

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



Legal Counsel Division



MEMORANDUM

TO: Fred P. Moosally
General Counsel
Alcoholic Beverage Regulation Administration

FROM: Wayne C. Witkowski
Deputy Attorney General
Legal Counsel Division *WCW*

DATE: February 9, 2007

SUBJECT: Legal Advice Regarding to Which Zoning Districts a Licensed Nude
Dancing Establishment May Transfer
(AL-07-069) (MID 193819)

This responds to your January 23, 2007 memorandum in which you set forth your request for legal advice from this Office.

You state, in your memorandum, that the Alcoholic Beverage Control Board (Board) seeks legal advice regarding the interpretation of D.C. Official Code § 25-374 (2001) (hereinafter, the Statute). Your question is prompted by an application, filed pursuant to D.C. Official Code § 25-374 (2001), for the transfer of a Class "CN" nightclub license (which permits nude dancing) (hereinafter, the License) from a CM-2 zone in one part of the city to a CM-1 zone in another part of the city.

The Statute states:

A license under section 25-371 (b) may only be transferred to a location in the Central Business District or, if the licensee is currently located in a CM or M-zoned district, transferred within the same CM or M zoned district, as identified in the zoning regulations of the District of Columbia and shown in the official atlases of the Zoning Commission of the District of Columbia; provided, that no license shall be transferred to any premises which is located:

- (1) Six hundred feet or less from another licensee operating under section 25-371 (b);⁽¹⁾ and

¹ D.C. Official Code § 25-371 (b) (2001), permits a licensee who regularly provided nude dancing entertainment before December 15, 1993, to continue to provide that type of entertainment at its establishment.

- (2) Six hundred feet from a building with a certificate of occupancy for residential use or a lot or building with a permit from the Department of Consumer and Regulatory Affairs for residential construction at the premises.

At issue is the interpretation of the phrase, "transferred within the same CM or M zoned district" (hereinafter, the Phrase). Two suggested interpretations have already been provided for the Phrase. The first suggested interpretation is contained in a June 7, 2006 advisory opinion from Board Chairperson Charles A. Burger to Councilmember Jim Graham (hereinafter, Board Opinion). The second proposed interpretation is contained in a January 17, 2007 letter, from counsel for the License applicant to the Board (hereinafter, Counsel Opinion). Both the Board Opinion and the Counsel Opinion focus primarily on the definition of the word "same" in the Phrase as the key to their respective interpretations.

CONCLUSION

Having reviewed the applicable law related to your inquiry, I believe that the best interpretation of the Phrase would require that any transfer of the subject license occur within the fixed limits of the zone in which the License currently exists and conform, in every degree, to the designation of the transferred license. Therefore, the License should only be transferred within its current CM-2 zoned district (Option 1, as defined below). This is the option advanced, but abandoned, by the Board in the Board Opinion.

Of course, any proposed new location must also comply with the requirements of paragraphs (1) and (2) of the Statute regarding the proximity of the transferred establishment to another Class CN nightclub or to a residential community, respectively.

This is a recommended interpretation only, since this Office must defer to any interpretation of the Statute by the Alcoholic Beverage Regulations Administration (ABRA) – the agency with broad statutory authority to implement and enforce the Statute.

DISCUSSION

It appears that any interpretation of the types of permissible transfers under the Statute must revolve around understanding the meaning of the Phrase.² The Board Opinion noted that one possibility would be to interpret the Phrase to limit the transfer of the subject establishment's license transfer application to the boundaries of the particular CM

² As you note in your memorandum, zone designations such as CM and M are defined as industrial districts under the controlling regulation (11 DCMR § 105.1 (e)). As you also note, a single set of uses is authorized for CM districts under 11 DCMR §§ 801 through 802. Thus, there is no usage distinction between areas zoned CM-1, CM-2, and CM-3. The numerical designations in CM-1, CM-2, and CM-3 pertain to building height restrictions and maximum floor area ratios and not to permitted usage of the building (11 DCMR §§ 840-841). Authorized uses in M-zoned districts are more expansive and include those allowed in CM-zoned districts plus additional uses (11 DCMR §§ 821 through 822).

or M-zoned district in which the establishment is currently located (hereinafter, Option 1). Thus, the establishment would be prohibited from moving its license from its existing CM-2 zone to another CM-2 zone in another part of the city.

Alternatively, the Board stated that the Phrase could be interpreted more expansively so as to permit the transfer of the License to an identical or equivalent CM or M-zoned district in another part of the city (hereinafter, Option 2). Thus, the License could be transferred from its present CM-2 zone in one part of the District to a CM-2 zone in another part of the District.

The Board concluded that the latter interpretation (Option 2) should be adopted for two reasons. First, the Board states that Option 2 provides greater meaning to the Council's inclusion of the words "CM or M zoned" in the phrase "transferred within the same CM or M-zoned district". Otherwise, the Board states, the Council could have used more limiting language such as "only within the existing district" or "only within the same district". Thus, the Board concludes, the more expansive language used by the Council, as interpreted in Option 2, is consistent with the canon of statutory construction that a statute should be construed in such a manner as to give meaning to every word in its text.³

Secondly, according to the Board, Option 2 is preferred because the public policy objectives of the Statute are better supported by that interpretation. The Board concluded that the public policy objective of the Statute is to identify those areas of the District that are less likely to be located in close proximity to residential communities. The Board states that there is nothing in the Phrase to suggest that the Council intended to differentiate between various areas zoned as CM or M. Rather, the Board believes that the Council viewed all CM or M-zoned districts as sharing similar characteristics with other CM or M-zoned districts. Thus, the Board Opinion concludes that the License may be transferred from a CM-2 zone in one part of the city to a CM-2 zone in another part of the city but not from a CM-2 zone in one part of the city to, for example, a CM-1 zone in another part of the city.

The Counsel Opinion takes the Board's opinion one step further and concludes that the plain language of the word "same" in the Phrase, does not differentiate between CM-1, CM-2, and CM-3 zones. Thus, Counsel argues that the Phrase should be given a broader application than that advocated by the Board, so that the License may be transferred from its present CM-2 zone to any other CM zone, such as a CM-1 zone, in any part of the city (hereinafter, Option 3). The Counsel Opinion states that to interpret the Phrase otherwise would lead to an irrational result where the present transfer application is denied but another CM-1 licensee could apply for a transfer and be able to open a class "CN" nightclub with nude dancing in the same location to which the applicant seeks to transfer its license.⁴ In that regard, the Counsel Opinion argues that statutes are not to be

³ Citing, *United States v. Menashe*, 348 U.S. 528, 538-539 (1955).

⁴ I assume that the applicant's counsel is here speaking of an entity that currently holds a CM-1 license, since there is a moratorium on new licenses for nightclubs with nude dancing.

construed in such a manner as to lead to an absurd result.⁵ The Counsel Opinion also suggests that the word "same" in the Phrase logically is intended to differentiate only between CM and M zones because of the differences in the permitted uses for CM and M zones and that adopting that distinction would be consistent with the principle of statutory construction requiring every word in a statute to be given effect.

Ambiguity exists in a statute when the statute is capable of being understood by reasonably well-informed persons in two or more different ways.⁶ The subject Phrase suffers from ambiguity. However, in interpreting the Statute and the Phrase, effect must be given, if possible, to every word, clause and sentence so that no part is inoperative or superfluous, void or insignificant, and so that one section does not destroy another section unless the provision at issue is an obvious mistake or error. Furthermore, every word in a statute must be presumed to have been used for a purpose.⁷

You state, in your memorandum, that the legislative history for the Statute does not define the word "same". However, the word "same" is not the single key to understanding the Council's intent in the Phrase.⁸ While both the Board Opinion and the Counsel Opinion focus exclusively on the definition of the word "same" in the Phrase, I believe that the word "within" is equally important to understanding the Statute's purpose. Unless otherwise defined, words take on their ordinary common meaning. While the dictionary definition of a word does not necessarily reflect the legislative intent, in the absence of relevant legislative history dictionary definitions do provide a useful starting point.⁹ The primary definition of the word "within", when used as a preposition as it is in the Statute, is "inside the fixed limits of".¹⁰ The primary definition of the word "same" is "identical; conforming in every degree;"¹¹ "the very thing just mentioned or described."¹² Thus, if we apply the plain meaning of the words in the Phrase, the Phrase would require that the License transfer remain within the fixed limits of the zone in which the License currently exists and to conform, in every degree, to the

⁵ Counsel Opinion pgs. 1-2, citing, *Zhou v. Jennifer Mall Restaurant, Inc.*, 699 A.2d 348, 351 (D.C. 1997).

⁶ Norman J. Singer, *2A Statutes and Statutory Construction*, § 45.02, at 12-13 (6th ed. 2000).

⁷ *2A Statutes and Statutory Construction, supra*, § 46.06, at 181-194; *Shelton v. U.S.*, 721 A.2d 603 (D.C. 1998); *Zhou v. Jennifer Mall Restaurant, Inc.*, 699 A.2d 348 (D.C. 1997); and *Tenants Council of Tiber Island-Carrollsborg Square v. District of Columbia Rental Accommodations Commission*, 426 A.2d 868 (D.C. 1981).

⁸ Not only does the legislative history not define the word "same", but I found no discussion of the Statute in the October 10, 2000 report of the Committee on Consumer and Regulatory Affairs that you provided to this Office.

⁹ *2A Statutes and Statutory Construction, supra*, § 47.28, at 352.

¹⁰ *Webster's II (New Riverside University Dictionary)* (1988)

¹¹ *Webster's, supra*.

¹² *Black's Law Dictionary* (7th ed. 1999).

designation of the transferred license. Therefore, the License should only be transferred within its current CM-2 zoned district (Option 1). This is the option advanced, but abandoned, by the Board in the Board Opinion.

If the Council had wanted to permit Options 2 and 3, it should have used different, more precise, words to accomplish that intent. For example, for Option 2, the Phrase could have read, "transferred from a CM or M zoned district to the same type of CM or M zoned district in another part of the District." For Option 3, the Phrase could have read, "transferred from a CM or M zoned district of any type to another CM or M zoned district of any type in another part of the District."

The stated rationale for the Board's preference (Option 2) is that Option 2 provides greater meaning to the Council's use of the words "CM or M-zoned" in the Phrase. The Board suggests that the Council could have limited the interpretation of the Phrase by using words such as "only within its existing district" or "only with the same district". With the exception of not using the word "only", that is exactly what the Council said in enacting the Statute.

The Board further states that Option 2 is the preferred interpretation because the Council's public policy objective of keeping Class CN Licenses in zoning areas that are generally less likely to be located in close proximity to residential communities is achieved. The Board further surmises that the Council did not intend to distinguish between specific CM zones, since there is no indication that CM zones vary in their characteristics. However, I believe that Option 1 best captures the Council's public policy objective of keeping Class "CN" nightclub licenses in zoning areas that are not in close proximity to residential communities, since maintaining the license in the same part of the city in which it is presently located best informs potential home buyers and builders where these establishments are located and thus enables home buyers and builders to keep residential communities away from Class CN establishments. In addition, I disagree with the Board's surmising that the Council did not intend to distinguish between specific numbered CM zones, since I believe that the plain language of the Phrase "within the same CM or M zoned district" does evidence the Council's intent to differentiate between specific numbered CM zones by keeping existing licenses within their current districts.

The Counsel Opinion argues that a finding that a CM-2 licensee in one part of the city may not transfer to a CM-1 location in another part of the city would lead to an irrational result in that denial of the subject application might be followed by a permitted application from a CM-1 licensee for the very same use (*i.e.*, nude dancing nightclub) at the very same premises. While I disagree with the conclusion reached in the Counsel Opinion, the hypothetical scenario presented in the Counsel Opinion (which is Option 2) provides further support for why Option 2 should not be selected. As stated above, the Counsel Opinion could only be referring to a license transfer, since there is a moratorium on new Class CN Licenses. However, under Option 2, a current CM-1 licensee could secure a transfer of that license to a CM-1 zoned district in another part of the city such as the location to which the current transfer applicant now seeks to relocate. Such an

outcome, which would certainly be irrational under the Statute's plain language, could not occur under Option 1. Under Option 1, a current Class CN licensee would already have to be located in the CM-1 zoned district within which it wished to transfer its Class CN License.

In summary, subject to a contrary opinion by ABRA, I recommend that the Phrase be interpreted pursuant to Option 1, as defined above. Should you have questions about this memorandum, please contact either Pollie H. Goff, Senior Assistant Attorney General, Legal Counsel Division, at 724-5558, or me at 724-5524.

WCW/phg