THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
The Popal Group, LLC t/a Napoleon	Case No.: License No: Order No:	14-PRO-00097 0875836 2014-499
Application to Renew a Retailer's Class CR License		
at premises 1847 Columbia Road, N.W. Washington, D.C. 20009		

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

ALSO PRESENT: The Popal Group, LLC, t/a Napoleon, Applicant

Stephen O'Brien, of the firm Mallios & O'Brien, on behalf of the Applicant

Ted Guthrie, Secretary, Advisory Neighborhood Commission (ANC) 1C, Protestant

Denis James, President, Kalorama Citizens Association (KCA), Protestant

Sonam Henderson, on behalf of a Group of Five or More Residents and Property Owners (Henderson Group), Protestants

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING MOTION FOR RECONSIDERATION

INTRODUCTION

In Board Order No. 2014-343, the Alcoholic Beverage Control Board (Board) approved the Application to Renew a Retailer's Class CR License filed by The Popal Group, LLC, t/a Napoleon, (hereinafter "Applicant" or "Napoleon") subject to conditions. *In re The Popal Group, LLC, t/a Napoleon*, Case No. 14-PRO-00097, Board Order No. 2014-343, 2 (D.C.A.B.C.B. Oct. 1, 2014). Specifically, based on the ownership's blatant and unacceptable failure to comply with its Settlement Agreement, crowd control issues, and repeat ABC Manager violations, the Board, among other conditions, limited the occupancy of the first floor to ninety patrons and limited the basement's occupancy to fifty-five patrons. *Id.* at 2, 9-10

Arguments of the Parties

Napoleon submitted a Motion for Reconsideration, which solely argues that the Board is barred under the doctrine of laches from limiting the establishment's occupancy. *Mot. for Recon.*, at 4. As evidence supporting its laches claims, Napoleon points to the Board's approval of a transfer application, four prior renewal approvals, licensing payments under the presumption of a capacity of 274, and approval of the establishment's expanding its physical space in January 2013. *Id.* Thus, Napoleon contends that it presumed it had occupancy of 274 for the past nine years and relied on this determination when it agreed to lease new space for the establishment. *Id.* at 3-4. The Protestants subsequently filed an opposition to the Motion, to which Napoleon filed a reply. *Memorandum in Opposition to Motion for Reconsideration*, at 1 [*Opposition*]; *Reply to Opposition to Mot. for Recon.* [*Reply*].[1]

The Board notes that the Motion for Reconsideration appears to solely target the Board as the entity that should be subject to laches. Nevertheless, this protest is a contested case that involves ANC 1C, the KCA, and the Sonam Group. In raising a claim of laches without including these parties or demonstrating why they should individually be subject to laches, it appears that Napoleon waived any laches claims it has vis-à-vis these other parties. As such, based on this deficiency, it appears that Napoleon cannot meet its evidentiary burden on the claim of laches.

The Board further denies Napoleon's Motion for the following reasons: (1) Napoleon could not have detrimentally relied on the Board's prior decisions, when the renewal process permits the Board to rescind previously granted privileges; (2) Napoleon cannot claim detrimental reliance when it should have known that its operations related to occupancy were restricted by the Settlement Agreement; (3) Napoleon has failed to demonstrate undue delay on the part of the Board or the Protestants when the underlying factual basis for the decision occurred during the most recent licensure period and the Protestants filed a timely protest; and

[1] The parties have not proposed an alternative condition; therefore, the Board is not in a position to consider alternative remedies that could satisfy both parties. *See e.g., In re BEG Investments, t/a Twelve Restaurant & Lounge*, Case Report 10-PRO-00138, Board Order No. 2011-368, 2 (D.C.A.B.C.B. Aug. 10, 2011) (saying ". . . the Board is not opposed to modifying conditions where such conditions severely harm an establishment's viability as a business and can be modified in such a manner that will not harm the neighborhood's peace, order, and quiet").

(4) Napoleon cannot benefit from a claim of laches, because the record shows that it lacks clean hands.

SUPPLEMENTAL 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 additional findings:

1. On January 24, 2013, an Alcoholic Beverage Regulation Administration (ABRA) Licensing Specialist informed Napoleon that the Board approved ". . . an increase in space" but did not purport to change the occupancy of the premises, which was listed in ABRA's records as 274 persons. *Letter from Patricia M. Jenkins, Licensing Specialist, to Michael D. Fonseca, Esq.* (Jan. 24, 2013). The Board approved the request on January 23, 2013 and it was not deemed a substantial change under D.C. Official Code § 25-762; therefore, the Board did not grant an opportunity to protest the change. *Board Agenda, Supplemental Agenda* (Jan. 23, 2013) (#1).

2. The following events highlighted in the Board's prior Order occurred after January 23, 2013:

A. Napoleon committed two separate violations of the ABC Manager requirement on September 17, 2013, and February 23, 2014. *In re The Popal Group, LLC, t/a Napoleon*, Board Order No. 2014-343 at ¶ 6.

B. The Protestants established that Napoleon engaged in additional settlement agreement violations after March 2013. *Id.* at ¶¶ 22, 25, 27.

C. On May 4, 2013, a rowdy crowd outside the establishment obstructed the street, disturbed nearby residents, and members of the crowd nearly threw a patron into a moving vehicle. *Id.* at ¶ 24.[2]

3. A settlement agreement is attached to Napoleon's license that has been in effect since 2005. *In re India 2000, LLC, t/a Mantis*, Case No. 11590-04/101P, Board Order No. 2005-277 (D.C.A.B.C.B. Oct. 19, 2005) (See *Cooperative Agreement Concerning Renewal and Substantial*

[2] The parties dispute whether the Board was attempting to uphold the settlement agreement in its Order. *Reply to Opposition*, at 1, *Reply*, at 1-2. While not necessary to the Board's determination, the Board agrees with the Protestants that "[t]he Board did not impose the reduced occupancy numbers on the basis that those were the numbers originally agreed to in the Settlement Agreement." *Opp.* at 1. In its Order, the Board stated that it was imposing the restriction because Napoleon demonstrated that it was failing to properly superintend the establishment. *In re The Popal Group, LLC, t/a Napoleon*, Board Order No. 2014-343 at ¶ 40. Indeed, the Board did not cite a violation of the occupancy provision in its Conclusions of Law; rather, the restriction is based largely on unchallenged evidence that the establishment lacks the capability to control crowds or manage its apparent transition from a restaurant to a nightclub. *Id.* at ¶¶ 36 (describing ABC Manager violations); 38 (describing crowd control issues), 40 (expressing concern that Napoleon was becoming a nightclub). While the numbers chosen by the Board were inspired by the agreement, the Board's decision is firmly based on "appropriateness" and avoiding a repeat of the situation that occurred on May 4, 2013. D.C. Official Code §25-313; *supra*, at ¶ 2. Therefore, the Board has separate and independent reasons, outside of enforcing the settlement agreement, for imposing the occupancy restriction that it chose.

Change of ABC License for Sale of Alcoholic Beverages) [*Settlement Agreement*]. The signatories to the agreement are as follows: Napoleon, Advisory Neighborhood Commission (ANC) 1C, and the Kalorama Citizens Association (KCA). *Id.* (Signature Page). The agreement contains an occupancy restriction. *Id.* at § 4. The agreement limits the establishment's first floor to "90 persons, or the number of persons allowed by DCRA on a separate Certificate of Occupancy for the First Floor level, or shown by a separately listed number, whichever is smaller." *Id.* The agreement limits the occupancy of the basement to "55 persons, or the number of persons allowed by DCRA on a separate Certificate of Occupancy for the basement level or shown by a separately listed number, whichever number is smaller." *Id.* The agreement then states, "[t]he Parties agree to amend this section to reflect the actual occupancy, should the permitted numbers vary from those described above." *Id.* The agreement further states that modifications to the agreement shall only occur by the mutual written agreement of the parties with the approval of the Board. *In re India 2000, LLC, t/a Mantis*, Board Order No. 2005-277, § 11 (D.C.A.B.C.B. Oct. 19, 2005).

4. There is no evidence in the record that the parties formally requested that the Board approve a modification to the Settlement Agreement that altered the occupancy limit contained in the agreement.

5. The record contains no evidence that the signatories to the Settlement Agreement were aware that the establishment had applied to expand the premises or were aware that it had been approved for an occupancy of 274.

6. The record shows that ANC 1C, the KCA, and the Sonam Group filed timely protests against Napoleon's renewal application.

7. Factually, Napoleon did not demonstrate that, as an entity, it was unaware of the existence of the Settlement Agreement. *Transcript* (*Tr.*), Jul. 16, 2014 at 205. During his testimony, Omar Popal left open the possibility that his father, the establishment's prior attorney, and managers may have been aware of the agreement. *Id.* at 205-06. In addition, the owner did not disclose the specific date on which he became aware of the agreement. *Id.* at 204-05.

DISCUSSION

8. The Board denies Napoleon's laches claim. A "party asserting laches has the burden of establishment both that it was prejudiced by the delay and that the delay was unreasonable." *Kuri Bros. v. D.C. Bd. of Zoning Adjustment*, 891 A.2d 241, 248 (D.C. 2006).

I. NAPOLEON CANNOT DEMONSTRATE PREJUDICE BECAUSE IT CANNOT DEMONSTRATE DETRIMENTAL RELIANCE.

9. Napoleon cannot demonstrate prejudice in this case for two reasons. First, Napoleon cannot show detrimental reliance, because the renewal process allows the Board to revoke previously granted privileges. Second, Napoleon cannot show detrimental reliance, because it was still subject to the Settlement Agreement at the time the expansion was approved.

10. It has been noted that "[t]he defense [of laches] involves not only delay but also a party's detrimental reliance on the status quo." Def Against a Prima Facie Case § 11:6 (Rev ed); *Amidon v. Amidon*, 280 A.2d 82, 84 (D.C. 1971) (finding prejudice where "appellee had relied to his detriment on [other party's] failure to take action").

a. The Board is authorized to rescind previously granted privileges during renewal; therefore, Napoleon cannot claim detrimental reliance on past decisions.

11. It is fair to say that on renewal, "what the Board gave, the Board may take away." *See* Job 1:21 (King James) ("the Lord gave, and the Lord hath taken away"). A liquor license issued by the Board is not issued for an indefinite period; instead, the Board only issues licenses for a three year period. 23 DCMR §§ 207.1-207.2 (West Supp. 2014). Upon expiration, the holder of the retail license must apply for a renewal if it seeks to continue operations. § 207.2.

12. In 1987, in *Gallothom*, the court described the renewal process as follows:

> [b]efore renewing the license . . . the statute requires the Board to make new findings, separate and apart from any prior findings, that the establishment is appropriate . . . The statute on its face explicitly provides for a new finding and it is clear that prior adjudications are subject to modification and reexamination. To conclude otherwise would lead to an absurd result because the factors impacting the renewal of a license are based on events subsequent to an establishment's last hearing.

Gallothom, Inc. v. D.C. Alcoholic Beverage Control Bd., 820 A.2d 530, 533 (D.C. 2003) (quotation marks removed); *K.G.S., Inc. v. D.C. Alcoholic Beverage Control Bd.*, 531 A.2d 1001, 1005 (D.C. 1987) (saying the burden is on the licensee to demonstrate that the operations "remain[] appropriate" for the location).

13. As a matter of law, the current renewal is a new transaction "separate and apart" from the Board's prior decisions related to Napoleon's license. *Gallothom, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 820 A.2d at 533. As *Gallothom* makes clear, when considering renewal, the Board is entitled to deny, modify with conditions, or approve a license application based on events subsequent to the last approval issued by the Board. *See* D.C. Official Code §§ 25-104(e), 25-313, 25-338(a). In this case, the Board's prior Order imposing an occupancy limitation on Napoleon is based on events that occurred during the most recent licensure period. *In re The Popal Group, LLC, t/a Napoleon*, Board Order No. 2014-343 at ¶¶ 36-38. Indeed, many of the events occurred after the Board approved the physical expansion in January 2013. *Supra*, at ¶ 2.

14. Napoleon cannot contend unreasonable reliance on prior actions by the Board when it committed acts during its most recent licensure period that rendered the issuance of a full license inappropriate. Therefore, Napoleon has no grounds to argue that the Board lacks the authority to take away previously granted privileges.[3]

[3] The Board notes that all businesses are presumed to be "going concerns" with the intention of operating indefinitely. If the Board accepted Napoleon's laches arguments, this would lead to every licensee that has its license revoked on renewal claiming laches, because the licensee expected to continue operations indefinitely.

b. Napoleon cannot claim detrimental reliance when it has always been subject to the Settlement Agreement provision limiting its occupancy.

15. Under § 25-446,

> [u]nless a shorter term is agreed upon by the parties, a settlement agreement shall run for the term of a license, including renewal periods, unless it is terminated or amended in writing by the parties and the termination or amendment is approved by the Board.

D.C. Official Code § 25-446(d)(1).

16. It is irrelevant that the Board approved an expansion of the premises in January 2013. *Supra*, at ¶ 1. Napoleon's Settlement Agreement has contained a specific occupancy limitation since 2005. *Supra*, at ¶ 3. There is no evidence in the record that the parties have formally agreed to amend this provision in writing before the hearing. *Supra*, at ¶¶ 3-4. Moreover, Napoleon has not demonstrated that as an entity it was unaware of the agreement. *Supra*, at ¶ 7.[4] Therefore, Napoleon has no grounds to argue detrimental reliance, because if it had engaged in due diligence, it would have known that it could not operate under the expanded occupancy until the Settlement Agreement was amended by the parties or terminated by the Board under § 25-446.[5]

II. NEITHER THE BOARD NOR THE PROTESTANTS ENGAGED IN UNDUE DELAY IN RAISING CLAIMS AGAINST NAPOLEON.

17. In order to succeed on a claim of laches, Napoleon must demonstrate that any delay engaged in by the Board and the Protestants ". . . was undue, unexplained, and inexcusable. *Am. Univ. Park Citizens Ass'n v. Burka*, 400 A.2d 737, 741 (D.C. 1979)

18. Napoleon's citation to *Wieck* to demonstrate undue delay is not persuasive. *Mot. for Recon.*, at 5. In *Wieck*, the government agency delayed enforcing a zoning violation for approximately six and half years. *Wieck v. D.C., Bd. of Zoning Adjustment*, 383 A.2d 7, 9, 11-12 (D.C. 1978). Unlike *Wieck*, the Board's Order does not rely on stale violations of the Settlement

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[4] The Board emphasizes that the mere fact that a licensee is not aware of the Settlement Agreement is not sufficient grounds to merit permitting a licensee to escape the terms of the agreement. *See* D.C. Official Code § 25-446.

[5] If the Board adopted Napoleon's argument, this would likely result in a troubling constitutional issue. Settlement agreements have been interpreted as being contractual in nature. *Legal Opinion on Inaugural Celebration Extension of Hours and Voluntary Agreements*, AL-08-868 A, MID 244473, 4 (Dec. 18, 2008) [*Legal Opinion*]. Under the Contracts Clause of the United States Constitution, "[n]o State shall . . . pass any Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10, cl. 1; D.C. Official Code § 1-203.02 (requiring the Government of the District of Columbia to abide by the Contract Clause). If the Board permitted Napoleon to escape the occupancy limitations of its Settlement Agreement without following the termination process provided by § 25-446, it could be argued that this would nullify a portion of the agreement in a manner that unlawfully impairs contractual rights of ANC 1C and the KCA. *See e.g., Legal Opinion*, at 4 (". . . the Council may not circumvent the Contracts Clause . . . .")

Agreement that occurred in the distant past. Instead, the events relied upon by the Board occurred during the most recent licensure period. *Supra*, at ¶ 2. Indeed, many of the incidents and events relied upon by the Board occurred after the Board approved the expansion. *Supra*, at ¶¶ 2, 7.

19. In addition, Napoleon has not established that the signatories to the agreement engaged in undue delay in seeking to uphold the Settlement Agreement. Napoleon has not established that the signatories to the agreement knew that it had applied for and received increased occupancy from the Board. *Supra*, at ¶ 5. There is also no claim that the Protestants in this matter failed to file a timely protest or that the Protestants should have raised their claims sooner. *Supra*, at ¶¶ 2, 6.

20. As a result, Napoleon has failed to cite any authority or facts that support its contention that the Board or the Protestants "slept on [their] rights." *Beins v. D.C. Bd. of Zoning Adjustment*, 572 A.2d at 126.

III. NAPOLEON CANNOT BENEFIT FROM LACHES BECAUSE THE ESTABLISHMENT LACKS CLEAN HANDS

21. It has been said that "[h]e who comes into equity must come with clean hands." *Burnette v. Void*, 509 A.2d 606, 607 n.1 (D.C. 1986) *citing* 2 J. Pomeroy, A Treatise on Equity Jurisprudence § 397, at 90 (5th ed. 1941). "The equitable doctrine of unclean hands . . . applies where there is misconduct by the plaintiff in the same transaction that is the subject of his claim." *Int'l Tours & Travel, Inc. v. Khalil*, 491 A.2d 1149, 1155 (D.C. 1985). The record in this case shows that Napoleon failed to comply with its Settlement Agreement even when the ownership allegedly became aware of the agreement. *In re The Popal Group, LLC, t/a Napoleon*, Board Order No. 2014-343 at ¶ 12. In addition, Napoleon does not challenge the Board's findings that it has operated in a manner that made the establishment a nuisance to nearby residents. For these reasons, Napoleon lacks sufficient "clean hands" to merit a determination in equity on its behalf.[6]

ORDER

Therefore, the Board, on this 3rd day of December 2014, hereby **DENIES** the Motion for Reconsideration filed The Popal Group, LLC, t/a Napoleon. The ABRA shall deliver a copy of this order to the Applicant, ANC 1C, KCA, and Sonam Henderson on behalf of the Henderson Group.

IT IS FURTHER ORDERED that the Board's findings of fact and conclusions of law contained in this Order and Board Order 2014-343 shall be deemed severable. If any part of these determinations are deemed invalid, the Board intends that its ruling remain in effect so long as sufficient facts and authority support the decision.

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[6] The Board notes that Napoleon's assertion that the Board imposed conditions beyond those listed on page 11 of the prior Order is incorrect. *Reply in Opp.*, at 3; *In re The Popal Group, LLC, t/a Napoleon*, Board Order No. 2014-343 at 11. The other portion of the Order section are merely advisories as to the proper interpretation of the Settlement Agreement. *In re The Popal Group, LLC, t/a Napoleon*, Board Order No. 2014-343 at 12.

District of Columbia
Alcoholic Beverage Control Board

Ruthanne Miller, Chairperson

Nick Alberti, Member

Donald Brooks, Member

Herman Jones, Member

Mike Silverstein, Member

Hector Rodriguez, Member

James Short, Member

Pursuant to 23 DCMR § 1719.1, 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 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).