

July 23, 2021

VIA ELECTRONIC MAIL

Desirae Griego
Alcoholic Beverage Control Division
Regulation and Licensing Department
2550 Cerrillos Road
Santa Fe, NM. 87504
Desirae.Griego@state.nm.us

RE: Written Comments on Proposed Rules

Dear Ms. Griego:

The New Mexico Alcohol Alliance (hereinafter, “NMAA”), by and through their attorney of record as set forth below, hereby submits written comments on the proposed rules set forth as 15.10.2, 15.10.31, 15.10.32, 15.10.33, 15.10.51, 15.10.52, 15.10.53, 15.10.54, 15.10.55, 15.10.61, 15.10.70, 15.11.2, 15.11.20, 15.11.21, 15.11.22, 15.11.23, 15.11.24, 15.11.25, 15.11.26, 15.11.27, 15.11.28, 15.11.29, 15.11.30, and 15.11.31 NMAC. NMAA maintains that the written comments set forth below are in compliance with the Notice of Proposed Rulemaking set forth in the New Mexico Register, Volume XXXIII, Issue 12 on June 22, 2021. Accordingly, NMAA hereby provides the following written comments in red font below the applicable rule provisions, and suggested changes to the proposed rules are set forth in red font using strikethrough and underline format:

I. PROPOSED CHANGES TO AND COMMENTS ON 15.11.24.8

The NMAA proposes the addition of a new paragraph G to 15.11.24.8 for the reasons set forth herein:

15.11.24.8 LIMITATIONS ON RESTAURANT LICENSE TYPES: A person holding a restaurant with beer and wine license or a restaurant with spirits license is subject to the following limitations:

A. The primary source of revenue for a restaurant holding [~~Ⓢ~~] any restaurant license must be the sale of food, meaning that sixty percent or more of the gross receipts must be derived from the sale of food, not alcoholic beverages, which must be demonstrated to the satisfaction of the division upon renewal of the license.

B. ~~[A]~~ All restaurant [licensee-is] licensees are prohibited from selling alcoholic beverages for consumption off the licensed premises except as provided by Subsection D of 15.10.51.9 NMAC or, when issued an alcoholic beverage delivery permit, through appropriate delivery methods.

C. ~~[A]~~ All restaurant [licensee-is] licensees are prohibited from serving alcoholic beverages after the restaurant ceases the sale of food or 11:00 p.m., whichever is earlier.

D. A restaurant with beer and wine license is non-transferable from person to person or from location to location. A restaurant with spirits license is non-transferable from person to person, but may be transferred from location to location within its local option district.

E. The sale of alcohol through a restaurant beer and wine license is limited to beer and wine, unless the restaurant a licensee has applied for and been granted a New Mexico spirituous liquors permit. A New Mexico spirituous liquors permit holder may sell beer, wine, and spirits made by a New Mexico Craft Distiller.

F. A restaurant may only purchase alcohol through a duly licensed wholesaler, except that a restaurant licensee that also holds a small brewer's or winegrower's license may be duly licensed as a wholesaler, solely for the purpose of selling beer or wine to the licensee's restaurant that it has manufactured through its own license.

G. Bar service is not permitted. No bar areas will be approved under these types of licenses; however, a preparation station for wait staff to prepare the beverages for delivery to the tables is allowed. All food and drinks must be delivered by wait staff to individual tables.

Comment: The Division's website contains a document called "Instructions for Restaurant Liquor License Application." Page 2 of 4 of that document contains a paragraph entitled "3. Detailed Floor Plan with Photos," and subparagraph f states: "**Bar service is not permitted. No bar areas will be approved under this type of license,** however a prep station for wait staff to prepare the beverages for delivery to the tables is allowed. **All food and drinks must be delivered by wait staff to individual tables or customers seated at food counter.**" NMAA maintains that this instructional paragraph should be contained in the proposed rules instead of just in the application instructions. Without this change, the rule provision is arbitrary and capricious and otherwise not in accordance with law. Moreover, other than some grammar and punctuation changes to convert the instructional language into this rule provision, NMAA did make one substantive change, whereby NMAA eliminated the phrase "or customers seated at a food counter." NMAA maintains that this phrase essentially allows a licensee to create a bar and call it a food counter. Therefore, NMAA proposes that this phrase should be deleted. Without this change, the rule provision would be arbitrary and capricious and otherwise not in accordance with law.

II. PROPOSED CHANGES TO AND COMMENTS ON TITLE 15, CHAPTER 11, PART 23

The NMAA proposes the addition of a new section to Title 15, Chapter 11, Part 23,

which is set forth below as 15.11.23.14:

15.11.23.14 VARIANCE:

A. Any applicant or licensee may seek a variance from the rules and shall do so by filing a written petition with the division. The petitioner may submit with the petition any relevant documents or material which the petitioner believes would support his petition. Petitions shall:

- (1) state the petitioner's name and address;
- (2) state the date of the petition;
- (3) describe the facility or activity for which the variance is sought;
- (4) state the address or description of the property upon which the facility or activity is

located;

- (5) identify the rules from which the variance is sought;
- (6) state in detail the extent to which the petitioner wishes to vary from the rules;
- (7) state why the petitioner believes that compliance with the regulation will impose an unreasonable regulatory burden upon the facility or activity; and
- (8) state the period of time for which the variance is desired, including all reasons, data, reports and any other information demonstrating that such time period is justified and reasonable.

B. The variance petition shall be reviewed in accordance with the adjudicatory procedures of the Uniform Licensing Act.

C. The division may grant the requested variance, in whole or in part, subject to conditions, or may deny the variance. If the variance is granted in whole or in part, or subject to conditions, the division shall specify the length of time that the variance shall be in place. A permanent variance may be granted.

D. A permanent variance may be granted. If a permanent variance is not granted, a petitioner may reapply for a variance once the time period expires.

Comment: NMAA maintains that this proposed rule provision is a logical outgrowth of the Division's proposed rules because it relates to the overall regulatory framework. In general, regulatory frameworks that propose a one-size-fits-all approach—such as the Division's proposed rules—contain variance provisions that allow applicants and licensees to petition regulators to craft solution to balance competing objectives. New Mexico statutes and rules contain numerous examples of variance provisions, and NMAA requests that the Division take judicial notice of such examples. These examples of variance provisions include, but are not limited to, rule provisions under the Water Quality Act and the Mining Act. Even the new draft rules dealing with cannabis contain a variance provision.

III. CONCLUSION

For the reasons set forth above, NMAA respectfully requests that the Alcoholic Beverage Control Division consider the proposed changes to the draft rules and the written comments set forth above. NMAA further reserves the right to change or supplement its comments based upon new information or evidence presented during the hearing or during any continuation of this rulemaking. Finally, NMAA greatly appreciates the Division's efforts putting the draft rules together for public consideration.

Respectfully submitted,



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