

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

NOTICE OF FINAL RULEMAKING

The Alcoholic Beverage Control Board (Board), pursuant to the authority set forth in D.C. Official Code § 25-211 (2012 Repl. and 2018 Supp.) and D.C. Official Code § 25-351, *et seq.* (2012 Repl.), hereby gives notice of the intent to adopt as final, amendments to Chapter 3 (Limitations on Licenses) of Title 23 (Alcoholic Beverages) of the District of Columbia Municipal Regulations (DCMR) by amending section 307 (West Dupont Circle Moratorium Zone).

The rulemaking would (1) maintain the cap of zero (0) for retailer’s licenses, class CN and DN, within six hundred feet (600 ft.) in all directions from 21st and P Streets, N.W. and (2) create an exemption from the moratorium zone for the “Dupont Underground”; a District-owned former streetcar station located below Square 114E Lot 0800 and below the right of way of Dupont Circle, N.W. and Connecticut Avenue, N.W. and surrounding streets.

I. PROCEDURAL BACKGROUND

A. ADOPTION OF THE NOTICE OF PROPOSED RULEMAKING

The West Dupont Circle Moratorium Zone (WDMZ) has been in effect since 1994. The original WDMZ prohibited the issuance of all alcohol retailer licenses, including restaurants, taverns, and nightclubs. The only exception to this prohibition was for hotel licenses.

The Board has amended the regulation several times since its initial adoption. Most recently, the Board amended the moratorium in 2016 by removing the cap on retailer’s licenses, classes A, B, CT, DT, CX, and DX; but retained the cap on nightclub licenses (CN and DN). The 2016 moratorium was effective for three (3) years.

The 2016 moratorium is set to expire on October 27, 2019. In advance of the expiration of the moratorium, Advisory Neighborhood Commission 2B (ANC 2B) submitted a resolution to the Board on June 19, 2019, requesting that it extend the current moratorium for an additional three (3) years. Specifically, ANC 2B requested that the Board maintain the existing cap of zero (0) on nightclub licenses located within six hundred feet (600 ft.) of 21st and P Streets, N.W. The one modification to the moratorium that ANC 2B seeks is an exemption from the moratorium for the area known as the “Dupont Underground”; a District-owned former streetcar station located below Square 114E Lot 0800 and below the right of way of Dupont Circle, N.W. and Connecticut Avenue, N.W. and surrounding streets.

In response to ANC 2B’s resolution, the Board scheduled a Public Hearing for July 24, 2019, for purposes of receiving comments from the public on the future of the WDMZ. Notice of the

hearing was published in the *D.C. Register* at 66 DCR 7920 (July 5, 2019) and on ABRA's website (www.abra.dc.gov). In addition to accepting oral comments at the hearing, the Board also allowed interested parties to submit written comments until August 2, 2019.

TESTIMONY RECEIVED IN RESPONSE TO AND/OR AT THE PUBLIC HEARING

The Board received written and oral testimony from individuals and groups concerning the WDMZ. Below is a summary of the testimony received:

Daniel Warwick, Chairperson, ANC 2B

Daniel Warwick, Chairperson of ANC 2B, testified on behalf of the ANC. Commissioner Warwick testified that since the ABC Board created the moratorium 20 years ago, the community had undergone significant changes. He testified that there were fewer late night establishments (*e.g.*, taverns and nightclubs) in the area, particularly along P Street, N.W. This, he explained, has resulted in fewer disturbances to neighboring residents.

Commissioner Warwick testified that since 2013, the ANC has sought to loosen the restrictions of the moratorium in West Dupont after having determined that they were no longer necessary to combat certain problematic behaviors and circumstances that were no longer a concern for residents. In 2016, Commissioner Warwick testified that ANC 2B sought to remove the remaining caps on all retail licenses except for nightclubs which the community was still concerned about.

Despite the continued growth of retail development in West Dupont, the ANC believes the moratorium is still necessary because it provides the community with an additional layer of protection against nightclubs that they otherwise would not have. According to Commissioner Warwick, noise remains a concern for many residents in West Dupont, especially along P Street, N.W., where there are retailers, restaurants, and residences. The ANC is concerned that noise problems would be exacerbated if the moratorium was lifted and nightclubs were permitted to open and operate in the area.

Notwithstanding ANC 2B's desire to maintain the cap on nightclubs, Commissioner Warwick testified that the ANC recognizes that nightclubs are desirable in certain parts of the District and that the Dupont Circle area, generally, is an attractive location for many people living or visiting the District. Thus, the ANC is amenable to allowing nightclubs as long as they are restricted to the area under Dupont Circle (*e.g.*, "Dupont Underground"). The ANC believes locating nightclubs in the "Dupont Underground" would have less of an impact on residents. Commissioner Warwick further stated that the ANC has spoken to several District agencies, including the Department of Zoning, about the space, and thus, they are confident that it would be the best location for a nightclub should one open in the area.

Glenn Engelmann, President, Dupont Circle Citizens Association

Glenn Engelmann, President of the Dupont Circle Citizens Association, also testified in support of the moratorium. He spoke more specifically, in support of the ANC’s resolution to continue the moratorium as it relates to nightclub licenses and he also supported the exception for the “Dupont Underground”. Similar to Commissioner Warwick, Mr. Engelmann acknowledged the improvements that have been made in the West Dupont area over the last 20 years.

Notwithstanding the improvements in the area, Mr. Engelmann noted that the community suffers from limited parking; particularly along P Street, N.W. where there are a number of restaurants, retail shops, and hotels. He noted that P Street, N.W. is a narrow street; thus, presenting pedestrian and parking challenges for the community.

Mr. Engelmann also agreed with the ANC’s position to create an exception to the moratorium to allow nightclub licenses in the “Dupont Underground”. According to Mr. Engelmann, allowing a nightclub to operate in this space, which would not be as burdensome for neighbors, and could be a good use of an otherwise underutilized space.

B. BOARD’S DECISION TO ADOPT THE PROPOSED RULEMAKING

The Board carefully considered ANC 2B’s resolution as well as the comments and testimony it received from the public concerning the WDMZ. In reaching its decision, the Board gave great weight to the recommendations of ANC 2B as required by Section 13(d)(3) of the Advisory Neighborhood Councils Act of 1975, effective March 26, 1979 (D.C. Law 1-21; D.C. Official Code § 1-309.10(d)(3)), and D.C. Official Code § 25-609. After evaluating all of the testimony and comments, the Board finds that ANC 2B’s resolution is appropriate under at least two appropriateness standards, as required by D.C. Official Code § 25-352(a)(4).

Whether to impose any moratorium is not a decision the Board takes lightly. The Board recognizes the impact that a moratorium can have on future business and residential development. The District of Columbia (District) has a robust economy and the Board wants to encourage the economy’s growth. Economic development, however, must be balanced with the safety and welfare of the city’s residents. Whenever the Board considers an application for an alcohol license or a moratorium request, it must consider the peace, order, and quiet of the community and how, if at all, the community will be affected, including any potential effects on residential parking needs and vehicular and pedestrian safety.

The West Dupont Moratorium Zone has been in effect for over twenty (20) years. The Board created the moratorium to address taverns and nightclubs that were having a negative impact on residents in the area. As previously mentioned, the initial moratorium prohibited the issuance of all alcohol retail licenses, excluding hotel licenses. Since 2000, however, the Board has lifted some of the restrictions of the moratorium. For example, in 2016, when the Board last renewed the moratorium, the only cap it imposed was on nightclub licenses.

Despite economic improvements in certain neighborhoods, the Board recognizes that protections provided by the moratorium may still be necessary. Dupont Circle is still an attractive place for alcohol establishments, particularly nightclubs and taverns. Yet, similar to many areas in the city, noise from alcohol-licensed establishments is still an ongoing concern and it presents health and welfare concerns for those who live nearby.

Similarly, parking is also a challenge in the area. Mr. Engelmann testified to the parking challenges along narrow P Street, N.W. As with most parts in the city, there is an insufficient number of public parking options available in West Dupont. As such, persons fraternizing at the alcohol-licensed establishments are frequently parking in the nearby residential areas. This in turn, prevents those who live in the area from being able to park near their homes. The moratorium can help address this problem by preventing nightclubs, with larger occupancy loads, from locating in the area.

Notwithstanding the Board's intention to maintain the cap on nightclub licenses within six hundred feet (600 ft.) of 21st and P Streets, N.W., the Board agrees with the ANC's request that an exemption be made for the "Dupont Underground", located below Square 114E Lot 0800 and below the right of way of Dupont Circle, N.W. and Connecticut Avenue, N.W. and surrounding streets from the moratorium zone.

Recently, the Board approved a CX retailer's license for the east platform of the Dupont Station located at 19 Dupont Circle, N.W., which is within the boundaries of the "Dupont Circle". Prior to issuing the permanent license in April 2019, the Board had approved several temporary licenses. Since granting the permanent license, and during the pendency of the temporary licenses, the ABC Board did not receive any complaints from the community or the ANC concerning the "Dupont Underground's" operations and it does not foresee any problems should a nightclub open and operate in the "Dupont Underground" in West Dupont Circle (*e.g.*, the west platform of the "Dupont Moratorium"). The Board is confident that it can readily address any concerns that might arise with the "Dupont Underground's" operations. For this reason, the Board exempts the "Dupont Underground" from this West Dupont Circle Moratorium Zone.

Although the Board has agreed to exempt the area known as the "Dupont Underground" from the moratorium it does so with the understanding that there are concerns. As Board Member James N. Short stated during the hearing, there are numerous safety concerns that need to be addressed before a nightclub can operate safely in this area. For example, the limited means of ingress and egress will be problematic should an emergency arise such as a fire; requiring persons to evacuate quickly. There needs to be more than one or two ways in and out of the space given its potential occupancy load of 400 persons. Likewise, should a power outage take place, public safety personnel will need a means of restoring and/or maintaining power. The Board fully expects that these safety concerns and any others that may be identified by safety personnel will be addressed before a nightclub license is issued for this space.

For the aforementioned reasons, the Board gives notice, that on August 7, 2019, it adopted the West Dupont Circle Moratorium Zone Notice of Proposed Rulemaking by a vote of five (5) to

zero (0). 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 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.

C. BOARD'S DECISION TO ADOPT THE NOTICE OF EMERGENCY RULEMAKING

Prior to its deciding to send the proposed rulemaking to the Council for review, the Board adopted the *West Dupont Circle Moratorium Zone Notice of Emergency Rulemaking*. This occurred at the Board's October 23, 2019 meeting. Emergency action was necessary in order to prevent the community from not having any protection against future ABC license applications.

As mentioned above, the West Dupont Circle Moratorium was scheduled to expire on October 27, 2019. This, however, was the same day that the thirty (30)-day public comment period ended. Unlike some other agencies who are not required to submit their rules to the Council before adopting them as final, the ABC Board is required to submit its proposed rulemakings to the Council for a ninety (90)-period of review. Recognizing this, the Board determined that emergency action was imperative.

The emergency rulemaking that the Board adopted mirrors the proposed rulemaking. The Board did not make any changes to the emergency rulemaking. The emergency rulemaking will remain in effect for one hundred twenty (120) days, unless superseded.

D. BOARD'S DECISION TO SEND THE PROPOSED RULEMAKING TO THE COUNCIL FOR REVIEW

The Board did not receive any comments during the public comment period. The comments that the Board received from ANC 2B and the DCCA were incorporated in the proposed rulemaking, itself. Therefore, the Board five (5) to zero (0) on October 30, 2019, to send the West Dupont Circle Moratorium Zone Notice of Proposed Rulemaking to the Council of the District of Columbia (Council) for a mandatory ninety (90)-day review. The Board notes that these rules will not be adopted as final until the conclusion of the ninety (90)-day review period, unless affirmatively approved by the Council, and that the rules will not take effect until five (5) days after publication in the *D.C. Register*.

E. BOARD'S DECISION TO ADOPT THE NOTICE OF SECOND EMERGENCY RULEMAKING

The *West Dupont Circle Moratorium Notice of Proposed Rulemaking* is still with the Council for review. The deemed approved date is March 17, 2020. The emergency rules that the Board on October 27, 2019, would have expired to before the Council's ninety (90)-day review period. In

order to avoid the West Dupont community not having any protection against future licensed establishments, and wanting to keep the emergency rules in place, the Board adopted the *West Dupont Circle Moratorium Zone Notice of Second Emergency Rulemaking* on February 12, 2020, six (6) to zero (0). These emergency rules are substantively the same as the previous emergency rules and the proposed rulemaking that is presently with the Council. The Board did not make any substantive changes to the rulemaking. These emergency rules will expire on June 11, 2020, unless superseded by final rulemaking.

II. ADOPTION OF FINAL RULEMAKING

In accordance with D.C. Official Code § 25-211(b)(2), these moratorium rules were deemed approved on March 12, 2020, absent affirmative disapproval by the Council. As such, the rules are now ripe for the Board to take final action. Therefore, on March 18, 2020, the Board voted seven (7) to zero (0) to adopt the rules as final.

This final rulemaking shall supersede the second emergency rulemaking. The Board did not make any substantive changes to the rulemaking since it was published as proposed in the D.C. Register on September 27, 2019, at 66 DCR 12748.

The rules will take effect five (5) days after the notice of final rulemaking is published in the *D.C. Register*.

Chapter 3 (Limitations on Licenses) of Title 23 (Alcoholic Beverages) of the DCMR is amended by amending § 307 (West Dupont Circle Moratorium Zone) in its entirety to read as follows:

307 WEST DUPONT CIRCLE MORATORIUM ZONE

307.1 A limit shall exist on the number of retailer's licenses issued in the area that extends approximately six hundred feet (600 ft.) in all directions from the intersection of 21st and P Streets, N.W., Washington, D.C., as follows: Class CN or DN - Zero (0). This area shall be known as the West Dupont Circle Moratorium Zone.

307.2 The West Dupont Circle Moratorium Zone is more specifically described as the area bounded by a line beginning at 22nd Street and Florida Avenue, N.W.; continuing north on Florida Avenue, N.W., to R Street, N.W.; continuing east on R Street, N.W., to 21st Street, N.W.; continuing south on 21st Street, N.W., to Hillyer Place, N.W.; continuing east on Hillyer Place, N.W., to 20th Street, N.W.; continuing south on 20th Street, N.W., to Q Street, N.W.; continuing east on Q Street, N.W., to Connecticut Avenue, N.W.; continuing southeast on Connecticut Avenue, N.W., to Dupont Circle; continuing southwest around Dupont Circle to New Hampshire Avenue, N.W.; continuing southwest on New Hampshire Avenue, N.W., to N Street, N.W.; continuing west on N Street, N.W., to 22nd

Street, N.W.; and continuing north on 22nd Street, N.W., to Florida Avenue, N.W. (the starting point).

- 307.3 Square 114E Lot 0800 and below the right of way of Dupont Circle, N.W. and Connecticut Avenue, N.W. shall be exempt from the West Dupont Circle Moratorium Zone.
- 307.4 All hotels, whether present or future, shall be exempt from the West Dupont Circle Moratorium Zone. The 1500 block of Connecticut Avenue, N.W., shall be exempt from the West Dupont Circle Moratorium Zone. Establishments located in, or to be located in, the New Hampshire side of One Dupont Circle, N.W., shall be exempt from the West Dupont Circle Moratorium Zone.
- 307.5 Nothing in this section shall prohibit the Board from approving the transfer of ownership of a retailer's license Class A, B, CR, CT, CX, DR, DT, or DX located within the West Dupont Circle Moratorium Zone, subject to the requirements of the Act and this title.
- 307.6 Nothing in this section shall prohibit the Board from approving the transfer of a license from a location within the West Dupont Circle Moratorium Zone to a new location within the West Dupont Circle Moratorium Zone.
- 307.7 A CN/DN license holder outside the West Dupont Circle Moratorium Zone shall not be permitted to transfer its license to a location within the West Dupont Circle Moratorium Zone.
- 307.8 Subject to the limitation set forth in subsection 307.9, nothing in this section shall prohibit the filing of a license application or a valid protest of any transfer or change of license class.
- 307.9 No licensee in the West Dupont Circle Moratorium Zone shall be permitted to request a change of license class to CN, or DN.
- 307.10 A current holder of a retailer's license Class A, B, C, or D within the West Dupont Moratorium Zone shall not be permitted to apply to the Board for expansion of service or sale of alcoholic beverages into any adjoining or adjacent space, property, or lot, unless:
- (a) The prior owner or occupant has held within the last five (5) years a retailer's license Class A, B, C, or D; or
 - (b) The applicant is a Class CR or DR licensee and the prior owner or occupant has held during the last three (3) years, and continues to hold at

the time of application, a valid restaurant license from the Department of Consumer and Regulatory Affairs.

- 307.11 The number of substantial change applications approved by the Board for expansion of service or sale of alcoholic beverages into an adjoining or adjacent space, property, or lot, as allowed under subsection 307.9, shall not exceed three (3) during the three (3) year period of the West Dupont Circle Moratorium Zone.
- 307.12 Nothing in this section shall prohibit holders of a retailer's license Class C or D from applying for outdoor seating in public space.
- 307.13 This section shall expire three (3) years after the date of publication of the notice of final rulemaking.