THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:	)	
	)	
Expresso, Inc.,	)	Case No. 10-PRO-00101
t/a Park Café	)	License No. 029448
	)	Order No. 2010-486
Application for Renewal of a	)	
Retailer's Class CR License	)	
	)	
at premises	)	
4400 Massachusetts Avenue, N.W.	)	
Washington, D.C. 20016	)	
	)	

Expresso, Inc., t/a Park Café, Applicant

Ms. Shea, on behalf of A Group of Five or More Individuals, Protestant

Leslie Nottage and Edward Nottage, Protestants

BEFORE: Nick Alberti, Acting Chairperson
Mital Gandhi, Member
Donald Brooks, Member
Herman Jones, Member
Calvin Nophlin, Member
Mike Silverstein, Member

ORDER DENYING APPLICANT'S MOTION FOR RECONSIDERATION

The Application for Renewal of a Retailer's Class CR License filed by Expresso, Inc., t/a Park Café (Applicant), having been protested by Leslie and Edward Nottage and A Group of Five or More Individuals, represented by Patti Shea (collectively "Protestants"), came before the Alcoholic Beverage Regulation Administration (ABRA) for a Roll Call Hearing on July 19, 2010, in accordance with D.C. Code § 25-601 (2001). The Status Hearing was held on September 15, 2010, and the Protest Hearing is scheduled for October 13, 2010, at 4:00 p.m.

Applicant's Arguments

The Applicant filed a Motion for Reconsideration, which asks that the Board reverse its decision in Board Order No. 2010-426 and Board Order No. 2010-447, which reinstated Leslie and Edward Nottage and the Group of Five or More Individuals represented by Patti Shea, respectively. The Applicant raises four issues through oral argument and in its Motion filed with the Board.

First, the Applicant argues that the Board erred when it reinstated the Group of Five or More Individuals represented by Ms. Shea on August 18, 2010. *ABRA Protest File 10-PRO-00101, Applicant's Motion for Reconsideration of the Board's Orders Dated August 11, 2010 and August 18, 2010 Granting Request for Reinstatement* 2. The Applicant notes that Ms. Shea originally filed her protest on behalf of the Lincoln Park Overlook Owners Association and was properly dismissed from the protest because her association did not satisfy the standing requirements for citizens associations found in D.C. Code § 25-601. *ABRA Protest File 10-PRO-00101, Applicant's Motion for Reconsideration of the Board's Orders Dated August 11, 2010 and August 18, 2010 Granting Request for Reinstatement 2.* In Board Order No. 2010-447, the Board allowed the Lincoln Park Overlook Owners Association to switch its party status to A Group of Five or More Individuals. *Board Order No. 2010-447.* The Applicant argues that the Board's Order prejudices the Applicant because the new Group of Five or More Individuals did not file its protest with the Board in a timely fashion. *ABRA Protest File 10-PRO-00101, Applicant's Motion for Reconsideration of the Board's Orders Dated August 11, 2010 and August 18, 2010 Granting Request for Reinstatement 4.* Further, the Applicant argues that the Board violated 23 DCMR § 1605.2 (2008) because there is no basis in law for a party to change its status after the protest period has concluded. *ABRA Protest File 10-PRO-00101, Applicant's Motion for Reconsideration of the Board's Orders Dated August 11, 2010 and August 18, 2010 Granting Request for Reinstatement 4.* In addition, the Applicant notes that the Group of Five or More Individuals has not complied with Chapter 17 of the District of Columbia Municipal Regulations' rules regarding designating a representative and filing a Motion to Reconsider. *ABRA Protest File 10-PRO-00101, Applicant's Motion for Reconsideration of the Board's Orders Dated August 11, 2010 and August 18, 2010 Granting Request for Reinstatement 5.* Lastly, even if switching parties were allowed after the protest period expires, the Applicant contends that the Group of Five or More Individuals, by failing to identify the members of the Lincoln Park Overlook Owners Association in its August 11, 2010, request, did not satisfy 23 DCMR § 1605.3. *ABRA Protest File 10-PRO-00101, Applicant's Motion for Reconsideration of the Board's Orders Dated August 11, 2010 and August 18, 2010 Granting Request for Reinstatement 4-5.*

Second, the Applicant argues that the protest is not based on a proper appropriateness ground found in 23 DCMR § 1605.2. *ABRA Protest File 10-PRO-00101, Applicant's Motion for Reconsideration of the Board's Orders Dated August 11, 2010 and August 18, 2010 Granting Request for Reinstatement 6.* Specifically, the Applicant asserts that the Protestants' complaints regarding the inadequacy of sidewalk space and the impact of the establishment's operating hours does not satisfy the law's requirements. *ABRA Protest File 10-PRO-00101, Applicant's Motion for Reconsideration of the Board's Orders Dated August 11, 2010 and August 18, 2010 Granting Request for Reinstatement 6.* The Applicant also argues that Protestants' arguments have no basis because the Board already approved the Applicant's operating hours and the sidewalk café has not opened yet. *ABRA Protest File 10-PRO-00101, Applicant's Motion for Reconsideration of the Board's Orders Dated August 11, 2010 and August 18, 2010 Granting Request for Reinstatement 6-7.*

Third, the Applicant argues that the Protestants failed to serve their requests for reinstatement on the Applicant or the Applicant's counsel and violated 23 DCMR § 1703.1 (2008), 23 DCMR § 1600.1 (2008), 23 DCMR § 1716.1 (2008), and 23 DCMR § 1719.2

(2008). *ABRA Protest File 10-PRO-00101, Applicant's Motion for Reconsideration of the Board's Orders Dated August 11, 2010 and August 18, 2010 Granting Request for Reinstatement 7.* The Applicant asserts that this led to the Protestants' Motions for Reinstatement being unopposed and violated the Applicant's right to notice provided by Carrol v. District of Columbia Dept. of Employment Services, 487 A.2d 622, 623 (D.C. 1985). *ABRA Protest File 10-PRO-00101, Applicant's Motion for Reconsideration of the Board's Orders Dated August 11, 2010 and August 18, 2010 Granting Request for Reinstatement 8.*

Fourth, during oral arguments, the Applicant also argued that the Nottages are not abutting property owners, and, thus, should not be granted standing.

Findings of Fact

The Board recounts the facts that have led to the Motion filed by the Applicant. On May 21, 2010, notice was given to the public that the Applicant was applying to renew its Retailer's Class CR License. *ABRA Protest File 10-PRO-00101, Alcoholic Beverage Regulation Administration on 5/21/2010 (Re-Advertise).* The deadline to file a protest was July 5, 2010. *ABRA Protest File 10-PRO-00101, Alcoholic Beverage Regulation Administration on 5/21/2010 (Re-Advertise).*

A protest petition was timely filed by Leslie and Edward Nottage on July 1, 2010. *ABRA Protest File 10-PRO-00101, Opposition of Alcoholic Beverage License Applicant from Leslie and Edward Nottage.* In their petition, the Nottages object to the Application because there is "limited space" for a sidewalk café and the sidewalk café is too close to a "vital alley driveway." *ABRA Protest File 10-PRO-00101, Opposition of Alcoholic Beverage License Applicant from Leslie and Edward Nottage.* Finally, they also state that the proposed operating hours "would create a potential for noise and disruption" to a "quiet residential neighborhood." *ABRA Protest File 10-PRO-00101, Opposition of Alcoholic Beverage License Applicant from Leslie and Edward Nottage.*

A second protest petition was received by ABRA by fax on July 2, 2010, from the Lincoln Park Overlook Owners Association. *ABRA Protest File 10-PRO-00101, Opposition of Alcoholic Beverage License Applicant from the Lincoln Park Overlook Owners Association.* The only signatory to the letter was Ms. Shea, in her capacity as President of the organization. *ABRA Protest File 10-PRO-00101, Opposition of Alcoholic Beverage License Applicant from the Lincoln Park Overlook Owners Association.* The Lincoln Park Overlook Owners Association shared the same objections as the Nottages. *ABRA Protest File 10-PRO-00101, Opposition of Alcoholic Beverage License Applicant from the Lincoln Park Overlook Owners Association.*

During the Roll Call Hearing on July 19, 2010, the Hearing Officer dismissed the Protestants because they did not appear at the hearing. However, after the matter was forwarded to the Board, the Board rescheduled the Status Hearing for September 15, 2010, because the parties stated that notices regarding the Roll Call Hearing were not sent in a timely fashion and contained incorrect information. On July 19, 2010, the Board dismissed the Nottages because the Board could not determine if they were abutting property owners but reinstated them once proof was presented. *Board Order No. 2010-*

426. The Lincoln Park Overlook Owners Association was also dismissed because they were not a "citizens association" as defined by D.C. Code § 25-601(3) (2007).

On August 11, 2010, Ms. Shea, representing the Lincoln Park Overlook Owners Association, requested that her party be designated A Group of Five or More Individuals. On August 18, 2010, the Board granted the Group of Five or More Individuals' request in Board Order 2010-447. *Board Order 2010-447*. Ms. Shea was accompanied by four other members of the Lincoln Park Overlook Owners Association at the September 15, 2010, Status Hearing.

The Board takes administrative notice that staff of the Alcoholic Beverage Regulations Administration (ABRA) misinformed Ms. Shea regarding the standing requirements for a citizens association. The Board acknowledges that this caused Ms. Shea to misunderstand the agency's standing requirements and fail to obtain standing for her group. The Board also acknowledges that ABRA staff misdated correspondence and did not send notices in a timely fashion, which resulted in the Protestants missing the Roll Call Hearing.

Finally, the Board takes administrative notice that the Nottages' property line touches the property line of the Applicant.

Discussion

The Board addresses each issue raised in the Applicant's Motion in turn. First, the Board will not dismiss the Group of Five or More Individuals represented by Ms. Shea because there is good cause under 23 DCMR § 1600.2 (2008) and 23 DCMR § 1700.2 (2008) to waive the requirements of Title 23 of the District of Columbia Municipal Regulations (DCMR) as they apply to the Group of Five or More Individuals. Second, the Board finds that the Protestants have stated appropriate grounds on which to base their protest. Third, the failure of the Protestants to properly serve the Applicant is not fatal to the Protestants' protest under 23 DCMR § 1703.8. Fourth, the Board finds that the Nottages have standing because they are abutting property owners. The Board's decision is explained below.

The Board finds good cause to waive the requirements of Chapter 16 and 17 of the District of Columbia Municipal Regulations and, as such, will not dismiss the Group of Five or More Individuals from the Protest. The Board agrees with the Applicant that the Board violated both Chapters 16 and 17 of the District of Columbia Municipal Regulations when it allowed Ms. Shea to change her party status to A Group of Five or More Individuals. Nevertheless, § 1600.2 and § 1700.2 allows "[t]he Board. . . for good cause shown and in the interest of justice or to prevent hardship, waive any provision of this chapter which is not required by the Act in any proceeding after duly advising the parties of its intention to do so." 23 DCMR § 1600.2 (2008); 23 DCMR § 1700.2 (2008). The Board notes that the law only requires that "any person objecting . . . to the approval of an application shall notify the Board in writing of his or her intention to object. . . within the protest period." D.C. Code § 25-602 (2001).

Here, the July 2, 2010, letter sent to the Board states that the Lincoln Park Overlook Owners Association intends to object to the Application. The Board finds that

the July 2, 2010, letter gives sufficient notice to the Board that the members and officers of the Lincoln Park Overlook Owners Association object to the Application. As such, the Board finds that waiving the requirements of Chapters 16 and 17 of the DCMR Regulations violated by the Group of Five or More Individuals would not violate the law.

The Board acknowledges that ABRA misinformed Ms. Shea of the agency's rules regarding standing, which resulted in her not obtaining standing for her association and not meeting the requirements for filing as a Group of Five or More Individuals. Had Ms. Shea been properly informed, the Board is confident that she could have met the requirements. The Board is also cognizant of the fact that the Group of Five or More Individuals does not have the benefit of legal representation.

As such, because the errors committed by Ms. Shea were caused by ABRA, the Board finds that there is good cause to waive the requirements of Chapter 16 and Chapter 17 of the DCMR. The Board finds that waiving these requirements will not prejudice the Applicant because the Group of Five or More Individuals' objections are the same as the Nottages and, thus, will not change the arguments presented at the Protest Hearing.

Although the Board will not dismiss the Group of Five or More Individuals from the Protest, the Board will stay Board Order No. 2010-447 until the Group of Five or More Individuals complies with the requirements laid out in Chapter 16 and Chapter 17 of the DCMR. The Board acknowledges that the Group of Five or More Individuals has already presented five members of its Group at the September 15, 2010, Status Hearing. As such, the Group of Five or More Individuals must resubmit their July 2, 2010, protest letter so that it complies with 23 DCMR § 1605.2 and 23 DCMR § 1605.3. Finally, the Group of Five or More Individuals must present the Board with a letter designating someone as the group's designated representative in accordance with 23 DCMR § 1706.5 (2008).

The Board also disagrees with the Applicant that the Protestants failed to state appropriate grounds on which to base a protest. Section 1605.2 requires the Protestant to state "why the matter being objected to is inappropriate under one (1) or more of the appropriateness standards set out in D.C. Code §§ 25-313 and 25-314 and § 400 of this title." 23 DCMR 1605.2 (2008). As determined by statute, the appropriate grounds to file a protest are adverse impact on peace, order, and quiet; real property values; and residential parking and vehicular and pedestrian safety. D.C. Code § 25-313 (2004); D.C. Code § 25-314 (2007), 23 DCMR § 400 (2008).

The Board finds that the Protestants have stated appropriate grounds to protest the Application. The Board notes that the Protestants object to the Application because the proposed operating hours "create a potential for noise and disruption" to a "quiet residential neighborhood." *ABRA Protest File 10-PRO-00101, Opposition of Alcoholic Beverage License Applicant from Leslie and Edward Nottage; ABRA Protest File 10-PRO-00101, Opposition of Alcoholic Beverage License Applicant from the Lincoln Park Overlook Owners Association.* The Protestants' letter specifically states that the Protestants are concerned about noise and disruption to the neighborhood. As such, based on the Protestants' initial filing with the Board, the Board finds that the Protestants are entitled to challenge the Application on the ground that the Applicant will have an adverse impact on peace, order, and quiet.

The Board further rejects the Applicant's arguments regarding the service of the Protestants' Motions on the Applicant. The Board notes that the Protestants' failure to serve their Motions for Reinstatement on the Applicant is contrary to the regulations' rules regarding the service of Motions. Nevertheless, the regulations specifically state that: "Failure to serve all parties of record, or their designated representatives, may result in the Board delaying action on the matter at issue until such time as service is properly accomplished. 23 DCMR § 1703.8 (2008). As such, the Protestants' failure to serve the Applicant is not fatal to the Protestants' claims. Further, the Board finds that this is not prejudicial to the Applicant because the Board has addressed the merits of the Applicant's arguments against the Protestants through this Order and over the course of the Protest proceedings.

Finally, the Board has determined that the property lines of the Nottages and the Applicant abut. Therefore, the Nottages, as abutting property owners, have standing to object to the Application.

ORDER

For these reasons, the Board does hereby, this 22nd day of September 2010, **DENY** the Motion for Reconsideration filed by Expresso, Inc., t/a Park Café.

(1) The Board **WAIVES** the requirements of Chapter 16 and Chapter 17 insofar as they prevent the Group of Five or More Individuals from obtaining standing and participating in the protest process;

(2) The Board will **STAY** Board Order No. 2010-447 until the Group of Five or More Individuals: (1) resubmit the July 2, 2010, protest letter so that it complies with the requirements of 23 DCMR § 1605.2 and 23 DCMR §1605.3 and (2) submit a letter designating a designated representative. The Group of Five or More Individuals must submit the required to documents to the Board within seven (7) days from the date of this Order;

(3) Based on the Protestants' initial objections to the Application, the Board **FINDS** that the only issue during the Protest Hearing is whether the Application will have an adverse impact on peace, order, and quiet;

(4) The Board **HOLDS** that the Nottages are abutting property owners and have standing to object to the Application;

(5) The Protest Hearing is now scheduled for October 13, 2010 at 4:00 p.m.;

(6) The parties are instructed to submit all pleadings, correspondence, documents, and evidence to the other party;

(7) Copies of this Order shall be sent to the Applicant and to the Protestants.

District of Columbia
Alcoholic Beverage Control Board

Nick Alberti, Acting Chairperson

Mital M. Gandhi, Member

Donald Brooks, Member

Herman Jones, Member

Calvin Nophlin, Member

Mike Silverstein, Member

Pursuant to 23 DCMR § 1719.1 (April 2004), 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, 1250 U Street, NW, Third Floor, Washington, D.C. 20009.