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ADVISORY #2021-4

Subject: Guidance regarding post-licensing package store applications for alterations, method of operation changes, related warehouse permits, corporate changes, and transfers

The following guidance is provided to liquor (“package store”) and wine store licensees who seek to change the size of the retail space, the size of their storage space, restrictions imposed on their product offerings, or other conditions imposed on their method of operation through post-licensing applications:

Alcoholic Beverage Control law §§ 63(6) and § 79(4) require that determinations made with respect to the issuance of new package and wine store licenses, or the “transfer to another premises” (*i.e.*, “removal”) of package and wine store licenses, be made “in accordance with public convenience and advantage.” To assist the Members of the Authority in assessing applications under this standard, we notify nearby package and wine stores of the application and collect revenue data from those stores. That notification often results in protests from neighboring stores. When considering the public convenience and advantage of adding a new store, or removing a store to a new location, the store’s size (retail space or total space) or its method of operation (bulletproof configuration, particular product offerings, etc.) can become the basis for protests and can be factors in the Authority’s decision.

The law does not expressly subject most post-licensing applications -- for alterations, method of operation changes, related warehouse permits, corporate changes, or transfers – to the public convenience and advantage standard. In our recent experience, applicants and licensees have been exploiting this distinction to obtain approval of the store they seek in two steps: securing approval of a more modest operation under the public convenience and advantage standard and then filing a subsequent, post-licensing application to secure additional features (expanded size, larger scope of product offerings, etc.). Proceeding in this way can allow a licensee to evade notice to nearby stores, and thus potential protests, as well as to have the Authority consider an expanded footprint, broader product offerings, or the like under the less stringent “good cause” standard.

We view these efforts to circumvent the law to be undertaken in bad faith and to constitute grounds to deny post-licensee applications under the good cause standard. We have rejected post-licensing applications in the past on these grounds. For example, we recently had a matter where an applicant’s lease included an option to rent an additional 1,000 square feet of space next door to the primary space. The licensee applied for a package store in only the primary space. Shortly after being granted the license, the licensee exercised the lease option and applied for an alteration to expand the footprint of the store. We rejected that application due to

a lack of good cause based on the licensee's effort to circumvent a full and fair airing of its initial application under the public convenience and advantage standard.

Going forward, the Authority will continue to consider whether post-licensing applications for package and wine stores are being used as a means to circumvent the law and, upon such a finding, will deny such applications for lack of good cause. The Authority also reserves the right, in appropriate matters, to consider a post-licensing application under the public convenience and advantage standard. In matters where it is unclear whether the two-step application was undertaken in bad faith, or where the post-licensing request would serve to transform the package or wine store substantially such that fairness requires it to be treated as an application for a new store, the Authority reserves the right to treat the application as one that requires consideration of the application under the public convenience and advantage standard. To avoid the need to have applications brought to the Full Board twice, the Chairman of the Authority will review such post-licensing package store applications in the first instance and determine whether the application should be so treated. To facilitate this process, we direct the Licensing Bureau to identify in its discretion potential candidates for such treatment and to send them to the Chairman for consideration.

This matter was heard and determined by the Members of the Authority at a Full Board meeting held on December 23, 2020 before Chairman Vincent Bradley, Commissioner Lily Fan and Commissioner Greeley Ford. The original version of this written advisory was approved by Chairman Bradley on behalf of the Members of the Authority on February 9, 2021. That version incorrectly identified the advisory as 2020-4 and stated that it was considered by the Members of the Authority on January 20, 2021. A corrected version, reflecting the correct advisory number and the correct date that the matter was considered by the Members of the Authority, was approved by Chairman Bradley on June 24, 2021.

Dated: 6/25/21



Thomas J. Donohue
Secretary to the Authority