

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

In the Matter of:)		
)		
Costco Wholesale Corporation)	Case Number:	N/A
t/a Costco Wholesale #1120)	License Number:	089498
)	Order Number:	2012-499
Application to Transfer a)		
Retailer's Class A License)		
)		
at premises)		
2441 Market Street, N.E.)		
Washington, D.C. 20018)		
)		

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Mike Silverstein, Member

ALSO PRESENT: Costco Wholesale Corporation, t/a t/a Costco Wholesale #1120,
Applicant

Kristina A. Crooks and Roderick L. Woodson, Esq., of the firm
Holland & Knight, LLP, on behalf of the Applicant

John Ray, Esq., of the firm Manatt, Phelps & Phillips, LLP, on
behalf of the Independent Gas Station Operators Alliance (Alliance)

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

**ORDER DENYING THE ALLIANCE'S PROTEST AND REQUEST FOR
REVOCAION OF THE APPLICANT'S LICENSE**

This case arises from the Application to Transfer a Retailer's Class A License to a New Location (Application) submitted by Costco Wholesale Corporation, t/a Costco Wholesale, (Applicant) at 2441 Market Street, N.E., Washington, D.C. *Licensing File No. 089498*, Notice of Public Hearing (May 11, 2012). Upon receipt of the Application, the Alcoholic Beverage Regulation Administration (ABRA) posted the following Notice of Public Hearing (Notice) on May 11, 2012, which advised the public that the Applicant applied for a Retailer's Class A License:

This is a Class “A” Retailer’s License (405.1) that is in Safekeeping and is being transferred to a new location. It is a membership-based, retailer/wholesaler of general merchandise and services. Services include photo processing, pharmacy, optical, hearing aids, tire services (installation & sales) deli, bakery and small food restaurant (no alcohol sales for on premise consumption).

ABRA Licensing File No. 089498, Notice of Public Hearing.

The Notice then informed the public that the last day to submit an objection to the Application was June 25, 2012. *Id.* We then approved the Application on July 18, 2012, because we did not receive any timely objections, and we determined that the Application met the qualifications for licensure. Board Agenda, 14 (Jul. 18, 2012).

On September 20, 2012—long after the June 25, 2012 deadline passed—the Alcoholic Beverage Control Board (Board) received a protest petition from the Independent Gas Station Operators Alliance (Alliance). Letter from John Ray, Esq., Counsel, Manatt, Phelps & Phillips, LLP, to Chairperson Ruthanne Miller, Chairperson, Alcoholic Beverage Control Board (Sept. 19, 2012) [Protest Petition]. The late-filed petition asked the Board to revoke our previous decision to approve the Application. Protest Petition, 1.

In support of its untimely request, the Alliance made the following arguments: (1) the Board should extend the protest petition under District of Columbia (D.C.) Official Code § 25-602(b), because the notice failed to adequately describe the nature of the Applicant’s operations under D.C. Official Code §§ 25-421(b) and 25-423 by failing to indicate that the Applicant would sell gasoline as well; (2) the Board should find that the Applicant sells gasoline, and therefore prohibited from obtaining a license under D.C. Official Code § 25-313, even though the Applicant’s property and the property selling gasoline has been subdivided by the Office of Zoning into separate plats and a separate corporation, CWC WDC, LLC, (CWC), will operate the gas selling facilities; (3) the Board should pierce the corporate veil, and find that the Applicant and CWC are the same entity; therefore CWC’s sale of gasoline prevents the Applicant from obtaining a license under § 25-313(d); and (4) the Alliance has standing to protest the Application as a Group of Five or More Individuals. Protest Petition, 1-12.

In response, the Applicant asked us to reject the Alliance’s late-filed request, noting: (1) the Alliance failed to file its protest petition within the 45-day protest period under § 25-602(a), even though the Alliance’s counsel clearly knew of these plans when he attended a community meeting on June 23, 2012, and made public statements related to the gasoline issue discussed in the protest petition; (2) the Board should not extend the protest period under § 25-602(b), because the Notice was not misleading, as the Applicant has no plans to sell gasoline and such operations will be conducted by a distinct corporate entity on a separate property; (3) the Alliance lacks standing, because its Group of Five or More Individuals do not share “common grounds”; (4) the Alliance has not submitted a valid protest petition, because it did not indicate a proper appropriateness ground; and (5) the Board should not revoke the Applicant’s license, because it has not sold nor will it sell gasoline, and even if it did, it would be entitled to a hearing under D.C. Official Code § 25-823. Applicant’s Response, 1-14 (Oct. 5, 2012).

In reply, the Alliance asked the Board to reject the Applicant's arguments for the following reasons: (1) the Alliance did not have "official notice" of the gasoline sale issue until September 11, 2012, when the Board of Zoning Adjustment received a special exception request regarding Market Street, N.W.; (2) although counsel for the Alliance attended the community meeting on June 23, 2012, and made public statements regarding the prohibition on licensing an entity selling gasoline contained in § 25-313(d), this did not constitute notice, because the Alliance had not been formed yet; (3) the Alliance has standing as a Group of Five or More Individuals, because 14 of its members are residents or property owners in the District of Columbia; and (4) the Alliance filed a valid protest petition, because it objects to the violation of § 25-313(d) and the Board is allowed to look beyond "appropriateness." IGSOA's Reply, 1-7 (Oct. 9, 2012).

The parties then ignored our regulations regarding the filing of motions by submitting additional documents without requesting leave from the Board to make additional filings. We note that under § 1716.7, once a reply is submitted, "No further pleading shall be filed except by leave of the Board." 23 DCMR § 1716.7 (West Supp. 2012). Therefore, we do not consider the additional documents filed by the parties after the Alliance submitted its reply on October 9, 2012.

While the parties raise a host of legal arguments and accusations, the threshold issue in this matter is whether we should extend the protest period, because we have "reason to believe that the applicant did not comply fully with the notice requirements set forth in subchapter II of Chapter 4. . . ." D.C. Code § 25-602(b) (West Supp. 2012). The Alliance argues that the Notice was inadequate because it failed to adequately inform the public of the Applicant's operations; namely, that the Applicant intended to sell gasoline at its proposed location. Protest Petition, 1. Nevertheless, because we agree with the Applicant that it has no intention to sell gasoline, and that the gasoline sales referenced by the Alliance will occur on a separate property and under the direction of a separate corporation, we find the May 11, 2012 Notice sufficient. Therefore, we deny the request to extend the protest proceeding and affirm our decision to grant the Applicant a Retailer's Class A License.

As noted above, by law, we may extend the protest period if the Applicant fails to comply with the legally mandated notice requirements required by subchapter II of Chapter 4. § 25-602(b). Under § 25-421(b), among other requirements, the Notice must contain "a description of the nature of the operation the applicant has proposed." D.C. Code §§ 25-421(b); 25-423(b) (West Supp. 2012).

The motions filed by the parties persuaded us that the nature of the Applicant's operations do not include the sale of gasoline.

First, CWC is a legitimate corporation, wholly separate from the Applicant; therefore, CWC is selling gasoline, not the Applicant. See Protest Petition, 9. In order to avoid this simple fact, the Alliance asks the Board to ignore the separation between CWC and the Applicant's corporate forms. *Id.* at 8. Nevertheless, "[p]iercing the corporate veil requires the [Alliance] to show that 'there is (1) unity of ownership and interest, and (2) use of the corporate form to perpetuate a fraud or wrong.'" Panutat, LLC, t/a Sanctuary 21, Case No. 10-PRO-00003, Board Order No. 2012-012, 4 (D.C.A.B.C.B. Jan. 11, 2012) citing Lawlor v. District of Columbia, 758 A.2d 964, 975 (D.C. 2000). In order to justify

piercing the corporate veil, “[n]o single factor is dispositive”; nevertheless evidence that the “Applicant has commingled personal and corporate funds, failed to inadequately capitalize the corporation, hold board meetings, or elect corporate officers” may be relevant. *Id.* at 4-5, citing *Flocco v. State Farm Mt. Auto. Ins. Co.*, 752 A.2d 147, 155 (D.C. 2000); *Estate of Raleigh v. Mitchell*, 947 A.2d 464, 470-71 (D.C. 2008). Yet, the Alliance only presents evidence that CWC and the Applicant share a similar principle address, share the same registered agent, and show that CWC lists Costco Wholesale Corporation as its sole member—activities that may only be characterized as normal corporate behavior. *Id.*, 9-10. For this reason, we find that the CWC and the Applicant are not “one and the same,” and that the Applicant is not selling gasoline as part of its operations. *See* Protest Petition, 10.

Second, the sale of gasoline is occurring on property that is legally distinct from the Applicant’s property. As the Alliance noted in its Petition, the Board of Zoning Adjustment separated the property occupied by the Applicant and CWC into separate plats; therefore, Lot 4, occupied by the Applicant and Lot 5, occupied by CWC are legally separate properties. Protest Petition, 9; *see also* 11 DCMR § 199 (defining “lot” as “the land bounded by definite lines”) By law, we defer to this decision by the Board of Zoning Adjustment, because the Board does not have the “jurisdiction” to overturn or review this decision. *Dupont Circle Citizens Ass’n v. District of Columbia Alcoholic Beverage Control Bd.*, 766 A.2d 59, 62 (D.C. 2001). As a result, because CWC and the Applicant occupy separate properties, the Notice did not have to inform the public of CWC’s gasoline operations.

Third, the Applicant’s establishment will occupy a premise completely separate from CWC’s premises. As noted by the Applicant, it does not share property with CWC and their operations will inhabit completely separate structures that are at least 460 feet away from each other. Applicant’s Response, 14.

For all these reasons, we find that the sale of gasoline does not constitute a part of the Applicant’s operations; therefore, we find that the Notice, as posted, satisfied § 25-602(b). We, therefore, deny the Alliance’s request to extend the protest hearing and dismiss the Alliance’s protest petition as untimely under D.C. Official Code § 25-602(a). We also note that we do not address the other arguments made by the parties, because, the issues they raise are moot based on our findings above.

ORDER

Therefore, the Board, on this 20th day of November 2012, hereby **ORDERS** that the protest petition filed by the filed by Independent Gas Station Operators Alliance is **DISMISSED**. The Board also **AFFIRMS** its July 18, 2012 approval of the Application to Transfer a Retailer’s Class A License to a New Location filed by Costco Wholesale Corporation, t/a Costco Wholesale #1120.

District of Columbia
Alcoholic Beverage Control Board



Nick Alberti, Member



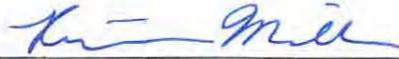
Donald Brooks, Member

Herman Jones, Member



Mike Silverstein, Member

I dissent because I believe the Board should hold a Fact Finding Hearing on the allegations raised by the Alliance.



Ruthanne Miller, Chairperson

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).