Government of the District of Columbia
OFFICE OF THE CORPORATION COUNSEL
JUDICIARY SQUARE
441 FOURTH ST., N.W.
WASHINGTON, D. C. 20001

IN REPLY REFER TO:
Prepared by:LCD:FPM
(AL-98-243)

March 11, 1999

OPINION OF THE CORPORATION COUNSEL

SUBJECT: 1720 H Street Corporation pending application to transfer its liquor license from 1720 H Street, N.W., to a new location.

Vannie Taylor, III, Esquire
Acting Chairperson
Alcoholic Beverage Control Board
614 H Street, N.W., 3rd Floor
Washington, D.C. 20001

Dear Mr. Taylor:

As you know, in a May 27, 1998 memorandum to the Alcoholic Beverage Control Board ("May 27th memorandum"), the Legal Counsel Division of this Office addressed whether 23 DCMR §904.6, which was enacted by the Alcoholic Beverage Control Act and Rules Reform Amendment Act of 1994 ("1994 Act"), effective May 24, 1994, D.C. Law 10-122, 41 DCR 1658, 1665 (April 1, 1994), allows a nude dancing establishment that has been "grandfathered in" to transfer its license to a new location.[1] The May 27th memorandum correctly pointed out that the answer depends on whether the word "establishment" as used in 23 DCMR §904.6 is necessarily tied to the location of a licensee's business when the 1994 Act was adopted, or instead reasonably may be more broadly construed to mean a licensee's business wherever located at any particular time -- not necessarily tied to the location in 1994. Without addressing whether the application should be granted, the Legal Counsel Division's memorandum opted for the broader meaning of "establishment" and, thus, it concluded that the ABC Board could lawfully consider the application of the 1720 H Street Corporation t/a 1720 Club (the "1720 Club") to transfer its class "CN" liquor

[1] 23 DCMR §904.6 provides:

> After the effective act of the Alcohol Beverage Control Act and Rules Reform Amendment Act of 1994, no holder of a retailer's License Class CN or DN may permit nude dancers pursuant to section 904.5 of this Section, provided that a licensee who regularly provided entertainment by nude dancers prior to December 15, 1994, may continue to do so at that establishment. (Emphasis added.)

license from 1720 H Street, N.W., to a new location in the Central Business District.

In reliance on the May 27th memorandum, the ABC Board accepted the 1720 H Street Corporation's application to transfer its license to a new location. One month earlier, the Special Litigation Division of this Office, in a brief filed in U.S. District Court opposing the 1720 Club's Motion for a Temporary Restraining Order, had taken the opposite view and construed "establishment" in 23 DCMR §904.6 to mean actual address or physical building in which a business is located. I understand that the Legal Counsel Division was unaware of the Special Litigation Division's brief when it issued the May 27th memorandum. Thereafter, the Board held a protest hearing intermittently between November 4, 1998 and January 27, 1999 on the Protestants' opposition to the 1720 Club application. On January 20, 1999, the Protestants filed an extensive, well-researched Motion to Dismiss the 1720 Club application on the ground that a grandfathered licensee's "establishment" in 23 DCMR §904.6 meant the business at its particular location when the 1994 Act took effect. The ABC Board now must rule on that motion.

In light of these previous conflicting views by two divisions of this Office -- a conflict of which I was not aware until recently -- I am now addressing what "establishment" means under 23 DCMR §904.6 as a formal opinion pursuant to Part II (A)(a) of Reorganization Plan No. 50 – Office of Corporation Counsel (June 26, 1953) as amended. See also United States Parole Commission v. Noble, 693 A.2d 1084, 1098 (D.C. 1997), affirmed on rehearing en banc, 711 A.2d 85 (D.C. 1998).

CONCLUSIONS

The phrase, "at that establishment," in 23 DCMR §904.6 is ambiguous. On the one hand, it may be narrowly construed to mean only a grandfathered licensee's place of business at the time that the 1994 Act took effect. Indeed, under the rule of construction that no statutory provision should be rendered superfluous, there is a good argument that the phrase "at that establishment" must refer to a specific location when the 1994 Act took effect because there would have been no need for this phrase -- *i.e.*, 23 DCMR §904.6 could have ended with the phrase "may continue to do so" -- if the Council had intended to permit a licensee to operate an ABC-licensed nude dancing business in a new location at a later date. Notwithstanding this point, I believe that "at that establishment" also can reasonably be construed to mean a licensee's business wherever located at any particular time, including any new place approved by the ABC Board pursuant to its longstanding license transfer procedures. Under this view, the broader construction of the grandfather provision could give a reasonable meaning to "at that establishment." Under that meaning, the phrase could be construed to limit the effect of the grandfather clause to a licensee's nude dancing business on the effective date of the 1994 Act, and yet would preclude that licensee from commencing nude dancing at any other ABC-licensed business it owned that did not already feature nude dancing when the 1994 Act took effect.

But for this possibility that a licensee might be conducting several businesses, I would not hesitate to conclude that the last words of 23 DCMR §904.6, supra note 1, would have to be construed to limit continuation of the nude dancing to a particular location. Given, however, this multiple business possibility -- so that there arguably was a need to make clear that a given licensee was grandfathered only for those licensed businesses where nude dancing was already being

conducted in 1994 -- the ambiguity persists as to what "at that establishment" means. In adopting 23 DCMR §904.6, the Council could have -- but did not -- clarify this point in the language it used. For example, if it intended to limit a grandfathered license to the place of business in 1994, it could have made the intent clearer through the addition of a phrase like "where located on the effective date of [the 1994 Act]." The legislative history of the 1994 Act slightly supports the broader interpretation of "establishment" in 23 DCMR §904.6, while the legislative history of the related provision in 23 DCMR §904.5 (adopted in 1986) slightly supports the narrower interpretation -- overall, a wash. Similarly, hypothetical substitutions of "business" or "place of business" for "establishment" in 23 DCMR §904.6 and the underlying District of Columbia Alcoholic Beverage Control Act ("ABC Act"), approved January 24, 1934, 48 Stat. 319, D.C. Code §25-101 et seq. (1996), in order to see which fits better, yield no definitive answer because both substitutions generally work reasonably well.

However, based on our evaluation of the Protestants' Motion to Dismiss, the Applicant's response, and our own extensive research, I am convinced that three interpretive factors -- which the Legal Counsel Division did not consider when the May 27th memorandum was issued -- weigh decisively in favor of the conclusion that "establishment" should be narrowly construed to mean a grandfathered licensee's place of business at the time the 1994 Act took effect. First, the courts' developed jurisprudence on the meaning of "establishment" shows that this term normally involves a location criterion. Second, the establishments covered by the Class "CN" and "DN" designations in the ABC Act and Regulations (e.g., restaurants and nightclubs) are, in turn, defined in the ABC Act in a way that includes location criteria. Third, the general rule of statutory construction is that a grandfather clause, as in 23 DCMR §904.6, is to be narrowly -- not broadly -- construed. Given these factors, it is unlikely that a reviewing court would give deference to any ABC decision to adopt the alternative broader construction of "at that establishment." See, e.g., DCX v. District of Columbia Taxicab Commission, 705 A.2d 1096, 1098 (D.C. 1998). Thus, I conclude that the ABC Board lacks the authority to grant a nude dancing establishment's application to transfer its license to a new location. Without such authority, the Board has no power to grant a transfer of the 1720 Club's license to a new location and, consequently, the Protestants' Motion to Dismiss should be granted.

ANALYSIS

I. Defining the Phrase "at that establishment"

A. Plain Meaning Rule

When a regulation does not provide a definition, the courts will attribute to a term its natural, plain, and ordinary meaning. See Riggs National Bank v. District of Columbia, 581 A.2d 1229, 1235 (D.C. 1990). In this case, the Council of the District of Columbia did not define the term "establishment" in 23 DCMR §904.6. Thus, we have to apply the plain and common meaning of this word. Dictionaries provide a useful starting point for determining what statutory terms mean, by suggesting what the legislature could have meant by using particular terms. See 2A Sutherland, Statutory Construction [hereinafter "2A Sutherland"] § 47.28 (N. Singer 5th ed. 1992). Based on several dictionaries' definitions -- including Webster's Third New International Dictionary (1981), Black's Law Dictionary (1990), The American Heritage Dictionary (1985),

Webster's New World Dictionary (1972), and the Webster's Ninth New Collegiate Dictionary (1985) -- I conclude that "establishment" has two applicable meanings. First, "establishment" can mean "a place of business or residence with its furnishings and staff." Second, it can mean "a civil organization" or "a public or private institution" without location criteria. Thus, the definition of the word "establishment" taken by itself, based on these dictionaries, is not determinative, making the meaning of "establishment" ambiguous. The same conclusion is reached with respect to the phrase, "at that establishment," in 23 DCMR §904.6.

B. Legal meaning

Absent legislative intent to the contrary, or other evidence of a different meaning, legal terms in a statute may be construed as having been used in their legal -- as contrasted with their plain -- sense. 2A Sutherland, at § 47.29. Black's Law Dictionary (6th ed. 1990), page 546, defines "establishment" to mean "[a]n institution or place of business, with its fixtures and organized staff." (Emphasis added.) In addition, to support this definition, Black's Law Dictionary cites Abnie v. Ford Motor Co. 195 N.E.2d 131, 135 (Ohio Com.Pl.1961), where the Court of Common Pleas of Ohio noted that "several cases of the Supreme Court of Ohio are cited to us which indicate the Supreme Court has defined 'establishment' as being a place where the business or operation is carried on." If the word "establishment" in the law normally includes a location criterion, and if "establishment" in 23 DCMR §904.6 is given its legal meaning -- an approach that, while not necessarily required, is nonetheless reasonable -- then it follows that "at that establishment" in 23 DCMR §904.6 narrowly refers to a grandfathered licensee's place of business when the 1994 Act took effect.

Aside from Black's Law Dictionary, the courts' developed jurisprudence supports the conclusion that the normal legal meaning of "establishment" is a "place of business." Even though not binding, a reviewing court would be likely to find that the Council was aware of these judicial decisions when it adopted 23 DCMR §904.6. See Bates v. Board of Elections and Ethics, 625 A2d. 891, 893 (D.C. 1993)(citing Morissette v. United States, 342 U.S. 246, 263 (1952), for the proposition that "where Congress borrows terms of art in which are accumulated the legal tradition and centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken."). The most significant decision we have found defining "establishment" is A.H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945). There, the U.S. Supreme Court stated, "'establishment' as used normally by Government and Business means "a distinct physical place of business". Id. at 496. (Emphasis added.) The Court went on to say that, "census reports, business analyses, administrative regulations, and state taxing and regulatory statutes interpret establishment in this way." Id.

In the present case, the Protestants submitted in their Motion to Dismiss eight examples from other jurisdictions where the word "establishment" is defined to include a specific place.[2]

[2] These are: (1) Town of Foxborough v. Bay State Harness Horse Racing & Breeding Ass'n. Inc., 366 N.E.2d 777, 5 Mass. App. 613, 617 (1977) (establishment is defined as a more or less fixed and usually sizable place of business together with all of the things that are an essential part of it); (2)Claims of Ffalco Ward, 514 N.Y.S.2d 568, 569 (1987) (airport terminal building was part of an establishment); (3)Ahnne v. Dept. of Labor, 489 P.2d 1397, 1401, 53 Haw. 185 (1971)

Several of these cases cite to the Supreme Court's decision in A.H. Phillips, supra, in reaching their determination that "establishment" means a distinct physical place in administrative regulations. No decisions to the contrary were cited in the Applicant's opposition to the Motion to Dismiss; nor have we found any decisions to the contrary. The decisions cited in the preceding footnote are significant because the D.C. Court of Appeals, in interpreting a term in a local statute, will give weight to the interpretation that another court has given to the identical term in a different statute. For example, in Bates v. Board of Elections and Ethics, 625 A.2d 891 (D.C. 1993), the Court of Appeals stated that its "reading of the statute produced a result that was consistent with the overwhelming majority view in American jurisdictions." Additionally, the Court of Appeals in Siegman v. District of Columbia, 48 A.2d 764, 766 (D.C. 1946), interpreted a "business establishment" to imply a particular location when, with regard to the specific language used in a regulation by the former Board of Commissioners, the Court stated:

> Had the Commissioners, instead of using the word 'location', said 'street address' or 'business establishment' or 'premises', **or such similar term**, it is obvious that such language would have included department stores and markets occupying all or most of a city block . . . [w]e conclude that the use of the general term 'location' is sufficiently definite to have informed defendant of the nature of the offense and how to avoid violations. . . . (Emphasis added.)

There is further support in the District's statutory law for the proposition that "establishment" means a "place of business." The Protestants submitted examples of the use of the word "establishment" to include the concept of location in D.C. business and tax law. In addition to the examples given by the Protestants, section 3 of the former Juvenile Curfew Act of 1995, effective September 20, 1995, D.C. Law 11-48, D.C. Code §6-2182 (1998 Supp.), defined "establishment" to mean "any privately owned place of business operated for a profit to which the public is invited, including, but not limited to, any place of amusement or entertainment." (Emphasis added.) Also, under section 3 of the District of Columbia Funeral Services Regulatory Act of 1984, effective May 22, 1984, D.C. Law 5-84, D.C. Code §2-2802 (1994), "funeral services establishment" is defined to mean "any place or premises in the District devoted to, or wherein is engaged, the business of the care or preparation of human remains for funeral burial . . . ." (Emphasis added.)

(establishment within the unemployment statute naturally means a building or group of proximate buildings); (4) Snook v. International Harvester Co., 276 S.W.2d 658, 660 (Ky. 1955) (establishment under unemployment compensation statute is particularly characterized by a fixed geographic location; (5)Auxier-Scott Supply Co. v. Oklahoma Tax Commission, 527 P.2d 159, 162 (Okla. 1974) (under statute extending sales tax exemption, establishment means any location or place where business conducted); (6) Marshall v. New Hampshire Jockey Club, Inc., 562 F. 2d 1323, 1329 (1st Cir. 1977)(an "establishment" within Fair Labor Standards Act ("FLSA") means a distinct physical place of business); (7) Usery v. Mother Hubbard's Kitchen Inc., 549 F.2d 566, 567 (8th Cir. 1977)(under retail establishment exemption of FLSA, establishment means a distinct physical place of business); (8) Abnie v. Ford Motor Co., 195 N.E.2d 131, 135 (Ohio Com.Pl. 1961) (an establishment is a place where one is permanently fixed for residence or business).

Moreover, under the ABC Act and the implementing regulations, restaurants, nightclubs, taverns, etc., are all considered to be "establishments." See e.g., D.C. Code §25-103 ("no licensed establishment other than a nightclub or a legitimate theater may provide entertainment by nude performers.") And, the statutory definition of each of these establishments, -- *i.e.*, restaurants, legitimate theaters and nightclubs, -- refers to a location criterion.[3] Because each of the establishments covered under ABC law is defined by reference to a location criterion, it follows that "establishment" as used in ABC law -- including 23 DCMR §904.6 -- must by definition contain location in its definition. Therefore, it is likely that, in reviewing any appeal under 23 DCMR §904.6, the D.C. Court of Appeals would conclude that "at that establishment" denotes the specific location of a grandfathered licensee's business when the 1994 Act was adopted and, consequently, would hold that the ABC Board has no authority to approve the 1720 Club's application for transfer to a new location.

C. Grandfather clauses are narrowly construed

As a general principle of statutory interpretation, a grandfather clause exception is to be construed strictly against the one who invokes it.[4] In addition as noted by the U.S. Supreme Court in USV Pharmaceutical Corp. v. Weinberger, 412 U.S. 655, 666 (1973), a "grandfather clause may not be construed so as to provide a loophole." While it has not expressly adopted these rules of statutory construction, the D.C. Court of Appeals appears to have tacitly adopted them because it has not looked favorably upon broad interpretations of grandfather clauses. See Convention Center Referendum Committee v. District of Columbia Bd. of Elections and Ethics, 441 A2d. 889, 900 (D.C. 1981)(en banc)(noting, with regard to the Convention Center Referendum Committee ("CCRC"), that the CCRC's grandfather clause did not give the Board of Elections and Ethics or the CCRC "the power to revise the substance of CCRC's initiative after petitions have been circulated"). It appears that the D.C. Court of Appeals will read a grandfather clause only as broadly as necessary to give it some meaningful effect. See e.g., Page Associates v. District of Columbia, 463 A.2d 649, 655 (D.C. 1983)(rejecting the D.C. Board of Zoning Adjustment's interpretation of a grandfather clause as being so restrictive as to undermine the rationale of the grandfathering provision). Here, 23 DCMR §904.6 has banned nude dancing except for those entities specifically "grandfathered in." Absent express language, no exceptions should be read into this regulation beyond those minimally necessary to give effect to the regulation's grandfather clause. Thus, the 1720 Club should not be allowed to transfer to a new location because to do so

---

[3] Under D.C. Code §25-103, the nightclub definition includes "a suitable space in a suitable building, approved by the board"; the brew pub definition includes "a suitable place"; the restaurant definition includes "a suitable space in a suitable building"; the tavern definition includes "a suitable space in a suitable building"; the "hotel" definition includes "a suitable building or other structure"; and the club definition includes "a corporation . . . owning, hiring or leasing a building or space in a building of such extent and character as in the judgment of the Board may be suitable . . . ."

[4] See United States v. Allan Drug Corp., 357 F.2d 713, 718 (10th Cir. 1966); Durovic v. Richardson, 479 F.2d 242, 250 (7th Cir. 1973); See National Association of Casualty and Surety Agents v. Bd. of Governors, 856 F. 2d 282, 286 (D.C. Cir. 1988); 73 Am. Jur. 2d, Statutes §313 (1974).

would be to read under the applicable rule of statutory construction, an unnecessarily broad exception into 23 DCMR §904.6.

D. Other factors

Other factors relevant to the interpretation of 23 DCMR §904.6, *i.e.*, the written legislative history of the 1994 Act and the hypothetical alternative substitution of "business" or "place of business" for "establishment" in the ABC Act and 23 DCMR §904.6 to see which fits better, add little to the foregoing analysis and, therefore, do not change my conclusion that the grandfather clause in 23 DCMR §904.6 should be narrowly construed to permit nude dancing only at the locations where ABC-licensed businesses were operating when the 1994 Act took effect.

With respect to legislative history, the committee report accompanying the 1994 Act stated that the purpose of the amendment to Section 904 in 23 DCMR was to provide that, "no newly-licensed ABC establishments may feature nude dancing," and that "existing establishments are grandfathered in." See Report of the Committee on Consumer and Regulatory Affairs for Bill 10-207, the "Alcoholic Beverage Control Act and Rules Reform Amendment Act of 1993," dated December 15, 1993. This statement reasonably may be interpreted to show that the Council's purpose was to limit the number of licenses featuring nude dancing, and not to restrict the transfer of those licenses, especially where the licenses were located in the Central Business District. However, the legislative history of related 23 DCMR §904.5, which was adopted in 1986, states that "[t]he intent is to restrict nude dancing at licensed nightclubs to the Central Business district, gradually phasing it out at establishments elsewhere in the District as ownership changes occur." See Report of the Committee on Consumer and Regulatory Affairs for Bill 6-504, the "District of Columbia Alcoholic Beverage Control Act Reform Amendment Act of 1986," dated November 12, 1986, at page 57. Thus, the intent of the Council under the 1986 Act was not simply to restrict the number of licenses, but rather only to allow existing nude dance clubs to remain at their current locations – and then only as long as their ownerships remained the same. Thus, the relevant legislative history is inconclusive concerning which of the alternative plausible definitions of "establishment" the Council intended to use.[5]

According to the Legal Counsel Division's May 27th memorandum, a comparison of the substance of 23 DCMR §904.6 with other portions of the 1994 Act where the word "establishment" is used indicates that the word was not intended to include the concept of a

[5] In their Motion to Dismiss, the Protestants attempt to show that the broader interpretation of the phrase "at that establishment," is incorrect based on a letter dated December 29, 1998 from Mr. John Ray to the ABC Board. Mr. Ray is the former Chairman of the Council's Consumer Regulatory Affairs Committee and was responsible for drafting the 1994 Act. Mr. Ray's letter indicates that, in the 1994 Act, the Council did not intend to authorize the ABC Board to consider a location transfer application if the licensee proposed to offer nude entertainment at the new location. It should be noted, however, that Mr. Ray's December 29, 1998 letter is not part of the legislative history of the 1994 Act and cannot be considered to determine the Council's intent when it passed the 1994 Act. See e.g., Riggs National Bank of Washington v. District of Columbia, 581 A.2d 1229, 1236 (D.C. 1990).

specific location -- *i.e.*, a geographical place -- and that the Council used the word "location" whenever it intended this concept. In support of this proposition -- and the key to its conclusion -- the May 27th memorandum lists examples in the 1994 Act where the use of the words "establishment" and "location" clearly are not intended to overlap; rather, "location" is used to refer to a specific place, whereas "establishment" is used to refer generally to a "business." I agree with the conclusion that the word "business" is a better fit than the word "location" when substituted for the word "establishment" in the various examples cited in the May 27th memorandum. However, for the May 27th memorandum to be correct in its interpretation of the Council's intent, the word "business" also must be a better fit than the phrase "place of business." After an extensive analysis by my staff, involving the insertion of the phrase "place of business" for "establishment" throughout the ABC Act and the implementing regulations, it is apparent that the phrase "place of business" is as good a fit as, if not a more appropriate fit than, the word "business."[6] Consequently, the substitutional analysis in the May 27th memorandum has no impact on the conclusion described earlier that "establishment" in 23 DCMR §904.6 must be narrowly construed to mean only a grandfathered licensee's place of business at the time the 1994 Act took effect.

Sincerely,

John M. Ferren
Corporation Counsel

---

[6] This analysis included the three examples from the 1994 Act that are cited in the May 27th memorandum. For example, section 2(f)(2) of the Rules Amendment Act amended section 14(b) of the ABC Act, D.C. Code 25-115(b), to add a new paragraph 5 which reads:

CN-licensed establishments to be located in a nightclub district shall be presumed to be appropriate for such location. (Emphasis added.)

Replacing this phrase with "CN-licensed places of business to be located in a nightclub district . . . , instead of "CN-licensed businesses to be located in a nightclub district", provides an equal or better fit within the context of the language. I reach the same conclusion regarding: section 2(f)(3) of the 1994 Act, which amended section 14(c)(2), D.C. Code 25-115(c)(2), to add a new phrase which reads "Except that in the case of establishments to be located in a nightclub district the Board shall post the notice for at least 20 calendar days prior to the hearing." (emphasis added); and section 2 (f)(5) of the 1994 Act, which amended section 14, D.C. Code §25-115, to add a new subsection (k) that now reads in part "no existing license class CN, CT, DN, or DT shall be transferred to any other person or to any other location within the Georgetown historic district, except when the number of such licensed establishments in the Georgetown historic district is below 6." (Emphasis added.)

cc: Anthony A. Williams
Mayor

Paul E. Waters
ABC Program Manager