

**ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD
NOTICE OF PUBLIC HEARING ON
NOTICE OF PROPOSED RULEMAKING**

TIME AND PLACE: **Wednesday, September 12, 2007, at 1:00 P.M.
ABC Board Hearing Room
941 North Capitol Street, N.E., 7th Floor
Washington, D.C. 20002**

FOR THE PURPOSE OF CONSIDERING THE FOLLOWING:

**NOTICE OF PROPOSED RULEMAKING THAT ESTABLISHES A NEW
ADMINISTRATIVE REVIEW PROCESS FOR INITIALLY HEARING
PROTESTED LICENSE APPLICATIONS**

The Alcoholic Beverage Control Board (Board) has scheduled this public hearing to discuss its Notice of Proposed Rulemaking that would establish a new Administrative Review Process for initially having cases involving protested license applications heard by Alcoholic Beverage Regulation Administration (ABRA) staff. The Board believes that this will allow protested license applications to be processed in a more timely and efficient manner. Additionally, having protested license applications heard by ABRA staff will allow the Board to spend more time adjudicating enforcement proceedings. A copy of the Notice of Proposed Rulemaking can be found in the August 31, 2007 edition of the D.C. Register.

Individuals who wish to testify should contact Cynthia Simms at (202) 442-4496 or by e-mail at cynthia.simms@dc.gov by September 10, 2007. E-mail contacts should include the full name, title, and affiliation – if applicable – of the person(s) testifying. Witnesses should bring eight (8) copies of their written testimony to the Board.

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

NOTICE OF PROPOSED RULEMAKING

The Alcoholic Beverage Control Board ("Board"), pursuant to the authority set forth in D.C. Official Code §§ 25-211(b), 25-431(c) (2006 Supp.) and Mayor's Order 2001-96 (June 28, 2001) as revised by Mayor's Order 2001-102 (July 23, 2001), hereby gives notice of the intent to adopt the following proposed rules that would amend Chapters 15 and 16 of Title 23 of the District of Columbia Municipal Regulations ("DCMR") to establish a new Administrative Review process for initially having cases involving protested license applications heard by Alcoholic Beverage Regulation Administration ("ABRA") staff. The creation of this new Administrative Review process is necessary to allow the Board to handle the processing of protested license applications in a more timely and efficient manner. Additionally, having protested license applications heard by ABRA staff will allow the Board to spend more time adjudicating enforcement proceedings involving alleged alcohol violations of Title 25 of the D.C. Official Code and Title 23 of the DCMR by ABC licensees.

Pursuant to D.C. Official Code § 25-211(b)(2) (2001), these proposed rules are also being transmitted to the Council of the District of Columbia, for a ninety (90) day period of review. The proposed rules will become effective in not less than thirty (30) days from publication of this notice in the D.C. Register, or upon approval by the Council by resolution, whichever occurs later. If the Council does not approve or disapprove the proposed rules by resolution, in whole or in part, within the ninety (90) day review period, the proposed rules shall be deemed disapproved.

Title 23 DCMR is amended by replacing specific subsections of Chapters 15 and 16 as set forth below.

23 DCMR Chapter 15, APPLICATIONS: NOTICE OF HEARINGS INVOLVING LICENSES, is amended as follows:

Section 1502 is amended in its entirety to read as follows:

1502. NOTICE OF AN APPLICATION FOR A NEW LICENSE, RENEWAL OF A LICENSE, OR TRANSFER OF A LICENSE TO A NEW LOCATION

1502.1 The provisions of this section shall govern notice to the public of all applications for new licenses, renewals, or a transfer to a new location, including Manufacturer, Wholesaler, and Retailer licenses, but shall not apply to Solicitor's licenses, Manager's licenses, Caterer's licenses, or to Temporary licenses.

1502.2 Upon acceptance of an application, the Board shall establish the date for the administrative review on the application, pursuant to D.C. Official Code § 25-431(h). The

administrative review shall be scheduled not less than five (5) calendar days and not more than fifteen (15) calendar days after the completion of the forty-five (45) day period to file a protest to a license application.

1502.3 The Board shall give timely notice of an application to the entities set forth in D.C. Official Code § 25-421(a).

1502.4 All fees associated with the newspaper advertisement required by D.C. Official Code § 25-422 shall be paid for by the applicant. Proof of payment must be submitted to the Board before placards will be provided to the applicant for posting.

1502.5 At the beginning of the forty-five (45) day protest period, the applicant shall post at least two (2) notice placards, provided by the Board, on the main entrance doors to the premises so as to be visible from the street, or on such other place on the premises as designated by the Board. The applicant shall continuously leave the placards posted until the completion of the forty-five (45) day protest period set out on the placards.

1502.6 The Board shall inspect the premises at least once before the completion of the forty-five (45) day protest period specified on the notice in order to ensure that the placards continue to be prominently and visibly displayed to the public. If the placards have been removed or are posted in a manner not visible from the street, the establishment shall be re-advertised and replacarded for a further forty-five (45) calendar day period.

23 DCMR Chapter 16, CONTESTED HEARINGS, NON-CONTESTED HEARINGS, PROTEST HEARINGS AND PROCEDURES, is amended as follows:

Sections 1600 and 1601 are amended in their entirety to read as follows:

1600. APPLICABILITY

1600.1 The provisions of this chapter shall govern the following items:

- (a) Administrative review hearings, roll call hearings, or status hearings regarding the issuance, transfer, or renewal of a license, or the making of substantial changes to a licensee's business operations under authority of the Act;
- (b) Protest hearings regarding the issuance, transfer or renewal of a license, or the making of substantial changes to a licensee's business operations under authority of the Act;
- (c) Fact-finding hearings on any matter governed by the Act regarding an applicant for a license or a licensee; and
- (d) Show cause hearings, summary suspension hearings or summary revocation hearings regarding the revocation or suspension of a license issued under the Act.

1601. GENERAL PROVISIONS

1601.1 The Board may, for good cause shown and in the interest of justice or to prevent hardship, waive any provision of this chapter which is not required by the Act in any proceeding after duly advising the parties of its intention to do so.

1601.2 The following hearings held before the Board shall be considered to be contested cases:

- (a) Protest hearings;
- (b) Show cause hearings;
- (c) Summary suspension or summary revocation hearings;
- (d) Cease and desist hearings; and
- (e) Safekeeping hearings

1601.3 The following hearings held before the Board shall not be considered to be contested cases:

- (a) Fact-finding hearings; and
- (b) Moratorium hearings and other rulemaking hearings

1601.4 The provisions of this chapter are intended to be consistent with the District of Columbia Administrative Procedure Act (D.C. Official Code §§ 2-501 *et seq.*). If there is any conflict between this chapter and the District of Columbia Administrative Procedure Act, the District of Columbia Administrative Procedure Act shall govern.

1601.5 If there is any conflict within this chapter, provisions of specific application shall supersede those of general application.

Section 1602 is amended in its entirety by creating new sections 1602(A) and 1602(B) to read as follows:

1602(A). ADMINISTRATIVE REVIEW

1602A.1 Before any license is issued, renewed, or transferred to a new location, and before any substantial change to the operations of a licensed establishment may be made, the Board shall provide notice to the public pursuant to the notice requirements set forth under §§ 1502, 1503, and 1504. Notice provided to the public shall specify the information required by D.C. Official Code § 25-423(b), including the final day of the protest period and the license application's administrative review date.

1602A.2 The administrative review hearing shall be a non-adversarial proceeding held by the Board's agent at which a list of applications for the licensing actions set out in § 1605.1 and the names of protestants who have filed an objection pursuant to D.C. Official Code § 25-601 shall be read to the public. For purposes of this section, the Board's agent shall be defined as an ABRA Office of the General Counsel employee at or above the Grade 12 level, excluding the ABRA General Counsel.

1602A.3 If no written objection to an application has been received by the Board during the protest period, the Board's agent shall hold an administrative review on the application within fifteen (15) calendar days after the end of the protest period. An objection must be received by the Board prior to the end of the protest period to be considered timely filed.

1602A.4 If an objection, in the form of a protest or by Protest Petitions (as set forth in § 1800.2 of this title), has been received by the Board during the protest period, the Board's agent shall so state and the Board's agent shall set a date for a status hearing before the Board unless the scheduling of a roll call hearing before the Board is necessary as required by § 1602A.8. In setting a date for a status hearing, the Board's agent may also approve a joint request by the parties to schedule a settlement conference prior to the status hearing date.

1602A.5 Each applicant, and each person submitting a protest shall attend the administrative review hearing in person or appear through a designated representative.

1602A.6 Failure to appear at the administrative review hearing either in person or through a designated representative may result in denial of the license application or dismissal of a protest unless good cause is shown for the failure to appear. Examples of good cause for failure to appear include, but are not limited to:

- (a) sudden, severe illness or accident;
- (b) death or sudden illness in the immediate family, such as spouse, partner, children, parents, siblings;
- (c) incarceration; or
- (d) severe inclement weather.

1602A.7 A recommendation by the Board's agent to deny a license application or dismiss a protest for failure to attend the administrative review shall be forwarded to the Board for consideration in writing. The Board's decision to adopt or not adopt the recommendation of the Board's agent to deny a license application or dismiss a protest for failure to appear shall be sent to the parties in writing. A request for reinstatement with the Board must be filed within ten (10) days after notification from the Board of the dismissal or denial. In reviewing the request, the Board shall consider whether, in the discretion of the Board, the party has shown good cause for his or her failure to appear at the administrative review.

1602A.8 The Board's agent shall schedule a roll call hearing rather than a status hearing before the Board when:

- (a) a dispute exists regarding whether the placards at an applicant's premises have remained visible to the public for a full forty-five (45) calendar days;
- (b) a legal issue is raised that would preclude the Board from granting the application, including but not limited to:
 - (1) the applicant's distance from a school or recreation center operated by the D.C. Department of Recreation;
 - (2) whether the applicant's proposed establishment is located in a residential-use district; and
 - (3) whether the applicant's voluntary agreement prohibits the application;
- (c) a dispute exists regarding the legal standing of a party or whether a party has raised legally permitted protest issues; or
- (d) any other legal issue arises that requires a decision by the Board. When a dispute arises regarding the applicant's distance from a school or recreation center operated by the D.C. Department of Recreation, the Board's agent shall request that a measurement be conducted by ABRA in advance of the scheduled roll call hearing.

1602A.9 At the administrative review, the Board's agent shall have the authority to:

- (a) regulate the course of the hearing;
- (b) request the persons appearing at the hearing to state their respective positions concerning any issues in the proceeding and their support of or opposition to such issues;
- (c) request or accept written documentation from the parties including letters of representation;
- (d) identify the parties with standing and the filed protest issues, if undisputed;
- (e) approve a joint request from the parties for a scheduled settlement conference;
- (f) grant a request to continue the administrative review consistent with the requirements of D.C. Official Code § 25-441 and § 1705;
- (g) adjourn a hearing and establish the date when the hearing will be continued; and
- (h) take any other action authorized by, or necessary under, this section.

1602A.10 Upon the scheduling of an application for administrative review with the Board's agent, all parties shall be prohibited from participating in any ex parte communication with the Board's agent relevant to the merits of the proceeding. This shall include any oral or written communication not in the public hearing record with respect to which reasonable prior notice is not given to all parties to the proceeding.

1602A.11 The administrative review shall be open to the public and transcribed by a certified court reporter.

1602B. ROLL CALL HEARING

1602B.1 The roll call hearing shall be a non-adversarial proceeding held by the Board to address unresolved legal and factual issues and disputes identified by the Board's agent at the administrative review.

1602B.2 Each applicant, and each person submitting a protest shall attend the roll call hearing in person or appear through a designated representative.

1602B.3 Failure to appear in person or through a designated representative may result in denial of the license application or dismissal of a protest, unless, in the discretion of the Board, good cause is shown for the failure to appear. Examples of good cause for failure to appear include, but are not limited to:

- (a) sudden, severe illness or accident;
- (b) death or sudden illness in the immediate family, such as spouse, partner, children, parents, siblings;
- (c) incarceration; or
- (d) severe inclement weather.

A request for reinstatement with the Board must be filed within ten (10) days after notification from the Board of the dismissal or denial.

1602B.4 The Board shall hear from the parties at the roll call hearing regarding any unresolved legal issues listed in § 1602A.8. The Board shall either announce its decision at the roll call hearing or take its decision on the unresolved legal issues under advisement and schedule the matter for a status hearing. A dispute identified at the administrative review regarding whether the placards at an applicant's premises have remained visible to the public for a full forty-five (45) calendar days will be heard by the Board at the roll call hearing. If the Board determines that the placards posted at an applicant's premises pursuant to D.C. Official Code § 25-423 have not remained visible to the public for a full forty-five (45) calendar days, up to and including the

date of the roll call hearing, the Board shall reschedule the roll call hearing for a date at least forty-five (45) calendar days after the originally scheduled hearing.

1602B.5 If a rescheduling is ordered, the applicant shall post new placards for another forty-five (45) calendar day period and no action on the application shall be taken until the administrative review date.

1602B.6 Whenever a rescheduling is ordered, further protests may be filed until the completion of the forty-five (45) day protest period set out on the placards.

1602B.7 The roll call hearing shall be open to the public and transcribed by a certified court reporter.

Section 1603 is amended in its entirety to read as follows:

1603. STATUS HEARING

1603.1 The status hearing is a non-adversarial proceeding held by the Board at which the parties inform the Board of their progress in reaching a cooperative/voluntary agreement.

1603.2 The Board in its discretion may set a protest hearing or another status hearing if the Board believes that the parties are close to reaching a cooperative/voluntary agreement or that mediation might be helpful.

1603.3 Failure to appear in person or through a designated representative may result in denial of the license application or dismissal of a protest, unless, in the discretion of the Board, good cause is shown for the failure to appear. A request for reinstatement with the Board must be filed within ten (10) days of the dismissal or denial date.

1603.4 A status hearing shall be open to the public and transcribed by a certified court reporter.

Copies of the proposed rulemaking can be obtained by contacting Fred Moosally, General Counsel, Alcoholic Beverage Regulation Administration, 941 North Capitol Street, N.E., 7th Floor, Washington, D.C. 20002. All persons desiring to comment on the 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.