

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

**NOTICE OF EMERGENCY AND PROPOSED RULEMAKING**

The Alcoholic Beverage Control Board (“Board”), pursuant to the authority set forth in D.C. Official Code § 25-351(a) (2001) and Section 303 of Title 23 of the District of Columbia Municipal Regulations (“DCMR”), 51 DCR 4309 (April 30, 2004), hereby gives notice of the adoption of emergency rules that replace existing section 306 of Title 23 DCMR and impose a limit on the number of retailer’s licenses Class A, B, CR, CT, CN, CX, DR, DT, DN, and DX issued in a portion of East Dupont Circle, which shall be known as the East Dupont Circle Moratorium Zone, for a three (3) year period.

On February 12, 2009 the Board received a request from Advisory Neighborhood Commission 2B (ANC 2B), voting nine (9) to zero (0) with a quorum present, for a thirty (30) day extension of the existing East Dupont Circle Moratorium Zone to April 23, 2009. The request for the extension was based upon ANC 2B’s desire to hold one more public meeting to receive community input and to finalize a committee report for consideration by the full ANC 2B. On March 4, 2009, the Board held a Fact Finding Hearing on the request for the thirty (30) day extension. ANC 2B appeared at the Fact Finding Hearing in support of the thirty (30) day extension. The Dupont Circle Merchants and Professional Association (DC MAP) also attended the Fact Finding Hearing and supported the thirty (30) day extension. As a result, the Board voted six (6) to (0) on March 4, 2009 to extend the existing East Dupont Circle Moratorium for thirty (30) days to April 23, 2009.

On March 12, 2009, ANC 2B filed its resolution, adopted on a nine (9) to zero (0) vote with a quorum present, to renew the East Dupont Circle moratorium for a five (5) year period. ANC 2B determined that the existing moratorium has had positive effects on the neighborhood by 1) protecting and supporting diverse retail and service establishments serving residents within the Dupont East moratorium zone, 2) promoting peace, order and quiet and 3) helping to avoid the parking and traffic difficulties evident in nearby entertainment corridors. The ANC 2B resolution allows ANC 2B and ABRA to approve no more than two (2) requests for lateral expansion of existing licenses. The resolution also addressed requirements regarding entertainment endorsements, prohibited additional sidewalk café and rooftop seats for establishments along 17<sup>th</sup> Street between P and Q Streets, N.W. and finally, encouraged establishments adjacent to Stead Park to construct summer gardens overlooking the renovated park.

On April 15, 2009, the Board held a public hearing on ANC 2B’s request to renew the moratorium pursuant to the requirements of D.C. Official Code § 25-354 (2001) at which time it

received a significant amount of detailed testimony and comments, both in favor of and in opposition to the renewal of the East Dupont Circle moratorium. ANC 2B Chairperson Michael Silverstein, and ANC 2B Commissioners Jack Jacobson and Bob Meehan all testified that the moratorium was needed to preserve the current retail diversity in the neighborhood. Chairman Silverstein testified that the moratorium had been in place for 18 years and that it had succeeded in its original intention of preventing the locating of too many bars along 17<sup>th</sup> Street N.W. ANC 2B testified that the two objectives of the moratorium allowed the neighborhood to 1) retain retail and service diversity in a commercial corridor by limiting the number of ABC licenses and limiting lateral expansion of existing licensed establishments and 2) ensure the continued peace, order and quiet of the neighborhood through measures which include restricting the categories of ABC licenses available and restricting the number of seats allowed. It is the belief of ANC 2B that 17<sup>th</sup> Street N.W. and the community as a whole will benefit from the renewal of the moratorium. Dupont Circle Citizens Association (DCCA) also supported the renewal of the East Dupont Circle moratorium and the approval of no more than two (2) requests for lateral expansion of existing licenses.

The Board heard testimony from the Federation of Citizens Association of the District of Columbia (Federation) who reaffirmed their support for the full renewal of the East Dupont Circle moratorium for five years. The Federation distinguished its position on the moratorium renewal by making it clear that any granting of a lateral expansion would be limited to the inside of the establishment and that the expansion could not increase the number of seats without an equal number of seats being retired elsewhere in the moratorium zone.

The Board also received comments from DC MAP who asked the Board to consider the current economic conditions and business slowdown to determine whether the moratorium has outlived its usefulness. DC MAP shares the concerns of ANC 2B but does not believe that past moratoriums have solved the problems nor has the current moratorium created a more vibrant local neighborhood commercial center. DC MAP indicated that there is residential and business interest in allowing lateral and vertical expansion and it should not be limited to the two lateral expansions proposed by ANC 2B. DC MAP also testified that a three year moratorium rather than a five year moratorium would be a more appropriate length.

The Board also received numerous petitions from area residents in ANC 2B asking the Board to not renew the East Dupont Circle moratorium. The neighborhood residents' comments indicate that they believed the existing moratorium has caused existing businesses to relocate, competition to stagnate and new businesses to locate elsewhere. Lloyd Shipley, a resident at 1425 17<sup>th</sup> Street, N.W., urged the Board to not renew the moratorium, testifying that licensees should be permitted to prosper without the interference of the ANC. Additionally, Jon Caley, a resident at 17<sup>th</sup> and S Streets, N.W., believes that the moratorium is unfair, unwise and unnecessary to Dupont Circle. Mr. Caley collected the signatures of over 450 residents in ANC 2B who support abolishing the moratorium.

The Board found the testimony and comments provided in response to ANC 2B's resolution to warrant the continued limit on the number of retailer's licenses Class A, B, CR, CT, CN, CX, DR, DT, DN, and DX issued in the East Dupont Circle Moratorium Zone, based upon the appropriateness standards set forth in D.C. Official Code §§ 25-313(b)(2) and 25-313(b)(3) (2001) with some modification. In reaching its decision, the Board gave great weight to the written recommendations and oral testimony of members of ANC 2B as required by section 13(d)(3) of the Advisory Neighborhood Councils Act of 1975, effective October 10, 1975, D.C. Law 1-21, D.C. Official Code § 1-309.10(d)(3) (2001), as amended, and D.C. Official Code § 25-609 (2001). ANC 2B voted to renew the existing East Dupont Circle moratorium by a nine (9) to zero (0) vote taken at a duly called public meeting on March 12, 2009. In reviewing the recommendation of ANC 2B, the Board finds based upon the appropriateness standards set forth in D.C. Official Code §§ 25-313(b)(2) and 25-313(b)(3) (2001), that the testimony and evidence put forward by ANC 2B, and various individual residents located in or in proximity to the East Dupont Circle Moratorium Zone reveals concerns with peace, order, and quiet. These residential concerns were also supported by testimony and written comments from various nearby residents, including Mildred Pacl, David Mallof and Lex Rieffel. The Board did not find, however, that the ABC establishments in the East Dupont Circle Moratorium Zone are adversely affecting real property values in the surrounding area.

Currently, there are twenty-two (22) ABC licenses located in the East Dupont Circle Moratorium Zone. The testimony of ANC 2B supports maintaining the current limit of twenty-two (22) ABC licenses permitted to be issued in the East Dupont Circle Moratorium Zone. However, the Board found the testimony and comments it received from opponents to the moratorium to reveal that there is neighborhood support to modify or eliminate the existing number of Class CR or Class DR licenses in the East Dupont Circle Moratorium Zone. Specifically, testimony provided by area residents established that there are existing licensees in the East Dupont Circle Moratorium Zone that are supported by the neighborhood, operate as restaurants, and would not likely have a significant adverse effect on peace, order, and quiet, should the neighborhood obtain an additional Class CR or Class DR license. Jamie Leeds, owner of Hank's Oyster Bar testified that granting a new license would allow for new chefs to showcase their talent in the East Dupont Circle neighborhood. Furthermore, the Board received testimony and comments from residents about the need to provide new fine dining restaurants an opportunity to locate in the East Dupont Circle Moratorium Zone. Additionally the Board took note that the ANC's surveys and listening sessions contained a number of area residents who no longer supported the moratorium. As DC MAP testified, it is not the CR and DR establishments that contribute to late night noise. After considering this testimony, the Board has decided to modify the existing moratorium to permit the issuance of one (1) additional Class CR or Class DR retailer's licenses and to place a limit on the number of retailer's licenses in the East Dupont Circle Moratorium Zone as follows: Class A – Two (2); Class B – Two (2); Class CR or Class DR – Seventeen (17); Class CT or Class DT – Two (2); Class CN or DN – Zero (0); and Class CX or Class DX – Zero (0). The Board received

little to no opposition to ANC 2B's proposal for the approval of no more than two (2) requests for lateral expansion of existing licenses, and thus adopts this recommendation.

ANC 2B voted on March 12, 2009 in favor of a five (5) year extension of the East Dupont Circle Moratorium, whereas the modified request of DC MAP urged for a three (3) year extension. After evaluating all the testimony and comments, the Board concluded that a three (3) year extension period, as sought by DC MAP, is the most appropriate. The Board concluded that a three (3) year extension should be sufficient to determine whether the moratorium really will be needed given its longevity. Furthermore, the testimony of Mr. Caley revealed that safety issues that were of a concern in the past no longer hold the weight they once did. MPD crime statistics are not affected by the existing moratorium. Licensed establishments and individual residents revealed that while problems with litter, noise, parking, and vehicular and pedestrian safety still exist in the East Dupont Circle Moratorium Zone these problems appear to be decreasing and the Board believes that they are worth re-examining at the end of a three (3) year moratorium period.

Additionally, ANC 2B's resolution provided several other recommendations such as prohibitions or limitations on entertainment endorsements, prohibited additional sidewalk café and rooftop seats for establishments along 17<sup>th</sup> Street between P and Q Streets, N.W. and finally, encouraging establishments adjacent to Stead Park to construct summer gardens overlooking the renovated park. The Board did not adopt these recommendations as a part of the renewed moratorium because there are currently mechanisms in place such as the Voluntary Agreement and the protest process that allow the ANC and area residents to evaluate those conditions on a case by case basis to determine what is best for the neighborhood.

Lastly, the Board would note that while it gave great weight to the ANC and considered heavily the concerns of the residents who live most closely to the commercial corridor, it is the Board's position that moratoriums are not meant to be in place indefinitely. The existing East Dupont Circle Moratorium has been in place for over 18 years and there has been a great deal of change in the neighborhood it is intended to preserve. The Board recognizes that the moratorium has worked well for the neighborhood, but it will also closely examine the need to renew the moratorium when it expires in 2012.

The statements set forth above reflect the written reasons for the Board's decision as required by subsection 303.1 of Title 23 DCMR (2004).

The emergency action is necessary to: (1) ensure that the limitations placed on the issuance of new retailer's licenses Class A, B, CR, CT, CN, CX, DR, DT, DN, and DX are not exceeded; and (2) prevent the filing of more than two license applications involving lateral expansion requests, which the Board has determined pursuant to D.C. Official Code §§ 25-313(b)(2) and 25-313(b)(3) (2001) would:

- (1) have an adverse effect on peace, order, and quiet; and
- (2) have an adverse effect on residential parking needs and vehicular and pedestrian safety.

The emergency rules will expire 120 days from the date of effectiveness or upon publication of a Notice of Final Rulemaking in the D.C. Register, whichever occurs first. The Board also gives notice of its intent to adopt these proposed rules in not less than thirty (30) days from the date of publication of this notice in the D.C. Register.

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, and the final rules may not become effective until their approval by Council resolution during the ninety (90) day period of Council review.

Title 23 DCMR, Chapter 3 (Limitations on Licenses), is amended by replacing the existing section 306 to read as follows:

### **306. EAST DUPONT CIRCLE MORATORIUM ZONE**

306.1 A limit shall exist on the number of retailer's licenses issued in the area that extends approximately six hundred (600) feet in all directions from the intersection of 17th and Q Streets, N.W., Washington, D.C., as follows: Class A – Two (2); Class B – Two (2); Class CR or Class DR – Seventeen (17); Class CT or Class DT – Two (2); Class CN or DN – Zero (0); and Class CX or Class DX – Zero (0). This area shall be known as the East Dupont Circle Moratorium Zone.

306.2 The East Dupont Circle Moratorium Zone is more specifically described as beginning at New Hampshire Avenue and S Street; East on S Street to 17th Street; South on 17th Street to Riggs Place; East on Riggs Place to 16th Street; South on 16th Street to P Street; West on P Street to 18th Street; North on 18th Street to New Hampshire Avenue; and Northeast on New Hampshire Avenue to S Street, N.W.

306.3 All hotels, whether present or future, shall be exempt from the East Dupont Circle Moratorium Zone.

306.4 Nothing in this section shall prohibit the Board from approving the transfer of ownership of a Retailer's license Class A, B, CR, CT, DR, or DT located within the East Dupont Circle Moratorium Zone, subject to the requirements of the Act and this title.

306.5 Nothing in this section shall prohibit the Board from approving the transfer of a license from a location within the East Dupont Circle Moratorium Zone to a new location within the East Dupont Circle Moratorium Zone.

306.6 A license holder outside the East Dupont Circle Moratorium Zone shall not be permitted to transfer its license to a location within the East Dupont Circle Moratorium Zone unless the transfer will not exceed the number of licenses permitted in the East Dupont Circle Moratorium Zone for that particular class or sub-class, as set forth in Section 306.1.

306.7 Subject to the limitation set forth in Section 306.8, nothing in this section shall prohibit the filing of a license application or a valid protest of any transfer or change of license class.

306.8 No licensee in the East Dupont Circle Moratorium Zone shall be permitted to request a change of license class to CT, DT, CN, or DN.

306.9 As of December 19, 2000, and at any time during the pending or renewed effective dates of the East Dupont Moratorium Zone established by this section, current holders of a Retailer's license Class A, B, C, or D within the East 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, the prior owner or occupant of which has not held within the last five (5) years a Retailer's license Class A, B, C, or D, or which has had a certificate of occupancy or building permit held in the name of any person other than the current holder of a Retailer's license Class A, B, C, or D within the East Dupont Moratorium Zone at any time within a period of five (5) years. Nothing in this section shall prohibit the Board from approving any application pending prior to December 19, 2000, subject to the requirements of Title 25 of the District of Columbia Official Code, nor shall this section prohibit holders of a Retailer's license Class C or D from applying for outdoor seating in public space.

306.10 This section shall expire three (3) years after the date of publication of the notice of final rulemaking.

Copies of the proposed rulemaking can be obtained by contacting Martha Jenkins, Acting General Counsel, Alcoholic Beverage Regulation Administration, 941 North Capitol Street, N.E., 7<sup>th</sup> 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 publication of this notice in the D.C. Register, to the above address.

