

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

In the Matter of:)

2461 Corporation,)
t/a Madam's Organ)

Holder of a Retailer's Class CT License)
at premises)
2461- 18th Street, N.W.)
Washington, D.C. 20009)

License Number: ABRA-025273
Case Number: 12-PRO-00073
ORDER NUMBER: 2013-019

BEFORE: Ruthanne Miller, Chairperson
Donald Brooks, Member
Mike Silverstein, Member

ALSO PRESENT: Bill Duggan, on behalf of the Applicant

Richard Bianco, Esq., on behalf of the Applicant

Billy Simpson, on behalf of Protestant

Maureen Gallagher, on behalf of Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

INTRODUCTION

This matter arises from the Application for a Substantial Change to an existing Retailer's Class CT License (Application) filed by 2461 Corporation, t/a Madam's Organ, (Applicant) at premises 2461- 18th Street, N.W., Washington, D.C. 20009. The Applicant sought to add an outdoor sidewalk café with four seats to the existing license, with

proposed hours of operation on Sunday through Thursday from 9:00 a.m. through 1:30 a.m. the following morning and on Saturday and Sunday from 9:00 a.m. through 2:30 a.m. the following morning. Alcohol sales were proposed to end one-half hour before closing. Several protests were filed, one by the Kalorama Citizens Association (KCA) and one by the Reed-Cooke Neighborhood Association (RCNA). Both KCA and RNCA protested on the ground that the Application would have a negative impact on the neighborhood's peace, order, and quiet. RCNA also protested on the ground that the Application would have a negative effect on vehicular and pedestrian safety. Both organizations requested that the Application not be granted.

On December 5, 2012, Advisory Neighborhood Commission (ANC) 1C, at its regularly scheduled meeting, adopted a resolution in which it stated that it welcomed outdoor sidewalk cafes and requested that the Board require that the sale and consumption of alcohol at the Applicant's sidewalk café be limited to seated patrons. Moreover, the ANC encouraged the Applicant to work with it to reach agreement on appropriate hours for the sidewalk café. Finally, on December 12, 2012, the KCA informed the Board that it wished to withdraw its protest.

The Board finds in favor of the Applicant, and approves the Applicant's Substantial Change Application without conditions, because the Applicant's operations do not have a negative impact on the neighborhood's peace, order, and quiet. Moreover, the Alcoholic Beverage Regulation Administration's (ABRA) investigation of the Applicant's operations, including repeated observations of the establishment, found no violations of ABRA law and regulations by the establishment.

PROCEDURAL BACKGROUND

ABRA gave public notice on July 13, 2012 that the Applicant had filed to substantially change its Retailer's Class CT License through the addition of an outdoor sidewalk café providing for four seats. The KCA, represented by Denis James and the RCNA represented by Benedicte Aubrun, filed timely protests to the Application under District of Columbia (D.C.) Official Code § 25-602.

The parties came before the Board for a Roll Call Hearing on September 10, 2012 and a Protest Status Hearing on October 10, 2012. The Protest Hearing occurred on December 13, 2012. On December 12, 2012, the day before the hearing, ABRA received a letter from the KCA withdrawing its protest.

PRELIMINARY MOTION IN LIMINE AND TO DISMISS

Prior to the Protest Hearing, Counsel for Applicant, on December 7, 2012 filed with the Board a Motion in Limine and To Dismiss for Lack of Standing.

With regard to the Motion in Limine, the Applicant argued that, because Protestants had failed to specifically identify the nature of their protests other than to recite the

applicable provisions of District law, had failed to identify specific witnesses and had failed to identify exhibits to be utilized at the hearing on their Protest Information Form (PIF), the Protestants should not be allowed to introduce evidence other than that generally described in their PIFs. This request would therefore only allow for the Protestant to talk about and introduce images of the establishment, thereby choking off their participation because they did not cite to anything other than the statutory standards set forth in D.C. Code § 25-313. Protestant complied with the Board's instructions to file a PIF and provided a summary description of the nature of their protest as well as a list of witnesses. While the PIF is helpful to the parties in helping to frame the discussion at the Protest Hearing, the PIF is primarily for the purpose of framing the arguments in order for the Board to prepare for the hearing. Moreover, the Applicant has had, prior to the hearing, at least three opportunities to hear the Protestant's concerns and to therefore prepare for the hearing: the Roll Call Hearing, the mediation and the Show Cause Status Hearing. The fact that the PIF may not be as helpful to the Applicant as the Applicant would like is not a ground for in essence cutting off the Protestant at the knees. Therefore, the Motion in Limine is **DENIED**.

As for the Motion to Dismiss for Lack of Standing, Applicant argues that, because the Protestant resolved to file the protest at an Executive Board meeting rather than a regular meeting of the RCNA that Protestant violated D.C. Code § 25-601(3) (B), which requires, in order to have standing, the resolution must be approved "at a duly called meeting" with at least ten days prior notice to its members. Without having reviewed Protestant's Bylaws, Applicant assumed that an Executive Board meeting was closed to the membership. While Applicant is correct that the issue of standing is not foreclosed and can be raised at any time during the proceeding, a review of RCNA's Bylaws, which were provided to the Board and Applicant at the Protest Hearing, shows that meetings of the Executive Board are duly called meetings, are publicly announced to the membership at least ten days prior to the meeting and are open to the membership. Moreover, the Executive Board uses these meetings to take action when such action cannot be delayed until the next meeting of the Association. Therefore, the Board does not find any issue of standing here. Accordingly, the Motion to Dismiss for Lack of Standing is **DENIED**.

The matter proceeded to a Protest Hearing and both the Applicant and the Protestant presented evidence through the testimony of witnesses and the submission of documentary evidence.

FINDINGS OF FACT

The Board, having considered the evidence, the testimony of the witnesses, the arguments of the parties, and all documents comprising the Board's official file, makes the following findings:

A. Investigator Brian Malloy

1. ABRA Investigator Brian Malloy conducted an investigation of the Application and authored the Protest Report submitted to the Board. *Transcript*, December 13, 2012 at 33;

see generally ABRA Protest File No. 12-PRO-00073, *Protest Report, December 2012*.

According to Inspector Malloy, the Applicant filed an application for a substantial change to its existing Retailer's Class CT License for a four seat outdoor sidewalk cafe. *Tr.* at 14, *Protest Report* at 2. Investigator Malloy interviewed Ms. Benedicte Aubrun of the RCNA in connection with this Application and was told that the RCNA opposed the Application on the grounds that it would increase noise by drawing more people to the surrounding area. *Tr.* at 12. Furthermore, she stated that more outdoor seating, when combined with late night music, will encourage more people to congregate outside of the establishment and be loud and disruptive. *Id.* Ms. Aubrun stated that she had attempted to reach an agreement with the Applicant to lessen the hours of the café but that the Applicant had refused to do so. *Id.* Investigator Malloy noted that the music coming from the establishment was from a speaker located in the adjacent summer garden and the speaker was permitted in the establishment's Voluntary Agreement. *Tr.* at 35.

2. The Applicant's establishment sits in a C-2-B commercial zone within the 18th Street Northwest Neighborhood Commercial Overlay District. *Protest Report* at 4. ABRA's records show that there are 56 other ABRA licensed establishments located within 1,200 feet of the establishment, of which twenty have Sidewalk Café endorsements and seven have Summer Garden endorsements. *Id.* at 5. There are no schools, recreation centers or public libraries located within 400 feet of the establishment. *Id.* at 8. A review of Metropolitan Police Department (MPD) records indicates that sixty nine calls were made to the establishment's address for the period from October 27, 2011 through October 26, 2012. None of the calls resulted in reports being transmitted to ABRA. *Id.* at 16. There is one current case pending concerning the establishment (Case No. 12-CMP-00704) which alleges that the establishment has been operating a sidewalk café without a Sidewalk Café endorsement. *Id.* at 14.

2. The establishment's hours of operation are Sunday through Thursday from 9:00 a.m. through 2:00 a.m. and on Fridays and Saturdays from 9:00 a.m. through 3:00 a.m., with alcohol sales permitted during all hours except the final half-hour of operation. *Protest Report* at 14. The Applicant's Summer Garden operates during the same hours as the establishment. Live Entertainment is offered beginning at 6:00 p.m. each day and ends at the same time as alcohol sales. *Id.* The establishment has certain food requirements through its Voluntary Agreement. *Id.* at 11.

3. The establishment does not have any off-street parking, but there are on-street parking spaces and off-street parking garages and lots surrounding the establishment. *Protest Report* at 8. As for public transportation, the establishment is served by a number of Metrobus routes that either travel on Columbia Road, N.W. or 18th Street, N.W. *Id.* at 9. Vehicular and pedestrian traffic is heavy on evenings but is monitored and controlled by MPD officers who patrol the area during the evening to maintain crowd control and maintain vehicular flow. *Id.*

4. ABRA investigators monitored the establishment on twenty separate occasions from October 18, 2012 through December 1, 2012 and did not notice any issues with regard to noise, trash or loitering. *Id.* at 14. Aside from the issue of already operating an

unauthorized sidewalk café at the establishment, which consisted of two tables and four chairs, there were no other issues. *Id.* While Investigator Malloy did notice a large amount of pedestrian and vehicular traffic as well as noise in the general area of the establishment, none could be specifically attributed to the establishment. *Tr.* at 36.

B. Bill Duggan

5. Mr. Duggan testified that is the president of the corporation that owns the establishment. *Tr.* at 43. He testified that the establishment had gone ahead and constructed the sidewalk café because they had obtained a public space permit and because the permit would expire within a certain period of time if it was not constructed. *Tr.* at 44. The establishment did not serve alcoholic beverages at the sidewalk café. *Id.* It was only after a visit from Investigator Malloy informing them that a Sidewalk Café endorsement from ABRA was necessary that they stopped using the space. *Tr.* at 45. Mr. Duggan further testified that the Summer Garden, which is in front of the establishment and adjacent to the sidewalk café space, does not have any restrictions on operating hours and is subject to a Voluntary Agreement that allows for the use of an outside speaker. *Tr.* at 49. He further testified that an establishment immediately to the north has a 20-seat sidewalk café without any operating hour restrictions. *Tr.* at 50-51. He also testified that he felt that he would be at a competitive disadvantage by not having a sidewalk café as did his neighbors. *Tr.* at 54-55.

C. Billy Simpson

6. Mr. Simpson testified that he is President of the RCNA. *Tr.* at 69. He testified that the sidewalk café *per se* would not have a detrimental impact on peace, order and quiet but the cumulative effect of all of the establishments in Adams-Morgan was detrimental to the area's peace, order and quiet and that of its residents. *Tr.* at 70. He further testified that all that he was seeking was a restriction on hours and a requirement that all patrons be seated. *Tr.* at 71. Moreover, he testified that with the recent completion of the 18th Street reconstruction project, he believed that there would soon be applications for many more outdoor seats for alcohol consumption, the cumulative effect of which would be detrimental to the area's peace, order and quiet. *Tr.* at 74-75. Mr. Simpson referenced the Board's actions with regard to uniform regulation of outdoor sidewalk cafes in the Dupont Circle area and requested that similar action be taken for Adams-Morgan. *Tr.* at 78.

CONCLUSIONS OF LAW

The Board has the authority to approve a substantial change in the operation of a licensed establishment if the Applicant demonstrates to the satisfaction of the Board that the proposed change in the nature of operation is appropriate for the area of the District where the establishment is located. D.C. Code § 25-404. In this instance, in determining appropriateness, the Board will look at the evidence provided to the Board, including the effect on peace, order and quiet. D.C. Code § 25-313.

In this matter, Applicant has demonstrated to the satisfaction of the Board that the substantial change to its license to add a four seat outdoor sidewalk café will not have a negative impact on the peace, order and quiet of the neighborhood. The Protest Report and the evidence provided by Applicant, as well as the testimony provided by both the Applicant and the Protestant, show that this Application, in and of itself, will not have a negative impact. The concern raised by Protestant was not of this particular Applicant, but of the cumulative impact on the neighborhood due to future applications for and approvals of sidewalk cafes. There is no evidence in the record that denying this Application or reducing the requested hours of operation will have any impact on the peace, order and quiet of the Adams-Morgan neighborhood. The Board will continue to monitor the activity in this area, as it has in the past, to ensure that there is a balance preserved between the need for thriving businesses and the need for ensuring a livable residential community.

In addition, the Board must further consider whether the Application will not have a negative impact on litter. Under §25-726, “The licensee under a retailer’s license shall take reasonable measures to ensure that the immediate environs of the establishment, including adjacent alleys, sidewalks, or other public property immediately adjacent to the establishment, or other property used by the licensee to conduct its business, are kept free of litter.” D.C. Code § 25-726(a). The testimony from Investigator Malloy indicated that the establishment does not have a negative impact on litter.

Therefore, we conclude that Applicant has demonstrated to the Board’s satisfaction that this application will not have a negative impact on the peace, order and quiet of the area in which it is located.

CONCLUSION

We are only required to produce findings of fact and conclusions of law related to those matters raised by the Protestant in its initial protest. See Craig v. District of Columbia Alcoholic Beverage Control Bd., 721 A.2d 584, 590 (D.C. 1998) (“The Board’s regulations require findings only on contested issues of fact.”); 23 DCMR § 1718.2. Accordingly, based on our review of the Application and the record, we find the Applicant has demonstrated that the change in operation is appropriate for its location in the District of Columbia.

ORDER

Therefore, the Board, on this 16th day of January, 2013, hereby ORDERS that the Application for a Substantial Change to Retailer’s Class CT License filed by 2461 Corporation, t/a Madam’s Organ, at premises 2461- 18th Street, N.W., Washington, D.C. 20009, is **APPROVED**. The Alcoholic Beverage Regulation Administration shall distribute copies of this Order to the Applicant and the Protestant.

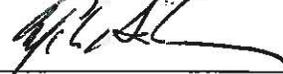
District of Columbia
Alcoholic Beverage Control Board



Ruthanne Miller, Chairperson



Donald Brooks, Member



Mike Silverstein, Member

Under 23 DCMR § 1719.1 (2008), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, Reeves Center, 2000 14th Street, NW, 400S, Washington, D.C. 20009.

Also, under 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 under 23 DCMR § 1719.1 (2008) 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) (2004).