

INTRODUCTION

The Alcoholic Beverage Control Board (“Board”) grants the Application for a Substantial Change filed by Clover Capitol Hill LLC, t/a Tortilla Coast (“hereinafter, the “Licensee” or “Tortilla Coast”) at premises 400 First Street, S.E., Washington D.C.

Nevertheless, in light of the increased noise that is imminent from the additional entertainment that will take place on the premises, the Board is persuaded that noise mitigation measures must be in place. Based on the evidence presented by Advisory Neighborhood Commission (ANC) 6B and Tortilla Coast, the Board grants the Application on the condition that the establishment’s windows and doors remain closed when providing entertainment, except for the normal ingress and egress of people into and out of the establishment.

Procedural Background

The Notice of Public Hearing advertising Tortilla Coast’s Application was posted on October 25, 2013, and informed the public that objections to the Application could be filed on or before December 9, 2013. *ABRA Protest File No. 13-PRO-00165*, Notice of Public Hearing [*Notice*]. On or before the protest deadline, the Alcoholic Beverage Regulation Administration (“ABRA”) received a protest letter from ANC 6B in accordance with District of Columbia Official Code §§ 25-601 and 25-602. Letter from Brian Flahaven, Chair, ANC6B, to Ruthanne Miller, Chair, Alcoholic Beverage Control Board (Nov. 16, 2013) [*Protest Letter of ANC6B*].

The parties came before the Board’s Agent for a Roll Call Hearing on December 23, 2013 where ANC 6B was granted standing to protest the Application. *ABRA Protest File No. 13-PRO-085922*, Letter from Tesha Anderson to ANC 6B (Dec. 31, 2013). The Licensee and the Protestants were unsuccessful in negotiating a Settlement Agreement before the Protest Hearing at a mediation session held on February 21, 2014. The Board held a Status Hearing with the parties on February 26, 2014.

The Protest Hearing occurred on April 9, 2014. At the beginning of the Protest Hearing, ANC 6B moved to dismiss the hearing on the basis that the Applicant did not timely submit the requested Protest Information Form (PIF) prior to the hearing. *Transcript, (Tr.)*, 4/9/14 at 3. The Board denied the motion in a 5-0-0 vote noting that the PIF and the corresponding time requirements are not regulations. *Id.* at 4-5. Rather, the time requirements serve as guidance to ensure that every party has sufficient notice of the proceedings. *Id.* The Board further notes that the Applicant’s error did not prejudice the ANC.

On April 2, 2014, the Board received the recommendation of ANC 6B. According to ANC 6B, the granting of the Applicant’s request for a substantial change to its liquor license will result in a negative impact to the peace, order and quiet of the surrounding neighborhood. *ABRA Protest File No. 13-PRO-085922*, Letter from Brian Flahaven, Chair, ANC 6B, to Ruthanne Miller, Chair, Alcoholic Beverage Control Board (Apr. 2, 2014) [*Recommendation Letter of ANC 6B*]. In addition, ANC 6B expressed its concern about live entertainment taking place in the patio area, which is located in close proximity to residential properties. *Id.* Further, the ANC is concerned about the significant criminal

activity that has taken place at the establishment over the past year, including disorderly conduct, simple assault and indecent exposure. Id. Finally, ANC 6B is concerned with the significant rodent issues along several of Capitol Hill's main commercial corridors where Tortilla Coast is located. The Board will give ANC 6B's recommendation great weight under D.C. Code § 25-609 (2014). The Board addresses ANC 6B's concerns in its Conclusions of Law.¹

The sole issue in this matter is whether granting a substantial change request to allow an entertainment endorsement to Tortilla Coast's existing CR license will have an adverse impact on the peace, order and quiet of the neighborhood surrounding the establishment. D.C. Official Code §§ 25-313, 25-725, and 25-726 and 23 DCMR § 400.1(a) (West Supp. 2014).

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 findings:

I. Background

1. Tortilla Coast holds a Retailer's Class CR license, License No. ABRA-085922. See ABRA Licensing File No. ABRA-085922. The establishment's premises are located at 400 First Street, SE, Washington D.C., 20003. See id. The hours of operation and sales are as follows: 11:30 a.m. to 12:00 a.m. Sunday through Thursday, and 11:30 a.m. to 2:30 a.m. Friday and Saturday. See id.

2. Tortilla Coast has submitted an Application for a Substantial Change to its existing Retailer's Class CR License to add an Entertainment Endorsement (Karaoke) at 400 First Street, S.E. *Notice*, 1. The establishment's proposed hours of entertainment are as follows: 6:00 p.m. to 9:00 p.m. on Sunday, 6:00 p.m. to 10:00 p.m., Monday through Wednesday, 6:00 p.m. to 11:00 p.m. Thursday through Friday, and 6:00 p.m. to 10:00 p.m. on Saturday. *Tr.*, 4/9/14 at 24.

II. ABRA Investigator Jason Peru

3. ABRA Investigator Jason Peru investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 13-PRO-085922, Protest Report (Apr. 2014) [Protest Report]*.

4. The establishment is located in a commercial C-2-A zone, in a primarily residential neighborhood. *Protest Report*, at 3-4. Nine licensed establishments are located within 1,200 feet of the establishment. Id. at 3. Two of these establishments have an

¹ The Board takes administrative notice of the supplemental information regarding previous Settlement Agreements between the ANC 6B and other neighborhood licensed establishments submitted by the Protestant on April 8, 2014.

Entertainment Endorsement and four of these establishments have a Settlement Agreement. Id.

5. ABRA investigators monitored the establishment on seven separate occasions between March 11, 2014 and March 22, 2014. *Protest Report*, 5-6. During this time, the Investigators found no ABRA violations by the establishment. Id. at 6; *Tr.*, 4/9/14 at 25. Moreover, investigators did not observe any issues with peace, order, or quiet in relation to Tortilla Coast. Id.; *Tr.*, 4/9/14 at 25.

III. Brian Sullivan

6. Brian Sullivan is a co-owner of the establishment. Id. at 2. Mr. Sullivan plans to have a number of areas in the restaurant that are utilized for private events and offer events that feature music if granted the Entertainment Endorsement. Id. at 86. He is considering hosting the karaoke in the bar, an area that is next to the windows. Id. at 89-90. However, the karaoke would not be in effect while windows are open. Id. In addition, Mr. Sullivan does not object to having the windows closed when the establishment provides live entertainment. Id. at 90.

7. The Applicant has been in business for twenty-five years and has not had a significant history of noise violations. Id. at 64, 70-71, 105. Mr. Sullivan is not aware of the establishment receiving any noise complaints. Id. at 70. The Applicant is committed to adhering to current law regarding noise if the Application is granted. Id. at 65.

IV. ANC Commissioner Sara Loveland

8. Sara Loveland serves as the Commissioner for Single Member District 6B07 and the Chair of ANC 6B's Alcoholic Beverage Committee. Id. at 107-08.

9. ANC 6B's primary concern is that the establishment is considering expanding its license to include live entertainment, which could negatively impact noise in the neighborhood. Id. at 139. More specifically, the ANC would like to see speaker placement inside the establishment that will proactively control the noise. Id. at 146.

10. In its recommendation letter submitted to the Board, ANC 6B expressed its concern that the addition of live entertainment will increase noise in the surrounding residential neighborhood. *Recommendation Letter of ANC 6B*. More specifically, Tortilla Coast has an enclosed patio with floor to ceiling windows that surround the perimeter of the establishment. Id. The windows available in the patio area can be fully opened in warm weather and the front door can be propped open. See Protestant Exhibit 6. The ANC argues that should live entertainment take place in this patio area, which is located close in proximity to residential properties, there will be a significant increase in noise that would affect the peace, order and quiet of the neighborhood. *Recommendation Letter of ANC 6B*. Additionally, ANC 6B is concerned about the establishment's contributions to addressing rodent issues in on the commercial corridor where Tortilla Coast is located and the evidence of significant criminal activity taking place at the establishment over the past year. Id. The ANC proffers that there were six calls for service to MPD for this location,

including two for disorderly conduct and two for indecent exposure. See Protestant Exhibit 2.

11. The ANC also expressed its concern about the rat infestation that currently exists in Ward 6. Id. at 142. This establishment is located in a “hot zone” where rat problems have been a serious concern. Id. at 143. The ANC also has concerns about the hours of disposal of trash and the manner of disposal of trash. Id. at 144. The ANC opines that an entertainment endorsement would attract more patrons, and thus more trash to dispose of. Id. at 151-52.

CONCLUSIONS OF LAW

12. Under D.C. Code §§ 25-313, 25-314, and 25-602 and 23 DCMR § 400.1(a), an Applicant must demonstrate to the Board’s satisfaction that the establishment for which an Application for a substantial change of operation is sought is appropriate for the neighborhood in which it is located. D.C. Official Code §§ 25-313, 25-314, and 25-602; 23 DCMR § 400.1(a) (West Supp. 2014). As such, the Board must determine whether the Application will adversely impact the peace, order, quiet of the neighborhood. The Board finds that the Application for a substantial change of operation is appropriate and is hereby granted on the condition that windows will be closed when providing entertainment except for ingress and egress.

13. Under D.C. Official Code §§ 1-309.10(d) and 25-609, an ANC’s properly adopted written recommendations are entitled to great weight from the Board. D.C. Official Code §§ 1-309.10(d) and 25-609; See also Foggy Bottom Ass’n v. District of Columbia Alcohol 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.” Id. at 646. Here, ANC 6B opposes the Application for a substantial change of operation. Supra, at ¶ 8-11. The Board will address ANC 6B’s concerns below.

I. Peace, Order, and Quiet

14. The Board finds that the Applicant will not adversely impact the peace, order, and quiet of the neighborhood. The law emphasizes that the Board should focus on “[t]he effect of the establishment on peace, order, and quiet, including [Title 25’s provisions regarding] noise and litter . . .” D.C. Official Code § 25-313(b)(2). The Board credits Mr. Sullivan’s testimony that in twenty-five years of operation, the establishment does not have a significant prior history of noise violations. Supra, at ¶ 7. The Board also credits Investigator Peru’s report which states that after monitoring the establishment on seven separate occasions from March 11, 2014 through March 22, 2014, there were no instances of excessive noise or other ABRA violations. Supra, at ¶ 5.

15. In addition, even though the establishment has had calls to the MPD for offenses including disorderly conduct, simple assault and indecent exposure, there is not sufficient evidence in the record to determine the outcome of these calls. Further, the Board does not find a history of ABRA violations in relations to these calls. As a result, the Board finds that this evidence is not significant enough to warrant the denial of an entertainment endorsement. Supra, at ¶10.

16. Furthermore, the Board finds that there is not sufficient evidence in the record that the Applicant's patrons or operations contribute to the rat problem in the neighborhood. The Protestant fails to connect Tortilla Coast to the rodent problem in any other way than the fact that it is located on a commercial corridor where the problem exists. Supra, at ¶11. Accordingly, there is no basis for believing that the Applicant will negatively impact the peace, order, and quiet of the neighborhood.

17. Under D.C. Code § 25-104(e), the Board, in issuing licenses, "may require that certain conditions be met if it determines that the inclusion of the conditions will be in the best interest of the locality, section, or portion of the District where the licensed establishment is to be located." D.C. Official Code § 25-104(e). Here, based on the proximity of residences to the establishment, the provision of live entertainment inside the establishment will likely cause an unreasonable amount of noise in the neighborhood. Supra, at ¶ 6, 9, 13. As a result, the Board finds it necessary that it impose a condition whereby the windows and doors of the establishment will be closed during hours of live entertainment except for the normal ingress and egress of people to and from the establishment.

II. Conclusion

18. Therefore, for the foregoing reasons, the Board finds that the Application is appropriate and will not disrupt the peace, order and quiet of the surrounding neighborhood.

ORDER

Therefore, it is hereby **ORDERED**, on this 18th day of June 2014, that the Application for a Substantial Change to add an Entertainment Endorsement filed by Clover Logan Circle, LLC t/a Tortilla Coast is hereby **GRANTED** with the condition that the windows and doors remain closed when the establishment provides live entertainment, except for normal ingress and egress of people into and out of the establishment.

District of Columbia
Alcoholic Beverage Control Board



Ruthanne Miller, Chairperson



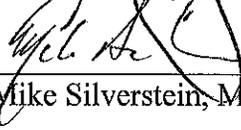
Nick Alberti, Member



Donald Brooks, Member

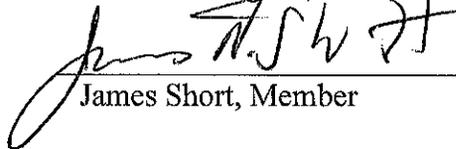


Herman Jones, Member



Mike Silverstein, Member

Hector Rodriguez, Member



James Short, Member

Pursuant to 23 DCMR § 1719.1 (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, 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 (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).