



## INTRODUCTION

The Alcoholic Beverage Control Board (Board) advises District of Columbia CVS Pharmacy, LLC, t/a CVS Pharmacy #1354, (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 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 CVS chain, seeks a new Class B retailer’s license for its store to be located at 2601 Connecticut Avenue, N.W., Washington, D.C. *Tr.*, 4/18/12 at 1. 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 additional Class B retailer’s 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 5.
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. The Licensee is presently expanding its grocery and food offerings. *Tr.*, 4/18/12 at 14-15. The Licensee’s goal is to compete with supermarkets, such as Giant and Safeway. *Tr.*, 4/18/12 at 14.

4. The Licensee’s current plan is to close down one of its current stores near the desired premises, and move across the street to a larger building. *Tr.*, 4/18/12 at 58. The Licensee hopes to open a new pharmacy, which was not present in the old store. *Tr.*, 4/18/12 at 58.

5. A significant portion of the Licensee’s business involves the sale of food. *Tr.*, 4/18/12 at 53-57. As noted by Vernon Goad, CVS’s Field Marketing Manager, the Licensee has four major categories of goods in its front store: consumables, health and beauty aids, general merchandise, and photography. *Tr.*, 4/18/12 at 53, 54. Mr. Goad noted that, in general, the chain’s stores generally earn 70 percent of its revenue from the sale of pharmaceutical products and 25 percent come from the sale of consumable products. *Tr.*, 4/18/12 at 54-55. Mr. Goad noted that the business could not survive without the sale of consumables, because current government policies are lowering the reimbursement rates for pharmaceutical products, which hurts the chain’s revenue. *Tr.*, 4/18/12 at 56. Mr. Goad estimates that the chain’s sales of sandwiches and salads in the District will be approximately \$1.4 million in 2012. *Tr.*, 4/18/12 at 29.

6. The Licensee has made great efforts to improve its food offerings. The chain has moved consumable products and the store’s coolers to the front of their stores, and expanded the mix of consumable goods offered for sale. *Tr.*, 4/18/12 at 25. In that vein, the national chain has added sandwiches, salads, and fruit to its product offerings. *Tr.*, 4/18/12 at 26. In addition, the Licensee now offers customers Chobani yogurts, and Odwalla and Simply beverages. *Tr.*, 4/18/12 at 26. The Licensee also offers Pepperidge Farms cakes and breads, fresh dairy products, and ice cream. *Tr.*, 4/18/12 at 27. Currently, the Licensee is also negotiating with suppliers to expand the store’s fresh fruit and vegetable selections. *Tr.*, 4/18/12 at 28.

7. The chain’s consumable sales are experiencing the fastest growth. *Tr.*, 4/18/12 at 24. Mr. Goad reports that bread and frozen food sales have grown by 15 percent in multiple years. *Tr.*, 4/18/12 at 28-29. Mr. Goad also reported that the chain has experienced 20 percent growth in the dairy category in multiple years. *Tr.*, 4/18/12 at 28.

8. Food sales are an important part of the Licensee’s offerings. The Licensee has seven freezer doors dedicated to frozen foods and seven freezer doors dedicated to dairy products. *Tr.*, 4/18/12 at 27. Presently, the Licensee also receives deliveries from the local sandwich and salad maker three days per week. *Tr.*, 4/18/12 at 26. Finally, the Licensee’s advertising circulars regularly advertise consumable items. *Tr.*, 4/18/12 at 33.

9. Mr. Pascal noted that Safeway, a supermarket, has a pharmacy in some of its stores. *Tr.*, 4/18/12 at 44. Furthermore, he noted that supermarkets have begun to offer more non-food products, such as household items, and cleaning and gardening supplies. *Tr.*, 4/18/12 at 36, 44-45.

10. 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 WP/C-2-B zone. Finally, at present, we have not received a recommendation or protest against the Application by the ANC. Therefore, we find no impediments to the Licensee obtaining the exception it seeks.

### CONCLUSIONS OF LAW

11. 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 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.

12. We note that §§ 25-331(d) and 25-332(c) state that, among other requirements, the prohibition on issuing new Retailer's 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).

13. 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.”

14. 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, as we found 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 these 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.

15. 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;<sup>1</sup>

§§ 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.

16. 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.

17. We first conclude that the Licensee offers a wide-range of food products, offers more than mere snack products, and does not primarily offer made-to-order food. Supra, at ¶¶ 6, 8. Simply put, the Licensee stocks its shelves with a full range of baked goods, dairy products, frozen foods, ready-to-go meals, and beverages. Supra, at ¶ 6-8. Furthermore, the food indicated by the Licensee is more than mere snack food, like that sold by the establishment in Rainbow Touch, and the store does not primarily offer made-to-order food. Id. Therefore, we find that the establishment qualifies as a full-service grocery store.

18. We also conclude that the establishment can meet the primary business and purpose test provided that it dedicates greater shelf and floor space to the sale of such food items than its other products. We note that the Licensee regularly and consistently offers food products, as evidenced by the fact that the Licensee receives frequent deliveries of freshly made sandwiches and salads, regularly advertises the food offered by the store, and has made consumable products one of the store’s key offerings. Supra, at ¶¶ 5, 8. 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 is in the front of the store, and the Licensee operates seven refrigerators and seven freezers carrying food products. Supra, at ¶¶ 6, 8. Finally, unlike in Rainbow’s Touch, we are convinced that the establishment offers more than mere snack items, and is not merely a corner store or convenience store (like a 7-11). We note that the Licensee offers freshly made sandwiches and salads, Pepperidge Farms bread and cakes, fresh dairy products, and frozen foods. Id. We also note that the Licensee intends to expand its selection of fresh fruits and vegetables, which we presume means that it will provide much more than the few baskets of produce that the Licensee presented in Rainbow’s Touch.

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<sup>1</sup> 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.

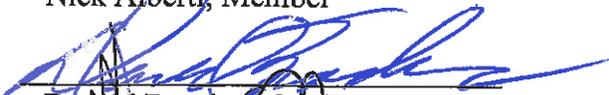
19. Therefore, for the foregoing reasons, we find that under these facts, the Licensee meets the full-service grocery store and primary business and purpose test described in §§ 25-331(d) and 25-332(c), as well as all of the other factors listed in those statutes, provided that it dedicates greater shelf and floor space to the sale of food items than its other products. Supra, at ¶ 10.

### **ORDER**

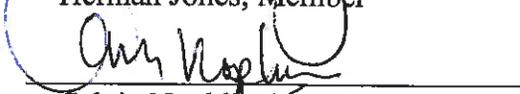
Accordingly, it is this 1st day of August 2012, **ORDERED** that the above represents the **ADVISORY OPINION** of the Board pursuant to 23 DCMR § 1902.

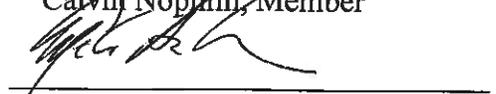
District of Columbia  
Alcoholic Beverage Control Board

  
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Nick Alberti, Member

  
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Donald Brooks, Member

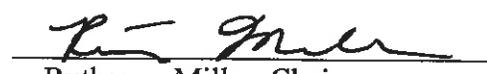
  
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Herman Jones, Member

  
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Calvin Noplin, Member

  
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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.

  
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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.