



THE BUCKEYE INSTITUTE

February 18, 2022

VIA ELECTRONIC AND FIRST CLASS MAIL

Keith David Parsons
Regulatory Enforcement Administrator
Department of Consumer and Regulatory Affairs
Government of the District of Columbia
1100 4th Street NW
Washington, D.C. 20024

Dear Mr. Parsons,

I write on behalf of Drane Flannery Restaurant LLC and Eric James Flannery, operator and owner of the Big Board restaurant, in response to the summary license suspension that the D.C. Department of Consumer and Regulatory Affairs issued against Big Board (Basic Business License No. 71103270) on February 3, 2022. That license suspension was expressly based upon alleged violations of a series of emergency orders issued by the Mayor requiring business establishments to impose proof of vaccination and masking as a requirement of entry or employment.

On February 14, the Mayor announced that the vaccination requirement was being lifted effective February 15, and that the mask requirement will be lifted on March 1. As a result, we request immediate confirmation that Big Board's license will be reinstated immediately. *See* DCRA Letter of 2/3/22 (noting that suspension will remain effective only until compliance with mayor's orders is confirmed).

Moreover, the suspension itself violated federal law governing the District of Columbia's authority to issue emergency regulations. As your February 3 notice states, the orders the DCRA relied upon in suspending Big Board's license were the latest in a series of emergency executive orders issued by the Mayor covering a rolling two-year period. The repeated issuance of such orders runs afoul of the United State Constitution, in two ways.

First, as you are no doubt aware, D.C.'s Home Rule Charter – which delegates Congress's exclusive authority to legislate over the District pursuant Article I, Section 8 – requires that legislation enacted by the D.C. Council be submitted to Congress for review during a 30-day period, during which Congress may take action to disapprove and invalidate legislation. *See* D.C. Code § 1-206.02(c)(1). There is an exception to this requirement for emergency legislation, but in such case the legislation "shall be effective for a period of not to exceed 90 days." D.C. Code § 1-204.12(1). The Mayor, in turn, has been authorized by the Council using emergency legislation to extend her own

emergency orders for months on end, which she has repeatedly done. *See* D.C. Code § 7-2306(c-1), (c-2).

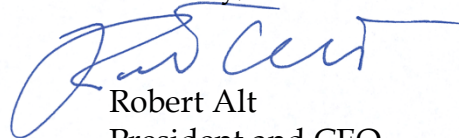
By layering emergency order on top of emergency order, the Council and Mayor have thwarted Congress's reserved constitutional power under D.C. Code § 1-206.02(c)(1). In making a limited exemption for legislation that was to be effective only for 90 days, Congress never could have intended to authorize legislation by the D.C. executive to escape Congressional review for years on end. This failure to adhere to the requirements of D.C.'s Home Rule Charter renders the Orders upon which DCRA's suspension relied *ultra vires* – and therefore the suspension itself *ultra vires* – null and void.

More significantly, the effect of the rolling “temporary orders” also precludes any judicial review of DCRA's suspension order. As the suspension decision itself notes (at 3), the Mayor's emergency order is subject to D.C. Code. 7-2308, which provides that “[n]o action taken pursuant to an emergency executive order” shall be subject to the review provisions of D.C.'s Administrative Procedure Act “until after the expiration date of the emergency executive order.” *Id.* This anti-appeals provision may make sense for orders of truly short duration (such as the 90 days anticipated by D.C. Code § 1-204.12(a)), but in conjunction with the series of emergency orders stretching for two years now, it has indefinitely prohibited any judicial review of DCRA's action. This preclusion violates basic concepts of due process. *See, e.g., Novelty Distributors, Inc. v. Leonhart*, 562 F.Supp.2d 20, 28 (D.D.C. 2008) (noting judicial review provisions as necessary to “ensure that a party is not deprived of its property interest ... in its registration without due process of law in violation of the Fifth Amendment”).

Additionally, we are concerned that enforcement actions were taken against Big Board for its owner's protected speech. We have seen interviews indicating that Big Board may have been singled out for enforcement action in order to make an example out of it. Obviously, government enforcement authority cannot be selectively used in a manner that violates the First Amendment rights of our client.

It is in no one's interest at this point to further prolong the suspension of Big Board's business license. We request that you revoke the suspension immediately in order to avoid further litigation, including requests for injunctive relief, attorney's fees, and other compensatory relief. Please respond to this letter no later than February 23, 2022.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robert Alt", is written over a horizontal line.

Robert Alt
President and CEO

cc: The Hon. Muriel Bowser