

**ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD**

NOTICE OF EMERGENCY AND PROPOSED RULEMAKING

The Alcoholic Beverage Control Board (Board), pursuant to the authority set forth in section 101(a) of the Moratorium Amendment Act of 1999, effective May 3, 2001 (D.C. Law 13-298; D.C. Official Code § 25-351(a))(2012 Repl.), as amended, hereby gives notice of its intent to amend section 308 (Glover Park Moratorium Zone) of chapter 3 (Limitations on Licenses) of title 23 (Alcoholic Beverages) of the District of Columbia Municipal Regulations.

The existing Glover Park Moratorium Zone (GPMZ) was set to expire on February 22, 2016. On December 4, 2015, Advisory Neighborhood Commission (ANC) 3B filed a Petition to Extend and Amend the Glover Park Liquor License Moratorium (Petition). The ANC Petition resulted from its October 2015 ANC meeting, in which the ANC intended to receive public input from stakeholders and constituents in order to formulate a recommendation for the Board. The Chairman of ANC 3B also met with the Glover Park Citizen's Association, and contacted licensed establishments to solicit their feedback on the proposed GPMZ extension. Summarily, the ANC requested that the Board renew the moratorium for a five (5) year period for Classes A, CN, CT, CX, DN, DT, and DX licenses, but to remove the restriction on Class CR licenses.

On February 3, 2016, the Board adopted emergency rules to extend the Glover Park Moratorium, five (5) to zero (0), for ninety (90) days; expiring on May 3, 2016. On March 30, 2016, the Board held a public hearing to receive comments from the community and the alcohol retail industry concerning the Glover Park Moratorium. Below is a summary of the comments that the Board received:

Advisory Neighborhood Commission (ANC) 3B

ANC 3B reiterated its support for renewing the moratorium for five (5) years for Class A, CN, CT, CT, DT, CX, and DX licenses because the neighborhood is still impacted by the adverse effects that these establishments have on the peace, order, and quiet of the community. ANC 3B Chairman, Jackie Blumenthal, testified to the excessive noise problems residents continue to complain about. This includes the noise patrons of taverns and nightclubs make as they leave the establishments. Furthermore, ANC 3B is still concerned about the parking problems the neighborhood endures as a result of these establishments. Many persons who fraternize at these on-premises license establishments park in the neighborhood; thereby, making it difficult for residences and their guests to find parking.

ANC 3B also requested that the Board maintain the restriction on Class A off-premises retail licenses (full-service liquor stores). ANC 3B submitted a resolution to the Board dated February 11, 2016, setting forth its opposition to lifting the restrictions on Class A licenses. Chairman Blumenthal testified to the community's concern with having three (3) Class A license retailers in the community; particularly one that may be located close to a nude dancing club.

Following the public hearing, ANC 3B submitted supplemental written testimony on April 8, 2016, reinforcing its position to maintain the restriction on Class A licenses. The supplemental testimony was filed in response to Stephen O'Brien's, Counsel for Rite Aid, testimony before the Board at the public hearing. In further support of its position, ANC 3B argued that limiting additional Class A licenses in Glover Park is supported by the current law. Specifically, ANC 3B purports that the Council legislatively set restrictions on Class A and B licenses in D.C. Official Code §§ 25-331 and 25-333 because it, too, wanted to prevent the dangers that might arise from an over-concentration of these licenses.

ANC 3B does not agree with opponents' argument that the Board need not or cannot take further action to restrict Class A licenses. Specifically, ANC 3B points to D.C. Official Code § 25-351(a)(1) which authorizes the Board to limit the number of any type of liquor licenses. Lastly, ANC 3B states that unlike other commercial areas in the District, it does not believe that D.C. Official Code § 25-333, alone, is enough to address the community's concerns regarding Class A licenses. For this reason, it requests that the Board continue the moratorium on Class A licenses.

Glover Park Citizens' Association (GPCA)

GPCA testified in support of ANC 3B's petition to renew the moratorium for five (5) years for CT, DT, CN, DN, and Class A licenses, but not for CR licenses. GPCA testified that it continues to have concerns about the adverse impact on peace, order, and quiet that licensed establishments have on the community. Similar to the ANC, GPCA is opposed to removing the moratorium on Class A licenses. Specifically, GPCA members are concerned about (1) the over-saturation of liquor licenses in a small geographic area; (2) the opponents' exploitation of a loophole in the law which prohibits two (2) Class B licenses from being within two hundred feet (200 ft.) of another; and (3) having a full-service grocery store located near taverns and nightclubs.

Residents of the Massachusetts Avenue Heights Neighborhood (MAHN)

MAHN residents submitted written comments and testified in support of renewing the Glover Park Moratorium. Specifically, they asked the Board to renew the moratorium and maintain the ban on new tavern and nightclub licenses. MAHN residents described the problems they continue to have with loud music and patrons late at night and in the early morning hours, as well as problems they encounter with parking. For these reasons, they asked the Board to renew the moratorium and maintain the cap on taverns and nightclubs.

Stephen O'Brien, Counsel for Rite Aid Pharmacy

Mr. O'Brien testified in general support of the Board's renewing the moratorium in Glover Park; however, he requested that the Board lift the prohibition on additional Class A licenses. He argued that there was no logical reason for the Board to maintain the restrictions on Class A licenses. According to Mr. O'Brien, the Board will still retain ultimate control and discretion over the issuance of additional Class A licenses. As such, the Board can provide protections to address the concerns raised by the ANC and GPCA. Additionally, Mr. O'Brien advised the Board that District's laws and regulations, which the Board enforces, has safeguards in place to prevent the over-saturation of Class A licenses within a geographic area.

D.C. Nightlife Hospitality Association (DCNHA)

DCNHA submitted written testimony to the Board in support of terminating the Glover Park Moratorium. DCNHA argues that the need for a Board-imposed moratorium on any liquor licenses is a relic of the past when the District was unable to adequately address the ill effects associated with liquor establishments (*e.g.*, noise, litter, vulgar behavior, and crime). DCNHA does not believe these concerns continue to exist, or if they do, they can be adequately addressed with existing alcoholic beverage laws and regulations.

Additionally, DCNHA suggests that eliminating the moratorium would improve the Glover Park commercial district's public image and signal support of a vibrant streetscape and dynamic retail sector. It is DCNHA's position that moratoriums hinder market innovation by not allowing for the emergence or evolution toward hybrid hospitality models which integrate dining, drinking, and entertainment. Lastly, DCNHA suggests that the Board is fully capable of reviewing and approving license applications and that it should be allowed to review such licenses on a case-by-case basis as opposed to employing blanket restrictions on liquor licenses.

Decision of the Alcoholic Beverage Control Board

The Board has duly considered all of the comments it received during the comment period and at the public hearing. The Board supports the ANC's recommendation to renew the Glover Park Moratorium for a five (5)-year period. The Board also supports the ANC's request to retain the moratorium for Class CT, DT, CN, DN, CX, and DX licenses, and to remove the moratorium on CR licenses.

The Board, however, is not persuaded to retain the moratorium on Class A retailer licenses. The Board finds that there is no justifiable reason to prohibit Class A licenses within the Glover Park neighborhood if they are compliant with District laws and regulations. The Board has numerous enforcement tools to ensure compliance, and will take steps to restrict privileges such as hours of sales, if necessary. Additionally, many of the concerns raised by the proponents of the moratorium, such as excessive noise, are attributable to on-premises establishments. Patrons of off-premises establishments such as a Class A retailer would not necessarily be loud or disruptive to the neighborhood. Lastly, the Board notes that it retains control to determine on a case by case basis whether a Class A license is appropriate for this neighborhood. For these reasons, the Board decided to eliminate the restriction on Class A licenses.

In reaching its decision, the Board has given great weight to the written recommendations of ANC 3B as required by Section 13(d)(3) of the Advisory Neighborhood Commissions Act of 1975, effective October 10, 1975 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)(3) (200612 Repl. & 20142 Supp.), and D.C. Official Code § 25-609 (20012 Repl. & 2014 Supp. ed.)). After evaluating all of the testimony and comments, the Board finds that ANC 3B's proposal, as modified above, is appropriate. Specifically, the Board agrees that maintaining the current cap on the on-premises licenses with the exception of restaurants and hotels is warranted to ensure that problems in the neighborhood are not exacerbated.

In reviewing a moratorium request, the Board must “consider the extent to which the testimony and comments show that the requested moratorium is appropriate under at least two (2) of the appropriateness standards set forth in subchapter II of this chapter.” D.C. Official Code § 25-354(d). After considering the comments it received and the testimony provided at the public hearing, the Board determines that it is in the public’s interest to renew the moratorium with modifications. The Board based its decision upon the appropriateness standards set forth in D.C. Official Code § 25-313(b)(2) and (3).

In regard to D.C. Official Code § 25-313(b)(2) (peace, order, and quiet), the testimony presented at the hearing as well as the proposal submitted by ANC 3B revealed that there continues to be problems in the Glover Park neighborhood with regard to peace, order, and quiet where ABC-licensed establishments are concerned. ANC 3B, as well as GPAC and MAHN testified to the continued adverse impact that nightclubs and taverns are having in the Glover Park neighborhood, including loud music and noise stemming from patrons departing from on-premises establishments and returning to their cars. For these reasons, the Board concludes that continuation of the moratorium, with modifications, is appropriate for the promotion of peace, order, and quiet in the Glover Park neighborhood.

Additionally, the Board concludes continuation of the moratorium, with modifications, is appropriate in light of the parking needs of residents in Glover Park, and vehicular and pedestrian safety. *See* D.C. Official Code § 25-313(b)(3). The majority of ABC-licensed establishments are located along Wisconsin Avenue and 37th Street. As ANC 3B noted its testimony and resolution, there is not an accessible Metro station near Wisconsin Avenue and 37th Street. As a result, many persons seeking to patronize at the licensed establishments drive. There is limited metered parking and the parking garages, though present, are offset from where the ABC-licensed establishments are located. As a result, many persons seeking to patronize at the licensed establishments tend to park along residential streets; posing parking problems for residents and their guests, and causing disruptions to residents who are disturbed at night by persons leaving the nightclubs and taverns.

In addition, to the residential parking concerns, there are concerns in respect to vehicular and pedestrian safety. There was testimony and comments concerning the amount of traffic generated by ABC-licensed establishments along Wisconsin Avenue and 37th Street. Persons driving along this thoroughfare tend to exceed the posted speed limit; thereby, increasing the risk of automobile accidents. Persons frequenting the ABC-licensed establishments oftentimes walk from one establishment to the next. This poses additional safety concerns, particularly at night, when visibility is limited. The increased risk of a person being struck by a car along this thoroughfare is a serious concern. For all of these reasons, the Board concludes that continuing the moratorium, with modifications, is essential to addressing the Glover Park neighborhood’s parking needs and ensuring vehicular and pedestrian safety.

The Board finds that a modified version of the ANC’s proposal constitutes a reasonable, measured, and appropriate solution for the Glover Park neighborhood. While it is sympathetic to the community’s concerns about the lifting of the ban on Class A licenses, the Board would

encourage the neighborhood to participate fully in the protest process when applications for Class A licenses are filed. In sum, the Board concluded that maintaining a modified moratorium is in the public's interest as determined by the appropriateness standards set forth in D.C. Official Code §§ 25-313 (b)(2) and (b)(3).

The Board also finds that emergency rulemaking action is warranted. In accordance with section 6(c) of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1206; D.C. Official Code § 2-505(c)), is necessary for the immediate preservation of health, safety, and welfare of District of Columbia residents. Emergency action is necessary for (1) ensuring that the limitations placed on the issuance of new retailer's licenses are maintained; and (2) keeping the existing GPMZ in place until the Board can adopt final rules regarding its renewal.

The Board gives notice of intent to take final rulemaking action in not less than thirty (30) days after publication of this Notice in the *D.C. Register*. In accordance with D.C. Official Code § 25-211(b), these emergency and proposed rules will be transmitted to the Council for the District of Columbia (Council) for a ninety (90)-day period of review. The Board will not adopt the rules as final prior to the expiration of the ninety (90)-day review period, unless approved by Council resolution.

These emergency rules were adopted by the Board on April 20, 2016, by a five (5) to zero (0) vote and became effective on that date. The rules will remain in effect for one hundred twenty (120) days, expiring on August 18, 2016, unless earlier superseded by an emergency rulemaking or final rulemaking. This rulemaking shall supersede the emergency rules adopted by the Board on February 3, 2016.

Section 308, GLOVER PARK MORATORIUM ZONE, of Chapter 3, LIMITATIONS ON LICENSES, of Title 23, ALCOHOLIC BEVERAGES, of the DCMR, reads as follows:

308 GLOVER PARK MORATORIUM ZONE

308.1 No new retailer's license class CT, CN, CX, DN, DT, or DX shall be issued for a period of five (5) years from the effective date of this section in the area that extends approximately one thousand two hundred feet (1,200 ft.) in all directions from 2436 Wisconsin Avenue, N.W., Washington, D.C. 20007.

308.2 The Glover Park Moratorium Zone is more specifically described as beginning at Tunlaw Road and Fulton Street; East on Fulton Street to Wisconsin Avenue; South on Wisconsin Avenue to Edmunds Street; East on Edmunds Street to Massachusetts Avenue; Southeast on Massachusetts Avenue to Observatory Circle; Southwest around Observatory Circle to Calvert Street; West on Calvert Street to Wisconsin Avenue; Southeast on both sides of Wisconsin Avenue to 35th Street; South on 35th Street to Whitehaven Parkway; West on Whitehaven Parkway to 37th Street; North on 37th Street to U Street; West on U Street to a

point of intersection of Huidekoper Place and W Street; West on W Street to 39th Street; North on 39th Street to Davis Place; East on Davis Place to Tunlaw Road; North and Northwest on Tunlaw Road to Fulton Street.

- 308.3 All hotels, whether present or future, shall be exempt from the Glover Park Moratorium Zone.
- 308.4 Nothing in this section shall prohibit the Board from approving the transfer of ownership of a retailer's license class CT, CN, CR, CX, DN, DT, or DX within the Glover Park Moratorium Zone that was in effect or for which an application was pending prior to the effective date of this section, subject to the requirements of Title 25 of the D.C. Official Code and this title.
- 308.5 Nothing in this section shall prohibit the Board from approving the transfer of a license from a location within the Glover Park Moratorium Zone to a new location within the Glover Park Moratorium Zone.
- 308.6 A license holder outside the Glover Park Moratorium Zone shall not be permitted to transfer its license to a location within the Glover Park Moratorium Zone.
- 308.7 Nothing in this section shall prohibit a valid protest of any transfer or change of a license class.
- 308.8 The moratorium shall have a prospective effect and shall not apply to any license granted prior to the effective date of this section or to any application for licensure pending on the effective date of this section.
- 308.9 This section shall expire five (5) years after the date of publication of the notice of final rulemaking.

Copies of the proposed emergency and proposed rulemaking can be obtained by contacting Martha Jenkins, General Counsel, Alcoholic Beverage Regulation Administration, 2000 14th Street, N.W., 4th Floor, Washington, D.C. 20009. All persons desiring to comment on the emergency and proposed rulemaking must submit their written comments, not later than thirty (30) days after the date of the publication of this notice in the *D.C. Register*, to the above address or via email to martha.jenkins@dc.gov.