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Members of the State Liquor Authority
Via email: secretarys.office@sla.ny.gov

**Re: NYC Hospitality Alliance Comments in Support of the
Attorney Self-Certification Program**

Dear Chairman Bradley, Commissioner Ford, and Commissioner Fan:

We represent The New York City Hospitality Alliance, a not-for-profit trade association representing New York City's hospitality industry, including over 2,000 establishments across the five boroughs.

Before the Members is a request by the Licensing Bureau to consider whether the attorney self-certification program should be continued and, if so, whether any changes should be made to the program.

The Alliance strongly supports the program and urges the Members to continue it.

The program remains necessary and justified because it does in fact reduce the time it takes for the Authority to process applications submitted under the program. This faster processing is incredibly important to New York City applicants. While some of the criticisms levied against the program are valid, none are unresolvable, and none are sufficient to justify taking action to *lengthen* processing times in New York City.

I. History

In section 120 of the Alcoholic Beverage Control Law, the Legislature issues an unambiguous command to the Authority:

A decision upon any application or hearing submitted to or held by the liquor authority shall be rendered within thirty days after such submission or hearing.

See ABC Law § 120.

We cannot speak to the practice in the early post-Prohibition years, but few will dispute that in the past two decades, the Authority's processing times have greatly exceeded this statutory mandate.¹

By the time the Authority adopted the attorney self-certification program, processing times were so long that it took almost nine months to approve an application. The New York State Law Revision Commission's 2009 report on the Alcoholic Beverage Control Law and its administration found:

The SLA's current nine-month backlog of license applications reflects a failure in the licensing process, jeopardizes public health and safety, and exacerbates the economic crisis currently plaguing New York. Small business owners, and some large ones as well, are forced to suffer ever-mounting expenses for months on end without the income generated from having these licenses. The situation deprives the state of new revenues from sales and income taxes, and it depresses the growth of new jobs in local communities.

See NYSLRC Final Report Part One (September 2009) at 9.²

Upon adoption of the attorney self-certification program, the backlog was quickly alleviated. In Part One of its Final Report, the Commission noted with approval that the Authority had been considering an attorney self-certification program. By the time the Commission delivered Part Two of its Final Report to the Legislature and Governor in December 2009, it found:

The licensing process has become more efficient by the SLA's adoption of a self-certification process.

See NYSLRC Final Report Part Two (December 2009) at 1.³ The success of the attorney self-certification program contributed to the Commission's observation that "the SLA's progress is remarkable." *Id.* at 2.

¹ Appellate courts have had very little occasion to apply this 30-day decision requirement. In the exceedingly few cases that have reached the Appellate Division, almost all having to do with the time to render decisions in disciplinary hearings, the Appellate Division has held that the 30-day timeframe is "directive, rather than mandatory." *See* *Perry v. New York State Liquor Authority*, 190 AD2d 675 (2 Dept. 1993). However, the First Department has held that a court may compel the Authority to decide an application not decided within the statutory 30-day period. *See* *Stuart & Stuart, Inc. v New York State Liq. Auth.*, 29 AD2d 176 (1 Dept. 1968) ("the very statute creating the Authority provides, however, that it shall render a decision within thirty days after submission of an application to it. Thus, while mandamus may not lie commanding the respondent to approve or disapprove the applications, it may be directed nevertheless to Decide the applications."). We are not aware of a Court of Appeals decision squarely addressing the issue. Our view is that the statutory text is unambiguous.

² Available at <https://nyslawrevision.files.wordpress.com/2014/07/finalreportpartone.pdf> (last accessed October 26, 2021).

³ Available at <https://nyslawrevision.files.wordpress.com/2014/07/12-15-09-report-on-abc-law.pdf> (last accessed October 26, 2021).

II. The Authority's lengthy processing times disproportionately impact New York City applicants.

As the volume of applications increases and staffing levels decrease, processing times have once again reached a critical and unacceptable state. But because section 97-a of the ABC Law prohibits the Authority from issuing temporary retail permits to the overwhelming majority of New York City applicants, it is the City that bears the brunt of this unsustainable development.

While applicants outside of New York City, uniformly eligible for temporary retail permits, are not sensitive to the length of time it takes for the Authority to issue their permanent licenses, New York City applicants are left to wait upwards of six months to begin operating. The wait is exacerbated by the fact that a disproportionate number of New York City applications are subject to the 500 Foot Law, compared with the rest of the state, requiring a delay-inducing 500 Foot Hearing.

The concerns raised by the Law Revision Commission in 2009 in the midst of the Great Recession have thus remerged as equally true in 2021. As New York tries to recover from the economic instability caused by the pandemic, small business owners in New York City suffer an injury waiting six months to open new bars and restaurants in otherwise vacant storefronts.

It is well-understood that there is a pressing need for an expedited process for new bars and restaurants in New York City to begin serving alcoholic beverages. The issue has been publicized in recent media, and the State Legislature is actively considering legislation extending temporary retail permits to New York City applicants. However, no such legislation has become law, and under any of the competing proposals, New York City applicants will still be treated disadvantageously compared to other applicants throughout the state.

III. The attorney self-certification program is sound policy

Against the backdrop of increased processing times, economic instability, and the unique plight of New York City applicants, now is not the time to eliminate New York City's only option to obtain a license in less than six months. Eliminating the program would have the effect of *lengthening* processing times in New York City; an untenable result.

In addition to the obviously important reduced processing times *produced* by the attorney self-certification program, the program *itself* is sound policy.

A. Professional self-certification, and relying upon licensed attorneys, are not novel concepts

When the Authority implemented the attorney self-certification program in 2009, it was not writing on a blank slate. Since the mid-1990s, the New York City Department of Buildings has implemented a successful self-certification program in which licensed architects and

professional engineers may submit self-certified plans that result in expedited processing.⁴ Self-certified applications submitted under the DOB program are subject to random audits, and deficient applications discovered during an audit could result in disciplinary action against the professional who certified the application. The DOB program has been so successful, it has been expanded over the years to include more and more application types.

Other jurisdictions, such as Chicago, also have robust self-certification programs.⁵

The rationale of relying upon licensed professionals, typically subject-area specialists, to self-certify complex regulatory applications is simple – accountability. Indeed, there are myriad examples of responsibilities that attorneys are entrusted with in New York that non-attorneys are not, due to the heightened accountability that comes with a license to practice law that can be suspended or revoked:

- Executing sworn affirmations in lieu of affidavits sworn before a notary
- Becoming a notary public without completing the notary exam
- Obtaining a real estate broker's license without completing the educational, experience, and examination requirements
- Issuing subpoenas
- Bypassing security in courthouses

It was thus not a novel concept for the Authority to achieve the goal of faster application processing times by relying upon licensed attorneys to perform self-certifications.

B. Attorney self-certified applications are better applications

The attorney self-certification program has vastly improved the quality of applications that are submitted through the program. This is especially so compared to non-certified applications submitted by laypeople.

Central to the improved quality of attorney self-certified applications is the requirement that the attorney personally visit the licensed premises. These personal visits frequently reveal issues that would not have otherwise surfaced.

For example, it is not uncommon on a site visit for an attorney to discover a house of worship or school within 200 feet of the proposed licensed premises that was otherwise not disclosed to the attorney by the applicant. This is generally due to a lack of knowledge on the part of laypeople concerning the 200 Foot Law, how it is measured, what buildings count, how to treat corner locations, etc. We have personally encountered such situations even when the prior tenant at the premises was licensed, having failed to disclose the offending house of worship or school to the Authority.

⁴ See Professional Certification Requirements, NYC Department of Buildings, available at <https://www1.nyc.gov/site/buildings/industry/professional-certification.page> (last accessed October 26, 2021)

⁵ See Self-Certification Program Permit, City of Chicago, available at <https://www.chicago.gov/city/en/depts/bldgs/provdrs/permits/svcs/self-cert-permits.html#:~:text=The%20DOB%20plan%20reviews%20are,using%20the%20E%2DPlan%20system> (last accessed October 26, 2021)

Similarly, the diligence needed for an attorney to affirm that he or she has complied with the requirements of the self-certification affirmation go far beyond the standard ethical requirements imposed upon an attorney engaged to represent an applicant in the course of preparing a non-certified application. For example, the high level of diligence required to personally verify the applicant's source of funds often reveals theretofore undisclosed investors that otherwise would have remained unknown to the attorney, and thus to the Authority.

Therefore, the issue is not comparing what is *in* attorney self-certified applications versus non-certified, but what is *missing* from non-certified applications submitted by laypeople versus attorney self-certified applications. On that score, we submit that attorney self-certified applications have the advantage.

The requirements of attorney self-certification capture important information that the Authority would otherwise not be privy to. All told, the Authority receives a better application when it is self-certified.

IV. Valid criticisms of the program can be addressed without discontinuing the program; and no criticism is significant enough to justify lengthening the Authority's processing times in New York City

The Authority may receive a better application when it is self-certified by an attorney, but we recognize that not all self-certified applications are perfect. Many areas of the ABC Law are vague, and the Licensing Bureau's application of the law to a particular set of facts may not always be in line with an attorney's. And deficiencies arising from simple oversights in attorney self-certified applications are more common than they ought to be.

Indeed, the core criticism of the attorney self-certification program is that deficient self-certified applications result in more lengthy examination of such applications than was ever anticipated when the program was inaugurated.

But discontinuing the program is not the solution. Improving the program is. We offer two suggestions:

- Enforce a strict policy of removing applications from the self-certification program for major deficiencies, which should be defined.
- Randomly audit a percentage of self-certified applications post-approval on an annual basis. Adjust internal management rules for attorneys who have submitted a certain number of self-certified applications that, upon random audit, are found to have had major deficiencies, which, if they had been discovered during the initial examination would have been grounds for removal of the application for the program.

Implementing these suggestions will have the result of improving self-certified applications, and reducing the time needed to examine such applications.

However, it is important to emphasize, even if the Members reach the conclusion that the current attorney self-certification cannot be improved, and that the time needed to examine such applications will likely remain the same for the foreseeable futures; that is emphatically *not* a sufficient justification to discontinue the program.

Even with its flaws, the program still results in faster processing times than non-certified applications, which, as discussed, is extremely important for New York City applicants.

* * *

Maintaining the attorney-certification program is an industry issue of importance to the Alliance and its members. Without the program, New York City applicants will have no relief from the unbearable six-month processing times for license applications.

Perhaps in the future when application processing times return to a timeframe within the range contemplated by the ABC Law, the Authority may have occasion to reconsider the ongoing need for the program. Now is clearly not that time.

In the final analysis, there is simply no reason strong enough to justify taking any action that has the result of lengthening processing times for New York City applicants. For these reasons, we urge the Members to continue the attorney self-certification program.

Very truly yours,

PESETSKY & BOOKMAN, P.C.

A handwritten signature in black ink, appearing to read 'Robert S. Bookman', written over a horizontal line.

By: Robert S. Bookman, Esq.

A handwritten signature in black ink, appearing to read 'Max Bookman', written over a horizontal line.

By: Max Bookman, Esq.