THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
Eagle N Exile, LLC t/a DC Eagle	License Number: Case Number: Order Number:	093984 N/A 2014-327
Application to Transfer a Retailer's Class CT License at premises 3701 Benning Road, N.E. Washington, D.C. 20010		

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Mike Silverstein, Member
Hector Rodriguez, Member
James Short, Member

ALSO PRESENT: Eagle N Exile, LLC, t/a DC Eagle, Applicant

Risa Hirao, Counsel, of the firm Pascal & Weiss, P.C., on behalf of the Applicant

Celia Properties Limited Partnership, LLC, Petitioner

Roderic L. Woodson, Counsel, of the firm Holland & Knight, LLP, on behalf of the Petitioner

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING PETITION FOR RECONSIDERATION

Celia Limited Partnership, LLC (Petitioner) filed a Motion to Re-Open Protest Period with the Board regarding the Application to Transfer a Retailer's Class CT License filed by Eagle N Exile, LLC, t/a DC Eagle (DC Eagle). Petitioner claims that the Applicant

failed to provide adequate notice to the public of the Application by failing to conspicuously post the required placards in accordance with D.C. Official Code § 25-423. *Motion to Re-Open Protest Period*, 1-2 [*Motion*]. On April 4, 2014, DC Eagle filed an opposition arguing that it followed the placard procedures and provided proper notice to the public. *Opposition to Motion to Re-Open Protest Period Filed By Celia Properties Limited Partnership*, 1-3 [*Opposition*]. Petitioner then filed a reply and DC Eagle responded. *Reply to D.C. Eagle's Opposition to Celia's Motion to Re-Open Protest Period* [*Pet. Reply*]; *Sur-Reply in Response to Reply to Applicant's Opposition to Motion to Re-Open Protest Period Filed by Celia Properties Limited Partnership's* [*DC Eagle Sur-Reply*].

The Board held a hearing on the motions on June 4, 2014. The Board denied the Petitioner's request, because DC Eagle complied with the notice requirements of D.C. Official Code § 25-423(a) and the Board's posting procedures. In re Eagle N Exile, LLC, t/a DC Eagle, Board Order No. 2014-277, 3-4 (D.C.A.B.C.B. Jul. 16, 2014) (Order Denying Motion to Replacard). The Board further denied the request, because DC Eagle's compliance with the Board's posting procedures excused any alleged lapse on the part of the applicant. Id. at 4.

The Petitioner subsequently filed a Petition for Reconsideration (Petition). In brief, the Petition argues (1) the placards did not satisfy D.C. Official Code §25-423(a), because they were not "conspicuous" based on the distance of the building from the street; (2) the placard posting did not satisfy 23 DCMR § 1502.5, because they were not visible from the street; and (3) good cause exists to extend the protest based on the prejudice caused to the Petitioner. *Petition for Reconsideration*, 2-6.

DC Eagle filed an opposition to the Petition with the Board. According to DC Eagle, the Board should affirm its prior Order. *Opposition to Celia Properties' Petition for Reconsideration*, 1-2. DC Eagle further notes that the Petitioner demonstrated that it was not prejudiced, because it was able to timely file a protest against another establishment applying for licensure in the same building, which discredits the position taken by the Petitioner. Id. at 2. DC Eagle also argues that the Board should give great weight to the ANC's support of the Application. Id. at 2-3. Finally, DC Eagle argues that the Board should not adopt the position taken by the Petitioner, because it would result in an unlawful rulemaking without notice and comment. Id. at 3.

In response, the Petitioner filed a reply. In brief, Petitioner argues: (1) the Board should ignore the timely protest against the other establishment because ". . . Celia only noticed the Terminal Alley placards after one of its employees stumbled upon the placard while he was cleaning an area of Celia's property behind the chain link fence . . . . Being visible to this employee is not the same as being conspicuous to the public"; and (2) the Board can extend the protest period under D.C. Official Code §25-602(b). *Reply to D.C. Eagle's Opposition to Celia's Petition for Reconsideration*, 1-2.

DISCUSSION

The Board affirms its prior Order and denies the Petition. In summary, the Petitioner ignores critical language contained in the relevant statute and regulation. Furthermore, the Board finds that DC Eagle has demonstrated additional cause for not extending the protest period.

I. The Petitioner's argument ignores portions of the language of D.C. Official Code §25-423(a) and 23 DCMR § 1502.5.

The Petitioner's arguments are inherently flawed, because they can only be accepted if one ignores key language in the statute and regulation at issue.

Under § 25-423(a), "[t]he applicant shall post 2 notices, furnished by ABRA, of the application in conspicuous places *on the outside of the establishment* for the duration of the protest period." D.C. Official Code § 25-423(a) (emphasis added). In accordance with § 1502.5, the placards shall be posted "on the main entrance doors to the premises so as to be visible from the street, or on such other place on the premises as designated by the Board." 23 DCMR § 1502.5 (West Supp. 2014) (emphasis added).

While the Petitioner attempts to "hang its hat" on the word "conspicuous" in § 25-423, this ignores key language in the provisions that limit the posting requirement to the building itself. § 25-423(a); 23 DCMR §1502.5. Specifically, the statute only requires the "conspicuous place[]" to be "on the outside of the establishment." Id. Likewise, § 1502.5 limits the placard requirement to the "main entrance doors" or "other place on the premises as designated by the Board." § 1502.5. In this case, the placard was posted on the outside of the building in satisfaction § 25-423(a) and § 1502.5. In re Eagle N Exile, LLC, t/a DC Eagle, Board Order No. 2014-277, at ¶ 3. It is further unchallenged that the building is not located near any public street; therefore, no matter where DC Eagle posts the placard on the building, it will be far away from the public street. Id. at ¶ 2. For this reason, because no reasonable alternative posting location on the building exists, the Board affirms its prior order.

II. Extending the protest period would be unjust when the Petitioner, an abutting property owner, could have or should have seen the placards.

The Board is further persuaded by DC Eagle that the Petitioner has not shown good cause for extending the protest period. Under § 25-423(e), the Board may deem the posting insufficient

> [i]f the Board determines that the notices posted at an applicant's establishment have not remained visible to the public for a full 45 days . . . unless the applicant has fully performed all other notice requirements and the Board determines that it is in the best interests, of the parties to proceed at an earlier date.

D.C. Official Code § 25-423(e).

In this case, the Petitioner, as the abutting property owner, could have or should have been able to observe the placards during the protest period itself or through its employee-agents. Unlike the parties listed in D.C. Official Code § 25-421, the Petitioner is not entitled to direct and specific notice of the application; instead, as a member of the public, the Petitioner is only entitled to general and indirect notice through the posting of the placard on DC Eagle's premises.[1] Compare D.C. Official Code § 25-421 with D.C. Official Code § 25-423. In the case of a party subject to general and indirect notice, there is always a risk that the recipient may miss the notice—whether because the recipient was out of town, chose to walk their dog down a different path, or failed to inspect their property during the protest period. Nevertheless, as the facts in this case show, the Petitioner had the ability to observe the signs. It is not the fault of DC Eagle that the Petitioner chose not to explore the portion of its property near DC Eagle's placards during the protest period. For these additional reasons, the Board does not find good cause to extend the protest period under D.C. Official Code § 25-423(e).

ORDER

Therefore, the Board, on this 10th day of September 2014, hereby **DENIES** the Petition for Reconsideration filed by Celia Limited Partnership, LLC (Petitioner). Copies of this Order shall be delivered to the Petitioner and the Applicant.

[1] Thus, the placard requirement is similar to posting notice of a legal matter in a newspaper.

District of Columbia
Alcoholic Beverage Control Board

Nick Alberti, Member

Donald Brooks, Member

Herman Jones, Member

Mike Silverstein, Member

Hector Rodriguez, Member

I dissent from the position taken by the majority of the Board.

Ruthanne Miller, Chairperson

I vote to abstain from the consideration of this matter.

James Short, 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).