

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

In the Matter of:)
)
Off-Premises Sale Privileges for) Order No.: 2015-272
Pub Endorsement Holders)
)
Advisory Opinion)
)
)

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Mike Silverstein, Member
Hector Rodriguez, Member
James Short, Member

ALSO PRESENT: Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

**ADVISORY OPINION ON THE OFF-PREMISES SALE PRIVILEGES OF
BREW PUB, DISTILLERY PUB, AND WINE PUB PERMIT HOLDERS**

INTRODUCTION

A number of applicants and license holders have recently asked whether the holders of brew pub, distillery pub, and wine pub permits may only sell products they have produced themselves at their licensed facility in the District for off-premises consumption.

The Alcoholic Beverage Control Board (Board) provides the following guidance:

- A. A brew pub permit holder may sell any brand of beer in a growler for off-premises consumption, whether produced by the license holder or not, in accordance with District of Columbia (D.C.) Official Code § 25-117(a-1);
- B. A distillery pub permit holder may sell any brand of spirit in a closed container for off-premises consumption, whether produced by the license holder or not, in accordance with D.C. Official Code § 25-125(d); and

- C. A wine pub permit holder may sell any brand of wine in a closed container for off-premises consumption, whether produced by the license holder or not, pursuant to D.C. Official Code § 25-124(d). It should be noted that a wine pub permit holder may also sell any brand of cider or mead in a closed container, because these products are considered wine under D.C. Official Code § 25-101(56), so long as the alcohol content of the product does not exceed fifteen percent alcohol by volume.

The basis for the Board's advisory opinion is provided below.

LEGAL BACKGROUND

1. The alcoholic beverage industry is divided into three categories: manufacturers, wholesalers, and retailers. D.C. Official Code §§ 25-110, 25-111, 25-112, 25-113. The retail category is further divided into two types of retailers: off-premises retailers and on-premises retailers. D.C. Official Code §§ 25-112, 25-113. The distinction between the tiers and types of retailers is important because under the conflict of interest provision an off-premises retailer's license holder cannot simultaneously hold an on-premises retailer's license under most circumstances. D.C. Official Code § 25-303(a)(2)-(3).
2. The law generally authorizes off-premises retailers “. . . to sell alcoholic beverages . . . in barrel[s], keg[s], sealed bottle[s], or other closed container[s].” D.C. Official Code § 25-112(a). In most cases, off-premises retailers are prohibited from allowing the consumption of alcoholic beverages on their premises other than for sampling purposes. D.C. Official Code § 25-112(b), 25-118(a), (c).
3. In contrast, the law generally authorizes on-premises retailers “. . . to sell spirits, wine, and beer at the licensed establishment for consumption only” on the premises. D.C. Official Code § 25-113(2)(A)(i). In most cases, on-premises retailers cannot sell closed containers of alcoholic beverages for off-premises consumption by the consumer. D.C. Official Code § 25-113(a)(3).
4. On-premises licenses with brew pub, distillery pub, and wine pub permits are an exception to the general rule prohibiting retailers from manufacturing alcohol and engaging in both on-premises and off-premises sales. D.C. Official Code §§ 25-117(a), 25-124(a), 25-125(a), 25-303. On-premises retailers authorized to obtain brew pub, distillery pub, and wine pub permits includes hotels, multipurpose facilities, nightclubs, restaurants, and taverns. §§ 25-117(a), 25-124(a), 25-125(a).
5. Title 25 of the D.C. Official Code (Title 25) recognizes three distinct categories of alcoholic beverages: beer, wine, and spirits. Beer, which can be produced by brew pubs, 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, which can be produced by wine pubs, 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, which can be produced by distillery pubs, is 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.

DISCUSSION

6. In this case, the Board’s analysis of the brew pub, distillery pub, and wine pub statutes is mandated by their plain language as adopted by the Council of the District of Columbia (Council).

7. First, the brew pub statute, in § 25-117(a-1), states that “[a] brew pub permit shall authorize the licensee to sell beer in growlers.” D.C. Official Code § 25-117(a-1). A growler is defined by § 25-101(24B) as “. . . a reusable container that is capable of holding up to 64 fluid ounces of beer and is designed to be filled and sealed on premises for consumption off premises.” D.C. Official Code § 25-101(24B). Second, the wine pub statute, in § 25-124(d), states that “[t]he holder of a wine pub permit may also sell wine to patrons in sealed bottles or other closed containers for off-premises consumption.” § 25-124(d). Third, the distillery pub statute, in § 25-125(d), states “[t]he holder of a distillery pub permit may also sell distilled spirits to patrons in sealed bottles or other closed containers for off-premises consumption” § 25-125(d).

8. The act of statutory interpretation by an administrative agency is governed by the *Chevron* test. *Pannell-Pringle v. D.C. Dep’t of Employment Servs.*, 806 A.2d 209, 211 (D.C. 2002) *citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The threshold question under *Chevron* is whether the statute is clear. *Id. citing Columbia Realty Venture v. District of Columbia Rental Housing Comm’n*, 590 A.2d 1043, 1046 (D.C.1991). If so, then the plain language of the statute governs its interpretation. *Id.* If not, the agency must simply provide a “reasonable” interpretation of the ambiguous statute to have its interpretation upheld. *Id. citing Chevron*, 467 U.S. at 842-43.

9. Plain language analysis requires the Board to interpret the “[t]he words of [a] statute . . . according to their ordinary sense and with the meaning commonly attributed to them.” *Davis v. United States*, 397 A.2d 951, 956 (D.C. 1979). In this case, the Board finds that the words contained in §§ 25-117(a-1), 25-124(d), and 25-125(d) are clear on their face: there is no language in § 25-117(a-1) restricting the type of beer that a brew pub may use to fill a growler, there is no language in § 25-125(d) restricting the type of spirit that a distillery pub may sell in a closed container, and there is no language in § 25-124(d) restricting the type of wine that a wine pub may sell in a closed container.

10. It should also be noted that a comparison of §§ 25-117, 25-124, and 25-125 with other statutes in Title 25 of the D.C. Official Code further support the Board’s analysis. It has been noted that a legislature’s “. . . failure to employ terms of art or other language” may indicate legislative intent. Yule Kim, “Statutory Interpretation: General

Principles and Recent Trends” Congressional Research Service, CRS-15 (Aug. 31, 2008) (explaining the “Congress Knows How to Say” canon of statutory construction); *Carl v. Children’s Hosp.*, 702 A.2d 159, 171 (D.C. 1997) (using the “knows how to say” canon); *Barrera v. United States*, 599 A.2d 1119, 1132 n. 14 (D.C. 1991) (using the “knows how to say” canon).

11. The court used this principle of statutory construction in the *1618* case. *1618 Twenty-First St. Tenants’ Ass’n, Inc. v. The Phillips Collection*, 829 A.2d 201, 206 (D.C. 2003). There, the court stated that “if the Council had wanted the word ‘bona fide’ to have a special meaning [in the statute] . . . it was well within its ability to do so, as it had done in other places in the Code.” *Id.* Furthermore, when the use of ‘bona fide’ in the statute at issue was compared with other uses of the term elsewhere in the law, it demonstrated to the court “. . . that the Council knew how to give ‘bona fide’ a special meaning when it deemed necessary.” *Id.*

12. As in *1618*, in the case of Title 25—the statutory code governing the sale and distribution of alcoholic beverages—the Council knows how write a law that limits the sales of alcoholic beverages to only products manufactured by the licensee. For example, in § 25-110, distilleries and wineries holding manufacturer class licenses may only “[s]ell the products manufactured under the license . . .” D.C. Official Code § 25-110(a)(1)(A)(ii). Likewise, breweries holding manufacturer class licenses may only “. . . [s]ell the beer manufactured under the license . . .” D.C. Official Code § 25-110(a)(2)(B). Finally, the newly enacted on-site sales and consumption permit found in § 25-126 also contains similar language limiting manufacturers to selling only products produced by the manufacturer. D.C. Official Code § 25-126(a), (b); *Omnibus Alcoholic Beverage Regulation Amendment Act of 2014*, 2014 District of Columbia Laws 20-270, § 2(c)(1)-(2) (Act 20-609). As a result, if the Council wanted to restrict the off-premises sale of closed containers in brew pubs, distillery pubs, and wine pubs to only products manufactured by the licensee, it knew how to do so—yet chose not to.

13. Consequently, there is no ambiguity that requires Board interpretation. Instead, the plain language of §§ 25-117(a), 25-124(d), and 25-125(d) provides clear guidance:

- A. A brew pub permit holder may sell any brand of beer in a growler for off-premise consumption, whether produced by the license holder or not;
- B. A distillery pub permit holder may sell any brand of spirit in a closed container for off-premise consumption, whether produced by the license holder or not; and
- C. A wine pub permit holder may sell any brand of wine in a closed container for off-premises consumption, whether produced by the license holder or not. It should be noted that a wine pub permit holder may also sell any brand of cider or mead in a closed container, because these products are considered wine, so long as the alcohol content of the product does not exceed fifteen percent alcohol by volume.

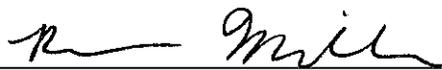
§§ 25-117(a-1), 25-124(d), 25-125(d).

14. The Board further reminds the holders of brew pub, distillery pub, and wine pub permits that any alcoholic beverages sold for off-premises consumption that are not manufactured by the licensee at its licensed facility must either be purchased from a licensed District wholesaler or obtained through the importation permit process. D.C. Official Code §§ 25-111, 25-119.

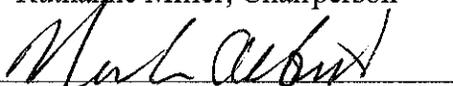
ORDER

Accordingly, the Board, on this 20th day of May 2015, hereby **ORDERS** that the above represents the **ADVISORY OPINION** of the Board pursuant to 23 DCMR § 1902.

District of Columbia
Alcoholic Beverage Control Board



Ruthanne Miller, Chairperson



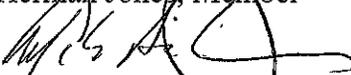
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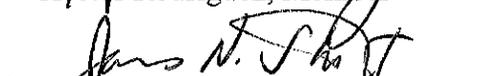
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Pursuant to D.C. Code § 1902.6 (West Supp. 2015), if the requestor disagrees with the Board's advisory opinion in any respect, he or she may, within twenty (20) calendar days after issuance of the opinion, petition the Board in writing to reconsider 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.