



The Applicant and the Protestants were unsuccessful in negotiating a Voluntary Agreement before the Protest Hearing at a mediation session held on March 3, 2011. The Protest Hearing was held on May 25, 2011.

The Board notes that on November 22, 2010, and December 16, 2010, the Board received the recommendation of ANC 3B, which opposed the renewal of the license. ANC 3B recommends that the Board deny the Application. *Letter from ANC 3B to the Board, 1* (Dec. 16, 2010); *ANC 3B Resolution, 1* (Nov. 22, 2010). ANC 3B argues that renewing the license will negatively impact the neighborhood's peace, order, quiet, parking, and pedestrian safety. *Letter from ANC 3B to the Board, 1; ANC 3B Resolution, 2*. The ANC also asks the Board to consider the proximity of the establishment to a nearby playground and the many families with small children that frequent the neighborhood. *Letter from ANC 3B to the Board, 2; ANC 3B Resolution, 2*. ANC 3B argues that the Application does not appear to comply with D.C. Code § 25-311(c) because the establishment does not have a valid Certificate of Occupancy. *Letter from ANC 3B to the Board, 2; ANC 3B Resolution, 2*. Additionally, ANC 3B argues that the Application should be denied because the Applicant is required to file an Application for a Substantial Change, given the new building being constructed. *Letter from ANC 3B to the Board, 2; ANC 3B Resolution, 2*. ANC 3B also argues that the Applicant should have to file a new security plan that conforms to the changes in the new building and that the security plan should include provisions to ensure that people on the street cannot see into the establishment. *Letter from ANC 3B to the Board, 2; ANC 3B Resolution, 2*. ANC 3B also argues that the owner, Michael Papanicolas, is not fit for licensure pursuant to D.C. Code § 25-301(1) based on allegedly false statements made by Mr. Papanicolas regarding the ownership of the establishment to ANC 3B. *Letter from ANC 3B to the Board, 2; ANC 3B Resolution, 2*. Finally, ANC 3B asks the Board to address whether Mr. Papanicolas is the true and actual owner of the establishment pursuant to D.C. Code § 25-301(5), given the existence of an alleged contract for sale. *Letter from ANC 3B to the Board, 2; ANC 3B Resolution, 2*. The Board will give ANC 3B's recommendation great weight under D.C. Code § 25-609 (2001).

We note that both parties have submitted Proposed Findings of Fact and Conclusions of Law. The Protestants also raised issues regarding the bar status of the Applicant's representative. We note that the Board does not have jurisdiction over matters related to attorney licensure and have forwarded the Protestants' complaint to the appropriate authorities.

The protest issues raised by the Protestants pursuant to D.C. Code § 25-602 and 23 DCMR § 1601.8, are whether the Application will adversely impact the peace, order, quiet, residential parking needs, residential parking, vehicular and pedestrian safety, and real property values of the neighborhood. In addition, the Board must also consider whether the Applicant has complied with D.C. Code §§ 25-301, 25-311, and 25-403.

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 OF FACT**

1. The Applicant has submitted an Application for renewal of its Retailer's Class CN License. *ABRA Licensing File No. 008511*. The establishment is permitted to offer nude dancing pursuant to D.C. Code § 25-371.

2. Alcoholic Beverage Regulation Administration (ABRA) Investigator Earl Jones was assigned to investigate the current protest. *Transcript (Tr.)*, May 25, 2011 at 17. We note that the establishment was not open for business at any point during Investigator Jones's investigation. *Tr.*, 5/25/11 at 29.

3. The Applicant's establishment is located at 2412 Wisconsin Avenue, N.W. *ABRA Protest File No. 11-PRO-00169, Protest Report, 2*. The establishment is located in a C-2-A zone. *Protest Report, 3*. There are no schools, public libraries, or day care centers located within 400 feet of the establishment. *Protest Report, 4*. The Guy Mason Recreation Center, located at premises 3600 Calvert Street, N.W., is located 84 feet away from the establishment. *Protest Report, 4*. The establishment is located between the Guy Mason Recreation Center, which is located in a residential, R-1-B zone, and an R-3 zone. *Protest Report, Extract of the District of Columbia Zoning Map*. There are 17 ABC-licensed establishments within 1,200 feet of the establishment. *Protest Report, 4*. The Applicant has no prior ABC violations. *ABRA Protest File No. 11-PRO-00169, Investigative History*.<sup>1</sup> The Applicant plans to continue offering nude dancing at the establishment. *Protest Report, 2*.

4. Michael Papanicolas owns the establishment and serves as the Applicant's president, treasurer, and director. *Tr.*, 5/25/11 at 41. Mr. Papanicolas inherited the business from his father and has owned the business for approximately 20 years. *Tr.*, 5/25/11 at 41. The establishment, which leases the premises, was forced to close in January 2008 after a fire destroyed the building. *Tr.*, 5/25/11 at 42. The establishment subsequently placed its license in safekeeping with the Board. *Tr.*, 5/25/11 at 42; see also *ABRA Licensing File No. 008511*.

5. The Applicant intends to wait until the renewal of its ABC-license is approved before finishing the establishment's construction and reopening. *Tr.*, 5/25/11 at 50. As indicated by Mr. Papanicolas, finishing the construction will cost approximately \$600,000.00. *Tr.*, 5/25/11 at 50. Mr. Papanicolas estimated that the club's new building will have an occupancy of approximately 100 people. *Tr.*, 5/25/11 at 57.

6. The Metropolitan Police Department (MPD) received two calls for service at the Applicant's address between March 1, 2010, and March 28, 2011. *Tr.*, 5/25/11 at 23. Neither of the calls involved alcoholic beverage control (ABC) law violations. *Tr.*, 5/25/11 at 23. MPD's crime statistics indicate that there were 12 calls for service at 2412 Wisconsin Avenue, N.W., since January 2003. *Protestants' Exhibit No. 3*. The statistics show that three of the incidents were related to alleged assaults and four of the incidents were related to alleged assaults with a deadly weapon. *Tr.*, 5/25/11 at 69, *Protestants' Exhibit No. 3*. Specifically, five of the alleged assaults occurred between July 2006 and November 2007. *Tr.*, 5/25/11 at 70; *Protestants' Exhibit No. 3*.

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<sup>1</sup> The Protest Report in this matter mistakenly lists the investigative history of a different establishment in the report. The correct investigative history for the Applicant has been added to the record by the Board.

7. The Protestants introduced Case Report No. 12032 into evidence. *Protestants' Exhibit No. 5*. The incidents related to an alleged assault of an employee cannot be substantiated by the Board because the Board decided to take no further action against the establishment when it reviewed the report on February 13, 2008. *Investigative History*. As such, the Case Report has no bearing on the Board's determination of the Application.
8. The establishment does not emit noise because the establishment is not a dance club and does not utilize loud music to operate. *Tr.*, 5/25/11 at 60, 120.
9. The Applicant has also hired Parliament to provide trash removal services for the establishment. *Protest Report, 6*.
10. The Applicant has its security personnel walk around the establishment every 15 minutes and encourages patrons not to loiter outside the establishment. *Tr.*, 5/25/11 at 60. The Applicant has stipulated that the establishment will provide a smoking area in the rear of the establishment. *Tr.*, 5/25/11 at 113.
11. The Wisconsin Avenue, N.W., area outside of the establishment experiences high volumes of traffic. *Protest Report, 8*. Near the establishment, there are pay-to-park spaces available during normal business hours. *Protest Report, 8*. In addition, there is a parking lot owned by Solo Parking at 2243 Wisconsin Avenue, N.W., which has 60 parking spaces available. *Protest Report, 8*. There are various no parking zones, two hour parking zones, and 15 minute parking zones in the neighborhood. *Protest Report, 8*. There are two Metrobus stops near the establishment. *Protest Report, 9*. Investigator Jones observed that pedestrians occasionally engaged in jaywalking. *Protest Report, 9*. Mr. Papanicolas admitted that parking in the neighborhood is "tight." *Tr.*, 5/25/11 at 61. The Applicant has stipulated that they will provide VIP parking to their customers. *Tr.*, 5/25/11 at 23-24, 113.
12. Brian Cohen is the Chairperson of ANC 3B. *Tr.*, 5/25/11 at 67. Mr. Cohen lives at 3908 Benton Street, N.W., which is approximately three to four blocks away from the establishment. *Tr.*, 5/25/11 at 67. Mr. Cohen also has two children who attend Stoddert Elementary School, which is located at 4000 Calvert Street, N.W. *Tr.*, 5/25/11 at 67.
13. The demographics of Glover Park have changed over time. In 1990, Stoddert Elementary School had 170 students while, in 2011, there are approximately 342 students. *Tr.*, 5/25/11 at 80; *Protestants' Exhibit No. 6*. In 1990, there were 433 children in Glover Park who were between the ages of zero and 18 years of age, while in 2010, there were 691 children. *Tr.*, 5/25/11 at 83; *Protestants' Exhibit No. 6*.
14. The commercial strip, containing the Applicant's establishment, is heavily used by families from the early morning until sundown. *Tr.*, 5/25/11 at 84-85; *Protestants' Exhibit No. 2*. As indicated by Commissioner Cohen, families often utilize the playground at the Guy Mason Recreational Center. *Tr.*, 5/25/11 at 85.
15. Mr. Cohen stated that many of his constituents are "not comfortable" with the establishment being in the neighborhood. *Tr.*, 5/25/11 at 93. Mr. Cohen is also worried that children will be able to see into the club and observe the activities occurring inside. *Tr.*, 5/25/11 at 101. He stated that his concerns regarding the establishment would be

mitigated if the Applicant ensured that the glass windows were covered, he hired more security, obtained valet parking, and ensured that the signage will be unobtrusive. *Tr.*, 5/25/11 at 124. Further, although the establishment does not emit noise, Mr. Cohen is concerned that the establishment's patrons will be loud when they leave the club. *Tr.*, 5/25/11 at 120; see also 176.

16. Melissa Lane formerly served as an ANC Commissioner on ANC 3B from 2002 to 2010 and served as the chairperson from 2003 to 2004 and from 2006 to 2010. *Tr.*, 5/25/11 at 134. Ms. Lane stated that Gin and Tonic, an establishment that neighbors the Applicant's establishment, attracts patrons between the ages of 21 and 24 and believes they will cause problems at the Applicant's establishment. *Tr.*, 5/25/11 at 137-38.

17. Ms. Lane alleged that Mr. Papanicolas lied about the sale of the business to the ANC. Mr. Papanicolas attended an ANC meeting in September 2010 where he discussed his plans for the business. *Tr.*, 5/25/11 at 147. We note that Mr. Papanicolas was not under oath when he spoke to the ANC and was under no legal obligation to speak to the ANC. *Tr.*, 5/25/11 at 156-57. Ms. Lane claims that Mr. Papanicolas stated that at the meeting Mr. Papanicolas stated that the business was not for sale and that it had not been sold. *Tr.*, 5/25/11 at 147. Later, a newspaper article in June 2010 stated that the business was for sale. *Tr.*, 5/25/11 at 154-55, 169; Margaret Guroff, Commercial Strip Confidential, Glover Park Gazette, June 2010, <http://www.gpcadc.org/z-gazette/Gazette1006a.pdf>.

18. The Applicant is owned by a corporation. *Tr.*, 5/25/11 at 47. Mr. Papanicolas owns 100 percent of the corporate entity's stock. *Tr.*, 5/25/11 at 47. As testified by Mr. Papanicolas, he has found a buyer for the business. *Tr.*, 5/25/11 at 51. However, the sale of the business's stock will not occur until the protest issues are resolved. *Tr.*, 5/25/11 at 51.

19. Lauren Biel lives at 2413 Tunlaw Avenue, N.W., and has lived at that address for the past four years. *Tr.*, 5/25/11 at 171. Ms. Biel believes that Mr. Papanicolas's business model "intrinsically alienates 50 percent of" the community. *Tr.*, 5/25/11 at 172. She further stated that she has felt uncomfortable walking by the establishment because she felt that exiting patrons would leer at her. *Tr.*, 5/25/11 at 173. She stated that she does not want to have to talk to her children about the issues surrounding nude dancing. *Tr.*, 5/25/11 at 174.

20. Dan Mellman lives at 2711 36th Street, N.W. *Tr.*, 5/25/11 at 184. Mr. Mellman is the President of the Friends of Guy Mason Recreation Center, which is a non-profit, that fundraises for the Guy Mason Recreation Center. *Tr.*, 5/25/11 at 185. Mr. Mellman's organization had a significant role in establishing and maintaining the recreation center's playground. *Tr.*, 5/25/11 at 185. According to Mr. Mellman, the park is one of the most actively utilized parks in the city. *Tr.*, 5/25/11 at 186, 190; *Protestants' Exhibit No. 8*. The recreation center and neighboring park is owned and operated by the Department of Parks and Recreation. *Tr.*, 5/25/11 at 187. The establishment can be seen from the Guy Mason Recreation Center's park. *Tr.*, 5/25/11 at 194.

21. John Wolfsthal lives at 2326 39th Street, N.W. *Tr.*, 5/25/11 at 196. Mr. Wolfsthal believes that relicensing the establishment will have a negative impact on the

neighborhood's real property values because it will have "a negative psychological impact on the desirability of the neighborhood." Mr. Wolfsthal bought his current residence in March of 2007, with the full knowledge that there were two strip clubs operating in the neighborhood. *Tr.*, 5/25/11 at 209-10.

22. The establishment entered into a Voluntary Agreement with ANC 3B that was approved by the Board on January 9, 2008. *Tr.*, 5/25/11 at 45. In pertinent part, the Voluntary Agreement requires the Applicant to:

- (1) employ at least one security guard from 7:00 p.m. to 9:00 p.m.;
- (2) employ at least two security guards from 9:00 p.m. to close;
- (3) require its security personnel to periodically patrol the area surrounding the establishment from 9:00 p.m. to close;
- (4) not display any signs on the exterior of the establishment, excluding the phrases "JP's Nite Club" and "A Gentlemen's Club;"
- (5) keep the front of the establishment clean;
- (6) install and maintain exterior lighting in the rear and side portions of the establishment;
- (7) keep its front door closed, except for the normal ingress and egress of its patrons; and
- (8) provide smokers repositories in the front and the rear of the establishment.

BJ Enterprises, Inc., t/a JP's, Board Order No. 2008-057 (D.C.A.B.C.B. Jan. 9, 2008).

### CONCLUSIONS OF LAW

23. Pursuant to D.C. Code § 25-313 and 23 DCMR § 400.1, an Applicant must demonstrate to the Board's satisfaction that the establishment for which an Application to renew a Retailer's Class CN License is sought will not adversely impact the peace, order, quiet, residential parking needs, vehicular and pedestrian safety, and real property values of the neighborhood. In addition, pursuant to 23 DCMR § 1601.8, the Protestants have raised the issue of whether the Application complies with D.C. Code §§ 25-301, 25-311, and 25-403. We find that the Applicant has demonstrated that it has complied with §§ 25-301, 25-311, and 25-403 if it conforms itself to the conditions imposed by the Board. We further find that the Application is appropriate subject to the condition that the Applicant does not permit entertainment to occur in the establishment before 5:00 p.m.

24. The Board recognizes that pursuant to D.C. Official Code § 1-309.10(d) (Supp. 2011) and D.C. Official Code § 25-609 (2001), an ANC's properly adopted written recommendations are entitled to great weight from the Board. See Foggy Bottom Ass'n v. District of Columbia Alcoholic Beverage Control Bd., 445 A.2d 643 (D.C. 1982). Accordingly, the Board "must elaborate, with precision, its response to the ANC issues and concerns." Foggy Bottom Ass'n, 445 A.2d at 646.

25. Here, ANC 3B opposes the Application and recommends that the Board deny the Application. *Letter from ANC 3B to the Board, 1* (Dec. 16, 2010); *ANC 3B Resolution, 1* (Nov. 22, 2010). ANC 3B argues that renewing the license will negatively impact the neighborhood's peace, order, quiet, parking, and pedestrian safety. *Letter from ANC 3B to the Board, 1*; *ANC 3B Resolution, 2*. The ANC also asks the Board to consider the

proximity of the establishment to a nearby playground and the many families with small children that frequent the neighborhood. *Letter from ANC 3B to the Board, 2; ANC 3B Resolution, 2.* ANC 3B argues that the Application does not appear to comply with D.C. Code § 25-311(c) because the establishment does not have a valid Certificate of Occupancy. *Letter from ANC 3B to the Board, 2; ANC 3B Resolution, 2.* Additionally, ANC 3B argues that the Application should be denied because it is unclear whether the Applicant is required to file an Application for a Substantial Change, given the new building being constructed. *Letter from ANC 3B to the Board, 2; ANC 3B Resolution, 2.* ANC 3B also argues that the Applicant should have to file a new security plan that conforms to the changes in the new building and that the security plan should include provisions to ensure that people on the street cannot see into the establishment. *Letter from ANC 3B to the Board, 2; ANC 3B Resolution, 2.* ANC 3B also argues that Mr. Papanicolas is not fit for licensure pursuant to D.C. Code § 25-301(1) based on allegedly false statements made by Mr. Papanicolas regarding the ownership of the establishment to ANC 3B. *Letter from ANC 3B to the Board, 2; ANC 3B Resolution, 2.* Finally, ANC 3B asks the Board to address whether Mr. Papanicolas is the true and actual owner of the establishment pursuant to D.C. Code § 25-301(5), given the existence of an alleged contract for sale. *Letter from ANC 3B to the Board, 2; ANC 3B Resolution, 2.* The Board will give ANC 3B's recommendation great weight under D.C. Code § 25-609 and respond to its concerns below.

### **Appropriateness**

26. We first find that granting the Application will not have an adverse impact on the neighborhood's peace, order, and quiet, real property values, and residential parking and pedestrian and vehicular safety, so long as the establishment does not provide entertainment before 5:00 p.m.

#### **Peace, Order, and Quiet**

27. In general, the establishment does not pose a threat to the neighborhood's peace, order, and quiet. "In determining the appropriateness of an establishment, the Board shall consider . . . [t]he effect of the establishment on peace, order, and quiet . . ." D.C. Code § 25-313(b)(2) (2001).

28. First and foremost, we find that there is no evidence that renewing the license will encourage crime. The establishment's long history indicates that it has never committed an ABC violation. *Supra*, at para. 3. There is no evidence that MPD's calls for service at the Applicant's address are in anyway tied to the establishment and do not substantiate that crimes occurred at the establishment. *Supra*, at para. 6. Further, as a matter of due process and basic fairness, we will not deny the renewal of a license based on Case Reports that the Board previously decided to take no further action on, because the Board would have taken punitive action against the licensee if the Applicant was culpable of wrongdoing in such an instance. *See supra*, at para. 7. Additionally, we find that Ms. Lane's testimony regarding the interaction of Gin and Tonic's patrons with the establishment to be entirely speculative and lacking factual support. *Supra*, at para. 17. Finally, we note that the Voluntary Agreement, which requires a minimum number of security personnel at various times and requires them to monitor the outside of the

establishment, provides sufficient protection against crime in and around the establishment. Supra, at para. 22.

29. We further find that the Applicant will not encourage litter or other trash problem or create noise. As the Applicant's investigative history notes, Mr. Papanicolas's establishment has never been cited for trash or litter problems or been convicted of a noise violation. Supra, at para. 3. We also note that the Applicant has hired a waste removal company and that the establishment does not provide music for general dancing by the public. Supra, at para. 8-9. As such, we find that renewing the license will not create trash, litter, or noise problems for the neighborhood.

30. We also are not convinced by the Protestants' general objections to nude dancing in their neighborhood.

31. First, Mr. Cohen's concern that children and families will be able to see the nude dancing occurring in the establishment is an unrealistic concern. It is already unlawful in the District of Columbia "for a person, in public, to make an obscene or indecent exposure of his or her genitalia or anus . . ." D.C. Code § 22-1312 (2001). As such, if at any point, the establishment's nude dancing became visible to the general public, the licensee and the participants would likely be subject to criminal sanctions. Parnigoni v. District of Columbia, 933 A.2d 823, 826 (D.C. 2007) ("An exposure becomes indecent when the defendant exposes himself at such a time and place, where as a reasonable man he knows or should know his act will be open to the observation of others.") citing Peyton v. District of Columbia, 100 A.2d 36, 37 (D.C.1953). Consequently, there is little risk that anyone, other than the establishment's patrons, will witness any nude dancing.

32. Second, the mere fact that there are children in the neighborhood does not prove that the establishment is inappropriate for the neighborhood. Although the establishment has a long operating history, there is no evidence that any families or children have been harmed by the Applicant's prior operations. Supra, at para. 3-4. Regardless of whether, as submitted by the Protestants, there are 433 children or 691 children in Glover Park, so long as the Applicant ensures that its nude dancing activities and other nightclub activities occur only within the confines of the establishment, there is no inherent negative impact on the neighborhood. Supra, at para. 13.

33. Nevertheless, although we generally find that the establishment will not have an adverse impact on its neighbors, we are concerned that the establishment is positioned between two residential zones. Supra, at para. 3. We find that it is important to balance the needs of residents in residential zones with the needs of businesses located in commercial zones. See NHV Corporation, Inc., t/a Haydee's Restaurant, Board Order No. 2010-464, para. 47, para. 49 (D.C.A.B.C.B. Sept. 8, 2010) (nightclub activities may impose a burden on a neighborhood with a strong residential character). Specifically, we are concerned that patrons coming to the neighborhood to visit the establishment and participate in other nightclub activities during the day may disturb nearby residents and potentially interfere with the use of the Guy Mason Recreation Center. Supra, at para. 20. As such, we find that the establishment should not offer entertainment until 5:00 p.m., which should sufficiently balance the needs of nearby residents and the Applicant.

34. For these reasons, we find that the Applicant will not have a negative impact on the peace, order, and quiet of the neighborhood so long as it does not offer entertainment until 5:00 p.m.

### **Residential Parking and Vehicular and Pedestrian Safety**

35. We further find that the Application will not have an adverse impact on residential parking and vehicular and pedestrian safety. Under our governing statute, the Board must consider “[t]he *effect of the establishment* upon residential parking needs and vehicular and pedestrian safety.” D.C. Code § 25-313(b)(3) (emphasis added). Based on the plain language of § 25-313(b)(3), we look for adverse impacts attributable to the Applicant. Although there is a heavy demand for parking in the neighborhood and high volumes of traffic, there is no evidence in the record that the Applicant will have more than a *de minimis* impact. Supra, at para. 11. Finally, we find that the Applicant’s stipulation, that the business will provide VIP parking, is sufficient to alleviate any of the Board’s concerns regarding the effect of the establishment on residential parking or vehicular and pedestrian safety.

### **Real Property Values**

36. We additionally find that the Application will not have an adverse impact on the real property values of Glover Park. See D.C. Code § 25-313(b)(1). The Applicant is constructing a new building, which will undoubtedly benefit the neighborhood. Supra, at para. 5. We further deem the Protestants’ presentation regarding the effect of the establishment on real property values to be insufficient. Mr. Wolfsthal’s testimony regarding real property values was not credible because it was not established that he had any special knowledge of real estate and failed to provide a factual basis for the claim that the establishment will have a “negative psychological impact on the desirability of the neighborhood.” Supra, at 21.

### **Conclusion**

37. On a final note, the Board will not find that the Application is inappropriate merely because some residents of Glover Park are uncomfortable or disagree with the Applicant’s business model. Supra, at para. 19. Under D.C. Code § 25-313 and 23 DCMR § 400, public support is not part of the Applicant’s burden of proof. See D.C. Code § 25-313; 23 DCMR § 400. Consequently, where an Application satisfies the criteria outlined in D.C. Code § 25-313 and 23 DCMR § 400, public opinion evidence cannot rebut the Application’s demonstration of appropriateness.

38. We note separately that such an interpretation of our statutes and regulations is called for because, if we followed the Protestants’ reasoning, we would be in danger of violating the First Amendment. The First Amendment states: “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. Const., Amend. I. Although, the District of Columbia, as a creature of Congress, is not permitted to prohibit nude dancing, the District may regulate the “time, place, and manner” of nude dancing where such regulation is “content-neutral,” serves a “substantial government interest and allows for reasonable alternative avenues of communication.” City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46, 48-49 (1986); see also D.C. Code § 1-203.02 (Supp. 2011).

Allowing criteria that is not “content-neutral,” like public opinion of nude dancing, to sway the Board’s analysis, would likely result in the Board depriving the Applicant of his right to free speech under the First Amendment. Instead of focusing on whether the community agrees with the content of the Applicant’s speech, the Board will look to stronger and more relevant indicators of adverse impacts, such as whether an establishment is encouraging crime, attracting vermin, reducing property values, etc., which have a clear and direct impact on the establishment’s neighbors.

39. Therefore, for the foregoing reasons, we find that the Application will not have an adverse impact on the neighborhood’s peace, order, and quiet, real property values, residential parking, and pedestrian and vehicular safety, so long as the establishment does not provide entertainment before 5:00 p.m.

### **Alleged Legal Impediments to Licensure**

40. We further find that the Applicant does not have to file an Application for Substantial Change at this time and has complied with D.C. Code §§ 25-301, 25-311, and 25-403.

### **Application for a Substantial Change**

41. As a preliminary matter, ANC 3B’s argument that the Applicant must submit an Application for a Substantial Change is premature. As indicated by the Applicant, he is not ready to commit to investing in further construction in the property until his license is renewed. Supra, at para. 5. As such, Mr. Papanicolas is entitled to forgo submitting an Application for Substantial Change until his plans are finalized and the establishment is ready to begin operations again. See D.C. Code §§ 25-404, 25-762 (2001).

### **Certificate of Occupancy**

42. The Board is permitted to renew the Applicant’s ABC-license without a valid Certificate of Occupancy. The law states: “No license, except a solicitor's license, *shall be issued* to an applicant unless the applicant has a valid certificate of occupancy for the premises in which the establishment is located and has all other licenses and permits required by law or regulation for its business.” D.C. Code § 25-311(c) (2001) (emphasis added).<sup>2</sup> The ABC statutes and regulations distinguish between the issuance and renewal of a license. See e.g., D.C. Code § 25-313(a) (To qualify for issuance, renewal of a license, transfer of a license to a new location, or an application for the approval of a substantial change . . . ). Simply put, the term “shall be issued” only refers to when a license is first issued and does not refer to the renewal of the license. Consequently, the Applicant, because he is merely renewing his license, is not required to have a valid Certificate of Occupancy in order for the Board to renew the license.

### **Section 25-403: License Renewal Application for Manufacturer, Wholesaler, or Retailer**

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<sup>2</sup> As an aside, we note that even when confronted with an application for an initial license the Board is entitled to approve an application before a valid Certificate of Occupancy is obtained. See 23 DCMR § 405, *et seq.* (2008) (License approval before issuance of Certificate of Occupancy).

43. We conclude that the Applicant has satisfied D.C. Code § 25-403.

44. The Protestants first claim that the Applicant has not satisfied § 25-403(a). Section § 25-403(a) states: “An applicant for license renewal shall verify, by affidavit, the accuracy of its application, including all documents and submissions constituting a part of the application for its initial license or, if appropriate, at the time of a Board-approved substantial change in operation.” D.C. Code § 25-403(a). We note that Question 14 of the Board’s renewal Application states: “I hereby certify under the penalty of perjury that the information in this renewal application is true and correct. I also certify that the above licensee is the true and actual owner of the business.” As such, the Applicant’s affirmative answer to Question 14 satisfies § 25-403(a). *ABRA Licensing File No. 008511, Class CR or DR Renewal Application.*

45. The Protestants further claim that the Applicant has not satisfied § 25-403(c). We disagree. Section 25-403(c) states: “The applicant shall submit documents or other written evidence establishing to the *satisfaction of the Board* that the applicant has complied with the requirements of § 25-423.” D.C. Code § 25-403(c) (emphasis added). Section 25-423 requires the licensee to conspicuously post the Board’s placards but may be waived by the Board if we determine that “[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. Code § 25-423(a), 25-423(e) (2001). As such, determining whether an Applicant has complied with § 25-403(c) is wholly within the discretion of the Board.

46. We note that the intent of § 25-403(c) and § 25-423 is to ensure that the public has notice of a pending application. Given the fact that both ANC 3B and the Group of Five or More Individuals have submitted protests, it is clear the goal of both statutes has been accomplished. Even though the Applicant has not filed any documents noting its compliance with § 25-423, we are satisfied that the required notices were posted pursuant to § 25-423. This is apparent because we have received no complaints from interested parties claiming they were not notified of the application, protests were received by the Board, and we note that the agency’s Enforcement Division, as a matter of policy, regularly checks that notices are posted. As such, the Board finds that the Applicant has satisfied § 25-403(c).

47. Lastly, the Protestants claim that the Applicant has not satisfied the security plan requirements of § 25-403 because the Applicant has to file a new security plan. However, the Protestants’ reasoning is incorrect. Section 25-403 states: “In the case of an application for renewal of a nightclub license, the applicant shall submit a written security plan.” D.C. Code § 25-403(e). Although security plans are required to discuss certain topics, they contain no specific security requirements. D.C. Code § 25-403(g). As a result, the Applicant is entitled to rely on its prior security plan and does not have to submit an entirely new security plan to the Board.

48. Nevertheless, we find that the security plan that the Board has on file is inadequate pursuant to the criteria outlined in D.C. Code § 25-403(g). In response, the Board will fill in the gaps in the Applicant’s security plan. We note that the Applicant is free to petition

the Board to remove these conditions if the Applicant submits a satisfactory security plan in the future.

### **Character and Fitness**

48. We further conclude that Mr. Papanicolas is of good character and fit for licensure pursuant to § 25-301. Under D.C. Code § 25-301(a), an applicant must demonstrate that they are “of good character and generally fit for the responsibilities of licensure.” D.C. Code § 25-301(a), 25-311 (2001).

49. Here, the Applicant has never committed an ABC violation and has never been convicted of a crime. Supra, at para. 3; *ABRA Protest File No. 11-PRO-00169, ABRA Application*. In opposition, ANC 3B claims that Mr. Papanicolas lied to the ANC during a meeting in September 2010 by claiming his business was not for sale and that the business had not been sold. Supra, at para. 17; *Protestants’ Proposed Findings of Fact and Conclusions of Law, 2*.

50. We are reluctant to declare an Applicant unfit for licensure based on Ms. Lane’s account or the ANC’s minutes of what Mr. Papanicolas said at the meeting, because such testimony and evidence is hearsay and does not definitively prove that the Applicant lied. See V.K. v. Child and Family Services Agency, 14 A.3d 628, 634 (D.C. 2011) (the practice of relying exclusively on hearsay should be heavily weighted against the sponsoring party.”); *Protestants’ Exhibit No. 4*. The evidence submitted by the Protestants, including the website advertisement ANC 3B found that lists the business for sale, does not prove that, when Mr. Papanicolas spoke to ANC 3B in September 2010, the business was still for sale, contrary to his statements at the meeting. Indeed, it is conceivable, given the up-and-down tenor of business negotiations, that at the time, Mr. Papanicolas believed that the negotiations had failed and he would not reach an agreement to sell the business. As a result, in light of this reasoning, the June 2010 article cited by the Protestants does not prove that Mr. Papanicolas was dishonest.

51. Simply put, we believe ANC 3B’s showing is too speculative and does not discount less nefarious alternatives. As such, we find that ANC 3B has not rebutted the substantial evidence that Mr. Papanicolas is of good character and fit for licensure; especially, in light of the establishment’s long history of compliance with the ABC laws, which we believe is the strongest indicator of an Applicant’s good character and fitness.

### **True and Actual Owner**

52. Finally, there is no evidence in the record that Mr. Papanicolas is not the true and actual owner of the establishment pursuant to § 25-301. “Before . . . renewing a license, the Board shall determine” whether “[t]he applicant is the true and actual owner of the establishment for which the license is sought, and he or she intends to carry on the business for himself or herself and not as the agent of any other individual, partnership, association, limited liability company, or corporation not identified in the application.” D.C. Code § 25-301(5). Mr. Papanicolas’s attempt to sell the business is a normal business activity and is not an indication that he does not retain control of the business. As such, there is no support in the record that Mr. Papanicolas has not satisfied § 25-301(5).

## Conclusion

53. For these reasons, we find that the Application is appropriate and satisfies D.C. Code § 25-301, in its entirety, as well as D.C. Code §§ 25-311, and 25-403, so long as the Applicant is subject to the conditions outlined below. 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 (2008).

## ORDER

Therefore, it is hereby **ORDERED**, on this 17th day of August 2011, that the Application to renew a Retailer’s Class CN License filed by B.J. Enterprises, Inc., t/a JP’s, at premises 2412 Wisconsin Avenue, N.W., is hereby **GRANTED**, subject to the following conditions:

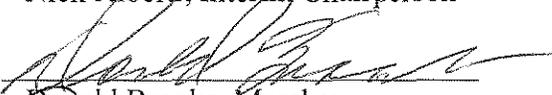
- (1) the establishment shall not offer entertainment before 5:00 p.m.;
- (2) as stipulated by the Applicant during the Protest Hearing, the Applicant shall:
  - a. provide its customers with VIP parking or provide for valet parking; and
  - b. create a smoking area in the rear of the establishment for the purposes of reducing loitering in the front of the establishment;
- (3) the following provisions shall be added to the Applicant’s security plan:
  - a. all bartenders are to be Training for Intervention Procedures (TIPS) certified;
  - b. MPD shall be contacted if staff or the establishment’s management observes any violent incidents or criminal activity occurring in or around the establishment;
  - c. in the case of a fire or medical emergency, staff or management shall contact the appropriate emergency service;
  - d. all patrons must show valid identification before entering the establishment;
  - e. security staffing the establishment’s entrance shall count the number of patrons entering the establishment and ensure that the establishment does not exceed its occupancy after 7:00 p.m.;
  - f. the establishment shall have at least 1 security staff member roam the interior and exterior of the establishment after 5:00 p.m.;
  - g. if the establishment obtains security cameras, the location of such cameras shall be reported to the Board and the establishment shall retain any footage recorded by the cameras for at least 30 days; and

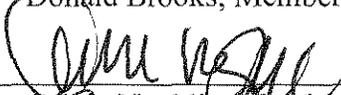
- h. the establishment shall maintain an incident log to track and describe any emergency, violent, disorderly, or criminal incidents that occur in or near the establishment.

Copies of this Order shall be sent to the Applicant, ANC 3B, and the Protestants.

District of Columbia  
Alcoholic Beverage Control Board

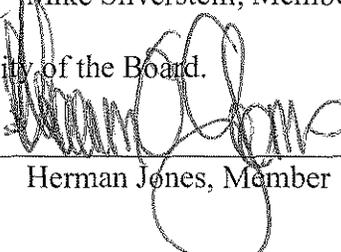
  
\_\_\_\_\_  
Nick Alberti, Interim Chairperson

  
\_\_\_\_\_  
Donald Brooks, Member

  
\_\_\_\_\_  
Calvin Nophlin, Member

  
\_\_\_\_\_  
Mike Silverstein, Member

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

  
\_\_\_\_\_  
Herman Jones, Member

Pursuant to 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, 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 (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).