishment a Retailer’s Class B License under the full-service grocery store exception in § 25-332. In the Matter of Grace Kwon, t/a Rainbow’s Touch, Board Order No. 2009-258, 1 (D.C.A.B.C.B. Nov. 4, 2009). In our findings of fact, we noted that the establishment was a small “mini-mart that primarily sold beverages, souvenirs, and gifts.” Id. at ¶ 4. The store had a small selection of dry and canned goods, as well as “on-the-go items such as breakfast bars, potato chips, and dried fruit in small packages.” Id. The store did not contain a selection of fresh or frozen meat, or any frozen foods whatsoever. Id. We further noted that the only produce offered by the store was “two baskets of apples and bananas.” Id. Under these facts, we found that the establishment did not qualify for the exception to § 25-332. This interpretation is consistent with the legislative history of D.C. Law 13-298, which reflects on page 114 of the Committee Report, that the full-service grocery store exception is not intended to apply “to corner stores or convenience stores, nor does it apply to renovation of existing supermarket spaces.”

28. For the reasons set forth below, the Board does not find the Licensee’s business to be a convenience store, corner store, or small mini-mart, in contrast to our decision in Rainbow’s Touch. Sections 25-331(d)(1) and 25-332(c)(1) require that the Board determine that the Licensee’s primary business and purpose is the sale of a full range of fresh, canned, and frozen food items. At first blush, because the Licensee operates a pharmacy, it can be argued that the Licensee’s establishment should be viewed by the Board as simply a pharmacy and not a full-service grocery store as defined in §§ 25-331(d)(4) and 25-332(c)(4). However, nothing in §§ 25-331 and 25-332 precludes full-service grocery stores from offering other products. Rather, a review of other full-service grocery stores in the District, including Safeway and Giant, reveals that these licensed establishments also operate extensive pharmacies. Additionally, large grocery stores and “big-box” stores, like Target, also offer, a variety of other products and services, including pharmaceutical products, cleaning supplies, gardening tools, and dry cleaning and banking services. As such, the differences between pharmacies selling groceries, like the Licensee, and grocery stores, such as Safeway, operating pharmacies is rapidly shrinking—if not disappearing altogether. Therefore, given the push by retailers towards one-stop-shopping, we question whether even retailers commonly considered by consumers to be grocery stores could meet a strict interpretation of this test. Therefore, the Board interprets §§ 25-331(d)(1) and 25-331(d)(2) to require that a Licensee ensure that food items are displayed and available for sale at a greater level than other non-food items offered by the Licensee for sale at the store.

29. We also do not find that §§ 25-331(d)(1) and 25-332(c)(1) impose an arbitrary revenue requirement on establishments. Indeed, no such number is provided in the

statute. Instead, we conclude that the primary business and purpose test focuses on the type of food sold and the floor space dedicated by the licensee to the sale of food compared to non-food items. Therefore, we find that an establishment's "primary business and purpose is the sale of a full range of fresh, canned, and frozen food items," when the establishment

- (1) consistently and regularly offers a full range of fresh, canned, and frozen food;
- (2) dedicates greater shelf and floor space to the sale of such food items than other non-food items or products; and
- (3) offers a significant amount of ready-to-go meals, or food that requires preparation and intended for home use, rather than merely snack items;¹

§§ 25-331(d)(1) and 25-332(c)(1). Also, when the statute states that "the sale of alcoholic beverages is incidental to the primary purpose," we interpret this provision to mean that the licensee's primary business and purpose cannot be the sale of alcoholic beverages. This includes the establishment not dedicating greater shelf and floor space to the sale of alcoholic beverages when compared to its food items. This interpretation is supported by §§ 25-331(d)(2) and 25-332(c)(2), which limit the licensee's sale of alcoholic beverages to no more than 15% of the total volume of gross receipts of the business on an annual basis.

30. Turning to the Licensee's presentation, we are satisfied that the establishment satisfies the full-service grocery store and primary business and purpose tests provided that it dedicates greater shelf and floor space to the sale of food items than its other products.

31. We first conclude that the Licensee offers a wide-range of food products, and, therefore, qualifies as a full-service grocery store. Supra, at ¶¶ 4-21. Simply put, the Licensee stocks its shelves with a full range of produce, dairy, eggs, meat, and other food products. Supra, at ¶¶ 5-21.

32. We also conclude that the establishment can meet the primary business and purpose test. We note that the Licensee regularly and consistently offers food products, as evidenced by the fact that the Licensee receives daily deliveries of freshly made grab and go sandwiches, salads, and other fresh foods, and has made consumable products one of the store's key offerings. Supra, at ¶¶ 4-21. We also note that the Licensee dedicates significant shelf and floor space within the store to the sale of food, as shown by the fact that the Licensee's consumable section occupies 1700 square feet, and offers a full range of fresh produce, and frozen and canned foods. Supra, at ¶¶ 5-21. Finally, unlike in Rainbow's Touch, we are convinced that the establishment offers more than mere snack

¹ For example, items that we would consider requiring preparation or intended for home use include those items that require baking or heating in an oven, items that require the addition of fresh ingredients, and those items that contain multiple servings, like loaves of bread or large cereal boxes.

items, and is not merely a convenience store (like a 7-11). We note that among other products, the Licensee offer freshly made sandwiches and salads, various fresh fruits, large containers of nuts, milk, juices, soda, eggs, frozen entrees, packaged deli meat, large boxes of cereal, cans of tuna and soup, and large packages of cookies and crackers. Supra, at ¶¶ 5-20. Finally, the Licensee's video showed many products with multiple servings and food that requires preparation at home. Supra, at ¶¶ 5-20.

33. Therefore, for the foregoing reasons, we find that under these facts, the Licensee may meets the full-service grocery store and primary business test described in §§ 25-331(d) and 25-332(c) provided that it dedicates greater shelf and floor space to the sale of food items than its other products. We note that this conclusion does not consider any possible or potential evidence that ANC 3F or other protestants may submit during a protest against the application for a new Retailer's Class B License.

ORDER

Accordingly, it is this 1st day of August 2012, **ORDERED** that the above represents the **ADVISORY OPINION** of the Board pursuant to 23 DCMR § 1902.

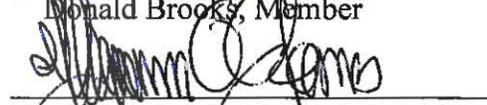
District of Columbia
Alcoholic Beverage Control Board



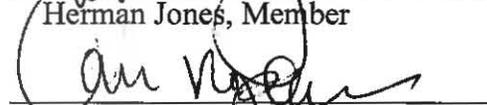
Nick Alberti, Member



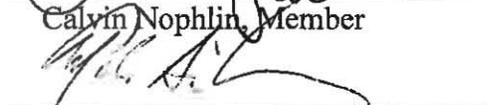
Donald Brooks, Member



Herman Jones, Member



Calvin Nophlin, Member



Mike Silverstein, Member

I dissent from my colleague's for the following reasons:

In my view, D.C. Code §§ 25-331 and 25-332 apply to supermarkets and grocery stores, and did not contemplate pharmacies, such as Walgreens and CVS. Further, I am not convinced that the primary business and purpose of this establishment is the sale of a full range of fresh, canned, and frozen food items. I would favor a rulemaking to determine whether these types of establishments should be treated in the same way as grocery stores and supermarkets under the statute.



Ruthanne Miller, Chairperson

Pursuant to 23 DCMR § 1902.6 (West Supp. 2012), if the requestor disagrees with the Board's advisory opinion in any respect, he or she may, within twenty (20) calendar days after issuance of the opinion, petition the Board in writing to reconsider its opinion, setting forth in detail the reasons and legal argument which support the requestor's points of disagreement, or may request the Board to issue a declaratory order, pursuant to § 1903. Advisory opinions of the Board may not form the basis of an appeal to any court in the District of Columbia.