

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 23, 2008

SUBJECT: Legal Opinion on Inaugural Hours and Entertainment Endorsements
(AL-08-868 E) (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, entitled 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 for 24 hours, but would require alcohol sales to cease at 4 a.m. The revised version of the bill would condition the extended operation and alcohol sales hours on the payment of fees (based upon the establishment's license class) and the provision of a written notification and public safety plan to the Board and the Metropolitan Police Department no later than January 7, 2009. In addition, the revised bill would authorize the Chief of MPD to suspend a licensee's privilege of extended hours of operation if the Chief believes that continued extended hours of operation

presents an imminent danger to the health, safety, or welfare of the public.¹ 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 proposed changes in the law, the Board would like advice from this Office concerning whether, should the Bill become law, the Board may, during the effective dates of the Bill, continue to enforce the existing hours restrictions² contained in a licensee's entertainment endorsement application (hereafter, Entertainment Endorsement).³

QUESTION

May the Board continue to enforce the existing hours restrictions contained in an Entertainment Endorsement, during the effective dates of the Bill?

RESPONSE

Yes, the Board may continue to enforce the existing hours restrictions contained in an Entertainment Endorsement, 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 an Entertainment Endorsement is a statement of the terms and conditions, submitted to the Board by a licensee, that specify certain things (such as time and days of the week) during which a licensee will operate, including the hours during which entertainment will be offered, once it is licensed. You further explained that the Entertainment Endorsement is a signed document between the Board and the licensee but that the Board does not consider Entertainment Endorsements to be contracts because there is no negotiation between the

¹ I am informed that a friendly amendment was made from the dais by Councilmember Catania that would change this language to state that MPD may suspend a licensee's extended hours privilege in the bill, if a licensee's operation presents a demonstrated danger to the health, safety or welfare of the public.

² The Board also asked for guidance on whether it may continue to enforce Board-approved voluntary agreements (Agreements) during the effective dates of the Bill. This Office responded to that question in a December 18, 2008 memorandum to you.

³ 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.

Board and the licensee regarding the Entertainment Endorsements. You provided two sample Entertainment Endorsements for our information. The Applications provided are for the: (1) Park Hyatt Washington Hotel, and (2) Washington Plaza Hotel.

You also explained, during the telephone conversation, that Entertainment Endorsements are different from Agreements in that Entertainment Endorsements have a uniform format and are only between the Board and the licensee. The Board does not consider Entertainment Endorsements to be contracts.

You stated that there are currently 316 establishments with Entertainment Endorsements in the District. Specifically, there are 180 restaurants, 88 taverns, 38 hotels and 10 multipurpose facilities that have entertainment endorsements. The Ward breakdown where these entertainment endorsements are located is as follows: Ward 1 – 71, Ward 2 – 146, Ward 3 – 19, Ward 4 – 18, Ward 5 – 8, Ward 6 - 53, Ward 7 – 1, and Ward 8 – 0.

You have informed me that there is no way to know, at this time, how many establishments with Entertainment Endorsements 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 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.

ANALYSIS

In your memorandum you explain that a licensee is required to list the hours that entertainment will occur at its establishment on its Entertainment Endorsement. As a possible interpretation of existing law, you state that since the Council did not specifically address Entertainment Endorsements in the Bill, as it could have, a licensee is still required to follow the hours listed on its Entertainment Endorsement. You further state that a public policy argument can be made that allowing for later entertainment hours could negatively impact District residents due to an increased likelihood of late night noise, rowdy behavior, and other peace and order concerns.

A second possible interpretation, set forth in your memorandum, would apply a broader interpretation to the Bill, providing that since a licensee is not required to secure Board approval for extended hours during the effective dates of the Bill, there is an implication that a licensee that possesses an entertainment endorsement in its Application may continue to provide the entertainment during all the hours that the licensee is open.

We have reviewed the exemplar Park Hyatt and Washington Plaza Entertainment Endorsements that you provided to this Office. The Entertainment Endorsements include such items as the: (1) license number; (2) fees paid; (3) license period; (4) the Board approval date; (5) name, address, and telephone number of the Applicant; (6) hours of

operation, including the hours for the sale of alcoholic beverages, or entertainment, if applicable; (7) nature of the entertainment, if applicable; (8) statement of any previous or pending adjudicatory actions concerning the licensee; and (9) certification that the licensee will abide by applicable District laws and regulations.

As stated above, the Board does not consider Entertainment Endorsements to be contracts, because they are not the subject of negotiations between the licensee, the community, and the Board. At the same time, a licensee is required to comply with its license, including the Entertainment Endorsement as it is incorporated into the license, and with all relevant provisions of the Board's laws and regulations not altered by the Bill. It is clear that the Entertainment Endorsement, as part of the establishment's license, represents those basic operational terms and conditions regarding entertainment upon which the Board and the licensee have agreed. Also, while the Bill allows licensees to operate 24 hours a day during January 17-21, 2009, it fails to address Entertainment Endorsements, at all, as it could have, strongly suggesting that – especially in light of the potential that entertainment would exacerbate late night noise, rowdy behavior, and other peace and order concerns – the Council did not intend to change entertainment hours.

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), the Council did not specifically exempt the requirements imposed on licensees in their Entertainment Endorsements and no exception should be read into the Bill.⁴ Thus, it follows that the limitations on hours for entertainment in licensees' existing Entertainment Endorsements remain valid and enforceable under 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

⁴ See, for example, *West Virginia University Hospitals, Inc. v. Casey, et al.*, 499 U.S. 83, 101 (1991), quoting *Iselin v. United States*, 270 U.S. 245, 250-251 (1926):

The [statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.