

**PUBLIC HEARING  
ON  
BILL 17-893  
“ALCOHOLIC BEVERAGE ENFORCEMENT ACT OF 2008”**

**NOVEMBER 14, 2008**

**TESTIMONY OF  
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Good morning Councilmember Graham and Members of the Committee and Council Staff. I am Andrew J. Kline and I am counsel to Restaurant Association Metropolitan Washington ("RAMW").

As you have said Councilmember Graham, alcoholic beverage regulation and enforcement requires balancing. On the one hand, we must protect residents and visitors to our city from the small number of licensees who disregard the law. On the other hand we must consider the interest of our largest private employer, the hospitality industry. For many years, the system was out of balance as bad operators damaged the reputation of the industry, and as the then office of Alcoholic Beverage Control did little to police the bad operators to make sure they complied with the most basic regulatory requirements.

In the last few years, however, the pendulum seems to have swung markedly in favor of enforcement with, suspensions and fines being imposed on all operators, both good and bad. ABRA investigators have been unearthing little known restrictions in the regulations and, without any effort on the part of ABRA to educate licensees as to their existence, using these provisions, as a basis for levying fines and suspensions. In fiscal year 2007, 138 licenses were suspended as the approximately 3800 licensees were subjected to almost 7500 inspections. The ABRA web site contains no information as to how many warnings were issued, but based on the experience of our members, we suspect that is because the number is zero.

In the face of this over-aggressive enforcement, you have introduced, at the Board's urging, the "Alcoholic Beverage Enforcement Act of 2008." Before making some suggestions for positive reform, I will address the provisions of the Bill, as

introduced.

The Board seeks to amend the law to create a violation on the part of a licensee, if a patron exits an on-premises retailer with an alcoholic beverage in an open container. The language, as proposed, imposes strict liability on the licensee, meaning the licensee will be absolutely responsible even if the open beverage is smuggled out under someone's coat. The effect is to require even the finest restaurants in town to station someone at their door for the purpose of policing patrons or risk being charged with this offense. We suggest that the proposed language be amended such that it is only a violation if a licensee knowingly allows a patron to exit an on-premises establishment with an alcoholic beverage in an open container. Further, it would seem that this should be a secondary, not a primary tier violation.

The Bill clarifies that it is a primary tier violation for a restaurant not to keep its kitchen violation open until two hours before closing. This requirement, which has been on the books for a number of years, has only recently been enforced. If this change is to be made, it is appropriately a secondary tier violation, not a first tier violation.

We strongly object to the provision which allows the Board to fine for a violation not listed on the schedule of violations in a manner consistent with primary tier violation penalties. If a violation is not important enough to be scheduled, certainly, it should be treated as a secondary tier violation and not primary.

We also have great concern with giving ABRA extended authority over capacity. Capacity issues are best left to the fire department which is uniquely qualified to determine fire safety and maximum capacity. ABRA should concentrate on alcohol issues, not attempt to be the super agency to enforce all manner or regulatory

requirements.

On October 15, 2008, the Board held a fact finding hearing to consider whether changes should be made with respect to the penalties that should be imposed for selling alcohol to those underage. Many licensees testified at that hearing and expressed frustration about the difficulty of doing business in the face of over aggressive enforcement. I have a copy of the transcript of the hearing and I am asking that you make it a part of the record of this hearing.

As a result of views expressed at the hearing RAMW is suggesting that several changes be made in the code and the regulations, so that continued enforcement will be fair, evenhanded, and implemented such that it will educate licensees instead of punishing them for ignorance of regulations.

First, we strongly suggest that written warnings be mandatory for any violation, unless the licensee has been given a written warning for the same offense during the three years preceding the violation. Sale to minor violations should be excluded from the written warning requirement, and there may be other, more serious, offenses for which a warning is not appropriate.

Next, we are recommending that ABRA be required to notify a licensee of a violation within 120 days of the date upon which the violation occurred. In too many instances, show cause proceedings are based on facts which occurred more than a year before the hearing or before the licensee receives notice of the alleged violation. No one can remember what happened on the date of the alleged violation, and in many instances, those involved are no longer employed by the licensee. The ABRA investigators testify from the written reports and frequently also have no recollection of

the actual events. This change will prevent unfair stale charges from being used to punish a licensee. Similarly, we are recommending that a licensee not be subject to being repeatedly cited for the same violation, before previous violations have been adjudicated. This prevents investigators from visiting an establishment night after night after night and then citing the licensee with numerous repeat violations of the same offense.

Finally, we are recommending that the fine schedule be adjusted. When the fines were set several years ago, there was no expectation that ABRA investigators would, rather than working with licensees, to ensure compliance, cite licensees for every perceived violation, even if there is no statute or regulation which covers the perceived wrong. Likewise, there is no expectation that the Office of the Attorney General, apparently at the instance of ABRA, be unreasonable in its demands for resolution of even the most minor offense. Consequently, fines should be reduced, standardized, and discretion eliminated.

Before concluding, I must comment on the proposal by the Alcoholic Beverage Control Board that the permissible penalties for sale to minors be increased to the astounding sums of \$5,000.00 for a first offense, \$10,000.00 for a second offense, and \$15,000.00 for a third offense. The notion that these punishments for our restaurants that operate on a 3% to 4% national profit margin will eradicate underage drinking is ludicrous. It is common knowledge among regulators that even the most vigorous enforcement of sale to minor offenses, the highest compliance rate obtainable is 86% or 87%. When I was in school, that was a B+. Although reasonable enforcement and fine can help obtain or maintain this grade, excessive fines will merely cripple businesses

who are ensnared in ABRA's sting operations in the name of seeking perfection that can never be obtained.

Thank you for giving me the opportunity to appear before you today. I am happy to answer any questions you may have.