

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

In the Matter of:)

Edgy Crafts, LLC)
t/a Craft Beer Cellar DC)

Order No.: 2016-403

Advisory Opinion)

301 H Street N.E.)
Washington, D.C. 20002)

Advisory Opinion)

BEFORE: Donovan Anderson, Chairperson
Nick Alberti, Member
Mike Silverstein, Member
Ruthanne Miller, Member
James Short, Member

**ADVISORY OPINION ON THE SALE OF INDIVIDUAL CONTAINERS AT
OFF-PREMISES RETAIL ESTABLISHMENTS**

INTRODUCTION

The Board provides the following advisory opinion to clarify the ability of off-premises retail license holders, both class A and B, to sell individual containers and divide manufacturer's packages of various alcoholic products.¹

In that vein, class A and B off-premises retail license holders located in a moratorium zone that prohibits the sale of individual containers of beer that are 70 ounces or less ("moratorium on the sale of singles") may divide manufacturers' packages, and sell multipacks of beer, so long as the retailer sells, gives or delivers no less than two containers of beer to a patron at one time. Class A and B off-premises retailers may allow a patron to choose between and purchase different individual containers of beer provided the retailer posts proper signage or take affirmative steps to notify patrons that

¹ This opinion presumes that the license holder is not otherwise restricted by a condition of licensure or the term of a settlement agreement. D.C. Official Code §§ 25-104(e), 25-446.

any individual containers of beer displayed in the establishment are being offered or exposed for sale to patrons for purposes of purchasing two or more containers of beer.²

This advisory opinion was issued in response to a request for an opinion filed by Edgy Crafts, LLC, t/a Craft Beer Cellar DC, (Edgy), which holds an off-premises retailer's license and is located in the Ward 6 moratorium zone that prohibits the sale of individual containers. Edgy is located at 301 H Street, N.E, Washington, D.C. 20002.

Edgy specifically requests that the Board advise as to whether it may (1) divide manufacturer's packages so that it can sell multipacks of beer and (2) whether it may sell individuals containers of beer, packaged as such by the manufacturer, so long as customers are required to buy two or more containers of beer. *Pet. for Adv. Op.*, at 1.

ANALYSIS

1. Title 25 of the D.C. Official Code (Title 25) recognizes three distinct categories of alcoholic beverages: beer, wine, and spirits. Beer is defined as “. . . a fermented beverage of any name or description manufactured from malt, wholly or in part, or from any substitute for malt.” D.C. Official Code §§ 25-110(10), 25-117(a). Wine is defined as “. . . an alcoholic beverage containing not more than 15% alcohol by volume obtained by the fermentation of the natural sugar content of fruits or other agricultural products containing sugar whether or not other ingredients are added.” D.C. Official Code §§ 25-110(56), 25-124(a). Finally, spirits are defined as “[a] beverage which contains alcohol mixed with water and other substances in solution, including brandy, rum, whisky, cordials, and gin; and . . . [a]n alcoholic beverage containing more than 15% alcohol. D.C. Official Code §§ 25-110(49), 25-125.

2. Under D.C. Official Code § 25-112(a), off-premises retail license holders are required “to sell alcoholic beverages from the place described and to deliver the same in the barrel, keg, sealed bottle, or other closed container in which the same was received by the licensee . . .” D.C. Official Code § 25-112(a).

3. The Ward 6 moratorium on the sale of singles creates the following restrictions in Ward 6:

(b) A licensee under an off-premises retailer's license, class A or B, located in Ward 6 shall not:

- (1) Divide a manufacturer's package of more than one container of beer, malt liquor, or ale, to sell an individual container of the package if the capacity of the individual container is 70 ounces or less; or
- (2) Sell, give, offer, expose for sale, or deliver an individual container of beer, malt liquor, or ale with a capacity of 70 ounces or less, as well as spirits (liquor) sold in half-pints or smaller volumes.

² The failure to notify the customer of the two container minimum could result in a violation of the moratorium on the sale of singles because individual containers could be “expose[d] for sale” without the notification. D.C. Official Code § 25-112(b)(2).

D.C. Official Code § 25-346(a)-(b)(1)-(2). It should be noted that it is possible for off-premises retailers to apply for an exception to this moratorium on a case-by-case basis. § 25-346(c)(1).

4. It should also be noted that the Ward 6 moratorium on the sale of singles contains similar language to the other moratoriums on the sale of singles. D.C. Official Code §§ 25-341.01-25-346. Consequently, the Board's interpretation of § 25-346 equally applies to the other moratorium zones.

5. In 2010, *New Hampshire Market*, the Board found a retailer liable for violating the moratorium zone regulations because he "admitt[ed] that he divided the manufacturer[']s] original packaging and re-packaged the individual containers in three-packs by binding them with clear plastic tape, and sold the newly created packages, which contained individual containers of beer under seventy ounces. *In re Bella Investments, Inc., t/a New Hampshire Market*, Case No. 09-CMP-00172, Board Order No. 2010-344, ¶¶ 17-18. (D.C.A.B.C.B. May 26, 2010). According to the Board,

The District of Columbia, under D.C. Code § 25-345(b)(1), forbids Class A and B licensees in Ward 2 from "Divid[ing] a manufacturer's package of more than one container of beer, malt liquor, or ale, to sell an individual container of the package if the capacity of the individual container is 70 ounces or less. D.C. Code § 25-345(b)(1). The Board interprets D.C. Code § 25-345(b) to mean that a licensee is prohibited from dividing a manufacturer's package and reselling the individual containers, regardless of how many containers they sell at one time or even if the licensee does not change the number of containers being sold.

Id. at ¶ 18.

6. Administrative agencies may change existing interpretations through adjudications so long as the Board provides a reasonable explanation for the departure. *Washington Hosp. Ctr. v. D.C. Dep't of Employment Servs.*, 743 A.2d 1208, 1211-12 (D.C. 1999); *Hensley v. D.C. Dep't of Employment Servs.*, 49 A.3d 1195, 1203 n.7 (D.C. 2012).

7. Since *New Hampshire Market* was issued in 2010, the Board has seen a number of changes in the alcohol market. First, the alcohol industry has adapted to the proliferation on bans against the sale of single containers by developing two-packs, three-packs, and four packs of alcoholic beverages. Second, the craft beer industry has developed a number of high-end and specialized products that are intended to be sold to the public in single containers.³ Consequently, the Board finds that changes in the market merit giving the interpretation expounded in *New Hampshire Market* a second and more comprehensive look.

8. The moratorium on the sale of singles seeks to curb public drinking by making individual small amounts of alcohol unavailable. How a product is packaged has no relation

³ The Board notes that this opinion applies to both mass produced commercial beers and craft beers, and anything in between.

to the issue of public drinking. Consequently, the Board finds that narrowing the rule to focus on the number of containers sold is just as likely to achieve the desired policy goal as the interpretation articulated in *New Hampshire Market*.

9. Just as important, a further review of D.C. Official Code § 25-346(a)(b)(1) reflects that this provision prohibits in relevant part an off-premises retail license holder from dividing a manufacturer's package to sell an individual container of the package and does not prohibit the off-premises retailer from dividing the manufacturer's package to sell two or more containers of beer or ale. To avoid confusion and compliance with Title 25, an off-premises retailer must also post proper signage or take other affirmative steps to notify patrons that any individual containers of beer displayed in the establishment are being offered or exposed for sale to patrons only for purposes of purchasing two or more containers of beer or ale.

10. Consequently, class A and B off-premises retail license holders located in a moratorium zone that prohibits the sale of containers of beer that are 70 ounces or less ("moratorium on the sale of singles") may divide manufacturers' packages and offer individually packaged containers so long as the retailer sells, gives, or delivers no less than two containers of beer to a patron at one time.

ORDER

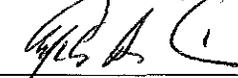
Accordingly, the Board, on this 29th day of June 2016, hereby **ORDERS** that the above represents the **ADVISORY OPINION** of the Board pursuant to 23 DCMR § 1902.

District of Columbia
Alcoholic Beverage Control Board

Donovan Anderson, Chairperson



Nick Alberti, Member



Mike Silverstein, Member



James Short, Member



Ruthanne Miller, Member

Pursuant to 23 DCMR § 1902.6, 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 file a petition with 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.