THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
An Interpretation of D.C. Official Code § 25-333	License No.:	N/A
	Case No.:	N/A
	Order No.:	2019-446
Advisory Opinion		

BEFORE: Donovan Anderson, Chairperson
Mike Silverstein, Member
James Short, Member
Bobby Cato, Member
Rema Wahabzadah, Member

ALSO PRESENT: Andrew Kline, Counsel, on behalf of Nolan Rodman, Petitioner.

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ADVISORY OPINION

On May 15, 2019, the Alcoholic Beverage Control Board (Board) held a fact finding hearing at the request of Nolan Rodman. Mr. Rodman seeks to transfer a Retailer's Class A License to 5100 Wisconsin Avenue, N.W., a location already occupied by Rodman's Discount Drugs, Inc. t/a Rodman's Discount Drugs, which holds a Retailer Class B License, designated ABRA License No. ABRA-000394.

Nevertheless, the question before the Board is whether the transfer of the Retailer's Class A License may be permitted under D.C. Official Code § 25-333(a) and 23 DCMR § 101.2 due to the location's proximity to a currently operating liquor store that holds a Retailer's Class A liquor license. At the hearing, Mr. Rodman requested that the Board clarify its interpretation of the rules regarding the measurement of distances as it pertains to his business plans based on a March 23, 2011, decision from the Board that the issuance of a Retailer's Class A License at 5100 Wisconsin Avenue, N.W., does not comply with § 25-333(a).[1]

[1] The following order was written without the benefit of the transcript from the fact finding hearing; however, as the matter is one of legal interpretation, there is no reason to delay the issuance of an advisory in this matter.

Additionally, Advisory Neighborhood Commission (ANC) 3E indicated in its resolution submitted to the Board that it supported Mr. Rodman's proposal and did not believe the proposed location violated any distance rules. The ANC further noted that even if the Board found otherwise, the Rodman Retailer's Class A License should not be subject to the 400-foot prohibition in the event that the Board is permitted to grant relief from this prohibition.

The Board advises that the measurement to determine whether a proposed off-premise retailer satisfies § 25-333 and 23 DCMR § 101.2 shall be taken from the nearest lot line belonging to the address of the building where the retailer seeks to be located. In this case, based upon the building address of the proposed location, 5100 Wisconsin Avenue, N.W, the appropriate place to measure the distance from the currently operating liquor store is the lot line bordering Crunch Fitness located at 5100 Wisconsin Avenue, N.W.

The Board notes that if the address of the proposed location is changed, then the lot line associated with that address from which the measurement is taken may change as well.

FINDINGS OF FACT

The Board's advisory is based on the following findings of fact:

1. Nolan Rodman seeks to transfer his Retailer's Class A License, currently held by the agency in Safekeeping at 914 Rhode Island Avenue, N.E., to 5100 Wisconsin Avenue, N.W. ABRA's records show that a Retailer's Class B License is held by Discount Drug Wisconsin, Inc., t/a Rodman's Discount Drugs, at 5100 Wisconsin Avenue, N.W. Mr. Rodman indicated that he planned to move his Retailer's Class A License to the location currently occupied by Rodman's Discount Drugs. He has not filed a Transfer to a New Location Application at this time given the potential proximity of the property to Paul's Discount Wine and Liquors, another liquor store that holds a Retailer's Class A License.

2. The Board notes that in determining whether establishments comply with any distance requirement provided by Title 25 of the D.C. Official Code, the agency relies on the Geographic Information System (GIS), a mapping tool maintained by the District of Columbia Office of the Chief Technology Officer. The Board notes that the GIS will show the lot lines of each individual address in the District of Columbia. As a result, the Board frequently relies on the GIS to determine whether an applicant satisfies a distance or boundary requirement.

3. The GIS measurement shows that Rodman's and Paul's are located within 400 feet of each other. The current store operated by Rodman's is part of a larger building complex that all share the address of 5100 Wisconsin Avenue, N.W. At the address, Rodman's sits on the corner of Garrison Street, N.W. and Wisconsin Avenue, N.W. Next to Rodman's, to the north, on Wisconsin Avenue, N.W., is a large office building, and, further north, next to the large building, is a Crunch Fitness that also faces Wisconsin Avenue, N.W. The zoning map shows that the three buildings sit on a square, suffix, and lot designated 1656 0009.[2] The lines of the square

[2] See the zoning map at http://maps.dcoz.dc.gov/zr16/ (Search 5100 Wisconsin Avenue, N.W.).

incorporate Rodman's, the large building, and Crunch Fitness. Crunch Fitness appears to occupy the building closest to Paul's.[3]

4. In addition to the measurements obtained by the utilization of the GIS, the Board directed Supervisory Investigator (SI) Jason Peru to conduct a manual measurement utilizing a measuring wheel between Rodman's Discount Drugs located at 5100 Wisconsin Avenue, N.W., and Paul's operating at 5205 Wisconsin Avenue, N.W.

5. On April 24, 2019, SI Peru observed that Paul's was open and operating at 5205 Wisconsin Avenue, N.W. SI Peru conducted two different methods of measurements. He first measured from property line to property line and determined that the distance between the two licensed establishments was 339 feet. He measured this distance twice with similar results.

6. At the request of Mr. Rodman, SI Peru then conducted a separate door-to-door measurement showing that Rodman's was 543 feet from Paul's. The Board notes that this measurement did not consider the property lines of the two establishments.

CONCLUSIONS OF LAW

7. Regarding the Resolution submitted by ANC 3E, the Board notes that D.C. Official Code § 1-309.10(h)(1) permits an ANC to initiate its own proposal for District government action. In this instance, ANC 3E notified ABRA of its May 9, 2019, public vote and resolution to support Rodman's application to be permitted to use its Retailer's Class A License at its Wisconsin Avenue store. This resolution was acknowledged by the agency on May 10, 2019. The Board appreciates ANC 3E's well written and detailed resolution as well as its position regarding this issue. Notwithstanding ANC 3E's resolution, the Board does not find any statutory authority to grant a waiver of the 400 foot rule in this case. Specifically, the Board does not find that any of the statutory exceptions to the 400 foot prohibition contained in D.C. Code § 25-333(c)-(e) to be applicable.

8. Regarding the measurement issue, the Board interprets D.C. Official Code § 25-333(a) and 23 DCMR § 101.2, as requiring the measurement to be taken from the nearest point of the lot belonging to the address of the Applicant's building that is the shortest distance from any off-premise retailer that may be located within 400 feet of the proposed location. Under § 25-333(a), "No new off-premises retailers license, class A, shall be issued for an establishment which is located within 400 feet from another establishment operating under an off-premises retailer's license, class A." D.C. Code § 25-333(a). Section 101.2 further indicates that "In establishing the distance between one or more places, (such as the actual distance of one licensed establishment from another . . .), the distance shall be measured linearly by the Board and shall be the shortest distance between the property lines of the places."[4] 23 DCMR § 101.2 (West Supp. 2019).

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[3] ABRA staff will make their own determination as to the exact point where the measurement should be taken if and when a complete application is filed in accordance with ABRA's standard procedure for processing applications.

[4] Section 101.1 is not relevant to this determination because it only describes measuring a "geographic boundary," and the present issue does not relate to a boundary. 23 DCMR § 101.1 (West Supp. 2019).

9. In the vast majority of the Board's cases, determining whether a property satisfies the distance requirement is a simple matter. For example, it is fairly obvious to identify where the property lines are of a small corner store that sits by itself on a small lot tucked between two separately owned houses. Indeed, in such a case, the property lines, lot lines, and building lines all inhabit the same locations. In other cases, a location may be so close to another Class A or B retailer that it will never satisfy the distance requirement no matter whether the measurement starts at the lot line or some other part of the property. In still other cases, some exception to the distance requirement would apply, which makes the distance requirement irrelevant. *See e.g.*, D.C. Code §§ 25-314(b)(1)-(9), 25-333(c)-(e). It should also be noted that over a long period of time, the Board has not issued many new Retailer's Class A and B licenses due to statutory moratoriums and caps on the issuance of new off-premises licenses. D.C. Code §§ 25-331-25-332. Finally, the question raised by Mr. Rodman is a rarely addressed legal issue under § 25-333 and 23 DCMR § 101.2 because there are not many shopping centers or large complexes in the largely urban District of Columbia. *Transcript (Tr.)*, Weygandt Wines, February 4, 2019 at 24. As a result, the Board's decisions contain few formal interpretations of § 25-333 and 23 DCMR § 101.2.

10. In considering the question raised by Mr. Rodman, the Board notes that in interpreting § 25-333(a) and 23 DCMR § 101.2 in *Brentwood Liquors*, the court noted that under a prior version of the regulation, the Board relied on a measurement of the "the shortest distance, not the best path . . . ." *Brentwood Liquors, Inc. v. Dist. Of Columbia Alcoholic Beverage Control Bd.*, 661 A.2d 652, 657 (D.C. 1995). This means, in interpreting the distance between two places, the Board will not consider outside factors such as "the danger of crossing a heavily traveled street . . . ." or the potential mode of transportation of customers. *Id.* at 657-58.

11. The Board's records further show that at a fact finding hearing on February 4, 2009, the Board discussed whether Weygandt Wines at 3519 Connecticut Avenue, N.W., applying for a Retailer's Class A License, satisfied the distance requirement between two Retailer's Class A stores. *Tr.*, at 4. The square and lot of Weygandt's proposed location held the addresses of 3501 to 3527 Connecticut Avenue, N.W., but Weygandt had its own address. *Id.* at 5. Weygandt would operate as a store within the retail shopping center, which also had a large parking lot. *Id.* at 5. The parking area would be operated as a private parking lot that charged an hourly rate. *Id.* at 6. Weygandt would have the ability to give customers free parking or discount parking, but a separate company operated the parking lot, which was owned by the real estate owner. *Id.* at 6, 18, 21. South of Weygandt's proposed location, a Retailer's Class A License, Cleveland Park Liquors, operated at 3421 Connecticut Avenue, N.W. *Id.* at 6.

12. Weygandt's counsel asked the Board to determine that Weygandt was not within 400 feet of Cleveland Park Liquors under 23 DCMR § 101.2. *Id.* at 7. Weygandt noted that it was only one store within a larger retail shopping center. *Id.* at 7. Further, it had documentation, including a Certificate of Occupancy, which showed that it was only occupying 3519 Connecticut Avenue, N.W. *Id.* at 7-8, 24. Weygandt's counsel indicated that there was prior precedent for using the address of 3519 Connecticut Avenue N.W., which was previously the location of a Blockbuster video store. *Id* at 8. Weygandt then requested that the Board calculate

the measurement by looking at the "lease line" or "building line" for the address of the proposed location. *Id.* at 8.

13. In considering the issue raised by Weygandt, the Chair indicated on the record that the Board considered "the testimony, maps, and measurements" submitted by Weygandt. *Id.* at 29. In interpreting § 25-333 and 23 DCMR § 101.2, the Board found that the language of the regulation referring to the "property line of the places" directed the Board to consider Weygandt's location as a tenant within a larger strip mall. *Id.* at 30. The Board further indicated that the measurement should not start at the parking lot because Weygandt had no ownership and control over that part of the property. *Id.* In summarizing the rule, the Chair stated that the measurement should be taken "from the leased property line rather than the record lot line of the strip mall in which the applicant seeks to open his business." *Id.* at 30. The Board notes that it has found no indication in ABRA's records that this decision was reduced to writing or subject to challenge.

14. In reviewing the relevant law and the Board's oral advisory in Weygandt, the present circumstances appear distinguishable from the facts in Weygandt. Specifically, unlike Weygandt, the proposed location does not have an address separate from the other buildings on its square. In light of this fact, the Board concludes that the property line of the proposed leased premises, which would occupy the space currently occupied by Rodman's, includes the lot line bordering Crunch Fitness, because the two establishments share the same address.

15. The Board views this as a clarification of its decision in the Weygandt matter and a further interpretation of § 25-301 and 23 DCMR § 101.2, because this specific set of circumstances does not appear to have been addressed or considered by the Board previously. Moreover, it does not reverse the result in Weygandt because the property line of the address, the lot line of the address, and the building line of the leased premises appear to have been located at the same point in that matter; namely, the wall dividing the store and address from the other stores and addresses in the shopping center. As a result, the Board views the decision in Weygandt as limited to the specific facts and circumstances of that case.

16. Moreover, to the extent this interpretation is deemed a departure, the Board finds a second look at the issue warranted for several reasons. *Brentwood Liquors, Inc. v. Dist. Of Columbia Alcoholic Beverage Control Bd.*, 661 A.2d 652, 656 (D.C. 1995) ("agency changing its course ... is obligated to supply a reasoned analysis for the change . . . ."). First and foremost, despite outlining an interpretation relevant to all applicants, the interpretation was never committed to writing or ever subject to a challenge. In addition, there has been scant opportunity to examine the impact of the interpretation where in many cases the lot line, building line, and lease line all inhabit the same space and the address at issue only encompasses one building or space.

17. Second, determining the property lines of a place solely from the lease lines set by two private parties is unreliable. Such a rule creates the risk of gamesmanship by actors seeking to evade the statutory distance requirement. For example, instead of leasing whole rooms or spaces, the parties could scheme to rent parts of a space and leave a portion of the room (e.g., 1

foot) unleased so that it satisfies the 400 foot rule. In addition, such a rule may encourage parties to gerrymander spaces and create irregular property lines.

18. Third, the Board is further convinced that relying solely on lease lines is not practicable. Specifically, because there is no assurance that the GIS system will reflect lease arrangements, the agency would lose an impartial and reliable tool for mapping distances and boundaries. Additionally, relying on lease lines as set by the parties means that no measurement can be conducted until a thorough analysis of the applicant's lease agreement is conducted. Furthermore, the same analysis would have to be conducted for any licensee that may be at risk for being within the 400 foot zone created by § 25-333, which adds complications to the analysis.

19. Fourth, Title 25 recognizes that the overconcentration of licensed establishments has an adverse impact on the community. D.C. Code § 25-314(a)(4). The prohibition against issuing licenses within a certain distance from another licensee under § 25-333 amounts to a legislative finding that in most cases such an occurrence should be deemed *per se* inappropriate. § 25-333. Based on the risk to the community, it is eminently reasonable for the Board to demand that the property line not just be recognized by two private parties, but also by an impartial governmental authority applying consistent standards.

20. Fifth, relying on the address to determine the property line is a reasonable and practical means of determining the licensee's location, because the District of Columbia Building Code creates minimum and consistent standards for creating addresses. As noted in § 118A of Title 12, the Building Code creates a "formal, legally based District of Columbia-wide system of assigning addresses to *premises* . . . ." 12 DCMR § 118A (West Supp. 2019). (see § 118.1). One of the many purposes of this system is for "property mapping" and non-compliance may result in the building being unsuitable for occupancy. *Id.* (see §§ 118.1; 118.3). New addresses may be created when a lot is subdivided or based on the application of a property owner for a building with multiple entrances. *Id.* (see § 118.12.4(1), (4)). Finally, in determining whether a property merits a new address, the D.C. Department of Consumer and Regulatory Affairs may examine the Certificate of Occupancy, the location of main entrances, the location of nearby streets, the site plan, and request approval by the Office of the Surveyor, among other requirements.[5] In light of these requirements, relying on the address is a consistent and reasonable means of determining the property lines of the place.

ORDER

Therefore, on this 22nd day of May 2019, the above represents the **ADVISORY OPINION** of the Board.

[5] District of Columbia Department of Consumer and Regulatory Affairs, "Application for New Address(es)," https://eservices.dcra.dc.gov/DocumentManagementSystem/Home/retrieve?id=Application%20For%20New%20Address.pdf (last visited May 20, 2019).

District of Columbia
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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.