

**THE DISTRICT OF COLUMBIA  
ALCOHOLIC BEVERAGE CONTROL BOARD**

In the Matter of:	)		
	)		
Leeds the Way, LLC	)	License Number:	071913
t/a Hank's Oyster Bar	)	Case Number:	10-PRO-00109
	)	Order Number:	2011-007
Application for Substantial Change to a Retailer's Class CR License	)		
	)		
at premises	)		
1624 Q Street, N.W.	)		
Washington, D.C. 20009	)		

BEFORE: Charles Brodsky, Chairperson  
Mital Gandhi, Member  
Nick Alberti, Member  
Donald Brooks, Member  
Herman Jones, Member  
Calvin Nophlin, Member

**DENYING PROTESTANTS' MOTION FOR RECONSIDERATION AND  
CLARIFICATION OF BOARD ORDER NO. 2010-595**

Leeds the Way, LLC, t/a Hank's Oyster Bar (Petitioner), which holds a Retailer's Class CR License, at premises 1624 Q Street, N.W., Washington, D.C., filed an Application for a Substantial Change to its Retailer's Class CR License (Application). On July 26, 2010, a protest against the Application was timely filed by A Group of Three or More Individuals (Protestants). The Application came before the Alcoholic Beverage Control Board (Board) for a Roll Call Hearing on August 9, 2010, and a Status Hearing on September 8, 2010. The Protest Hearing was held on November 3, 2010.

The Board published its decision on December 8, 2010, in Board Order No. 2010-595 and approved the Application subject to certain conditions. In pertinent part, the Board required that the Petitioner take commercially reasonable steps to install soundproofing and mitigate any potential noise problems. In that vein, the Board ordered the Petitioner to hire a noise consultant to analyze whether the wall that the Petitioner and Mr. Poozesh share is sufficient to prevent noise from the establishment being heard in Mr. Poozesh's home or whether noise from the establishment's sidewalk café will deny him usage of his patio. The Board then required the

Petitioner to submit the consultant's recommendations to the Board. The Board stated that it would approve the Application so long as the analysis and recommendations received are reasonable and the Petitioner complies with those recommendations.

Mr. Mallof, on behalf of the Protestants, submitted a Motion for Reconsideration on December 22, 2010, and asked the Board to clarify Board Order No. 2010-595. Mr. Mallof requested that the Board clarify whether (1) the Petitioner should submit its noise consultant's recommendations to the Protestants, ANC 2B, and Mr. Poozesh; (2) clarify whether the Board will issue a second order approving or disapproving of the expansion; (3) asks the Board to address the summer garden mentioned during the November 3, 2010, hearing; and (4) asks the Board to declare the Petitioner's plans for the façade doors a substantial change and require the Petitioner to submit a separate application. Mr. Mallof also requested that the Board amend paragraphs 2, 30, and 46 because they are allegedly incorrect.

In response, the Petitioner submitted a reply on January 4, 2011. The Petitioner argues that the Board should only accept motions through the Protestants' designated representative, Mr. Hibey; however, there is no administrative or legal reason to enforce such a requirement at the present time. The Petitioner further states that the Petitioner does not oppose the noise consultant's recommendations being sent to the Protestants but objects to sending them to non-parties. The Petitioner also argues that the façade doors do not constitute a substantial change. In regards to Mr. Mallof's request regarding the findings of fact, the Petitioner does not object to amending paragraphs 2 and 30 but shows decisively that paragraph 46 is correct.

The Board will deal with each of Mr. Mallof's requests in turn:

First, the Licensee does not object to the Protestants receiving a copy of the noise consultant's recommendations. As a result, the Board has no objection to providing the Protestants a copy of the recommendations. Nevertheless, ANC 2B and Mr. Poozesh are not parties to this dispute and lack standing in this matter. Therefore, providing the noise consultant's report to these non-parties is of no use to these proceedings. As such, the Board denies Mr. Mallof's request as it relates to ANC 2B and Mr. Poozesh. However, the Board encourages the Petitioner to work cooperatively with Mr. Poozesh in order to avoid any future noise violation issues under D.C. Code § 25-725 (2001).

Second, Board Order No. 2010-595 clearly indicates that further action by the Board is required before the Application is approved. The Board intends to issue an order indicating whether the Petitioner may proceed with its plans.

Third, the Board is unclear as to Mr. Mallof's request regarding the summer garden. The summer garden endorsement only regulates a licensee's ability to sell and serve alcoholic beverages on its outdoor private property, not whether a licensee can build in such space. *See* 23 DCMR § 1004 (2008). Here, the notice of public hearing stated that the Petitioner applied for increased seating and a sidewalk café and nothing more. *ABRA Protest File No. 10-PRO-00109, Notice of Public Hearing*. As such, if the Petitioner wants to serve alcoholic beverages in an

area that would qualify as a summer garden it must obtain a summer garden endorsement. Nevertheless, the failure of the Petitioner to apply for a summer garden endorsement does not prevent the Petitioner from building or constructing its summer garden area as it sees fit. ABRA only regulates the number of seats and the selling and serving of alcoholic beverages in the summer garden.

Fourth, the Board agrees with the Petitioner's arguments regarding the façade doors. A substantial change only occurs if the Petitioner is proposing a change that changes the nature of the operation and the Board deems it a substantial change. D.C. Code § 25-762 (2001). The addition of façade doors does not alter the Petitioner's business model as a fine-dining establishment. Therefore, the Petitioner is not required to submit a separate substantial change Application to the Board if it wants to install such doors.

Finally, regarding the Findings of Fact in Board Order No. 2010-595, the Board finds paragraph 46 to be correct. In addition, neither party objects to amending paragraphs 2 and 30. As such, the Board will amend paragraphs 2 and 30 in agreement with the parties.

### **ORDER**

Therefore, this 2nd day of February 2011, the Motion for Reconsideration submitted by the Protestants is hereby **DENIED**. The Board clarifies Board Order No. 2010-595 as follows:

- (1) The Petitioner shall provide a copy of the noise consultant's recommendations to the Board and the Protestants;
- (2) The Board strikes the second sentence in paragraph 2, which reads: "The Board notes that both parties in that matter are the same as the parties now before the Board."
- (3) The Board amends the second to last sentence of paragraph 30 where it states: "Mr. Poozesh testified that Mr. Mallios offered to participate in the rezoning process for free and make his property commercial." The sentence shall now read:
  - a. "Mr. Mallios asked Mr. Poozesh to participate in the rezoning process and make his property commercial."
- (4) Board Order No. 2010-595, otherwise, remains in full force and effect; and
- (5) Copies of this order shall be sent to the Petitioner and the Protestants.

District of Columbia  
Alcoholic Beverage Control Board

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Chuck Brodsky, Chairperson

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Mital M. Gandhi, Member



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Nick Alberti, Member



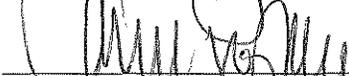
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Donald Brooks, Member



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Herman Jones, Member



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Calvin Nophlin, Member

Pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (April 2004) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b).