

**THE DISTRICT OF COLUMBIA  
ALCOHOLIC BEVERAGE CONTROL BOARD**

_____ )	
In the Matter of: )	
)	
Giron and Martinez, Inc. )	Order No. 2010-321
t/a Acuario )	
)	
Application for an )	Case No. 74502-09/069P
Entertainment Endorsement )	
)	
Application for a )	Case No. 74502-09/076P
Sidewalk Café )	
)	
Class CR License )	License No. 74502
at premises )	
3410 11th Street, N.W. )	
Washington, D.C. 20010 )	
_____ )	

BEFORE: Charles Brodsky, Chairperson  
Mital M. Gandhi, Member  
Nick Alberti, Member  
Donald Brooks, Member  
Herman Jones, Member

ALSO PRESENT: Victor Giron and Carmen Martinez, the Applicants  
  
Betty Pair, on behalf of Advisory Neighborhood Commission 1A  
  
Tim Turner, on behalf of the Group of Five or More Individuals  
  
Martha Jenkins, General Counsel  
Alcoholic Beverage Regulation Administration

**FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND ORDER**

Giron and Martinez, t/a Acuario, (Applicant) filed two separate Applications for a Substantial Change to its Retailer's Class CR License at premises 3410 11<sup>th</sup> Street, N.W., Washington, D.C. The first Application seeks an Entertainment Endorsement to offer karaoke Sunday through Thursday, from 8:00 p.m. to 12:00 a.m., and on Friday and

Saturday, from 8:00 p.m. to 2:00 a.m. The Application initially came before the Alcoholic Beverage Administration Regulation (ABRA) for a Roll Call Hearing on August 24, 2009. Protests against the first Application were timely filed by Advisory Neighborhood Commission (ANC) 1A by letter dated July 8, 2009 and by a Group of Five or More Individuals (Protestants) by letter dated May July 31, 2009.

ANC 1A was dismissed at the Roll Call hearing on August 24, 2009 for failure to appear and subsequently reinstated to the Protest by the Alcoholic Beverage Control Board (Board) on September 16, 2009 by Board Order No. 2009-231. The Protestants were dismissed at the Protest Status Hearing on November 4, 2009 for failure to appear and subsequently reinstated to the Protest by the Board on December 2, 2009 by Board Order No. 2009-266.

The second Application filed by the Applicant seeks a Sidewalk Café Endorsement with seating for 39 patrons and hours of sales and service of alcoholic beverages Monday through Thursday from 2:00 p.m. to 10:00 p.m. and Friday through Sunday from 12:00 p.m. to 10:00 p.m. This second Application came before ABRA for a Roll Call Hearing on October 19, 2009. A protest was timely filed against the second Application by a Group of Five or More Individuals (Protestants) by letter dated September 21, 2009. ANC 1A was not a party to the Protest on the second Application.

No Voluntary Agreement was reached between the Applicant and the Protestants for either Application before the Protest Hearing. The first Application was heard at a Protest Hearing on December 2, 2009, and the second Application was heard at a Protest Hearing on January 27, 2010. Because both Applications were filed by the same licensee for the same establishment and the same Protestants are involved, the Board has consolidated both Applications into one Order for the sake of economy.

Pursuant to D.C. Official Code § 25-602(a) (2001), the protest issues are whether the request for a substantial change to the licensee's operations to allow for an entertainment endorsement and a sidewalk café would adversely impact the peace, order, and quiet of the neighborhood. The Board, having considered the evidence, the testimony of witnesses, the arguments of counsel, and the documents comprising the Board's official file, makes the following:

### **FINDINGS OF FACT**

1. The Applicant is requesting two substantial changes to its Retailer's Class CR license. *ABRA Licensing File No. 74502*. The first substantial change is an Entertainment Endorsement to allow for karaoke on Sunday through Thursday from 8:00 p.m. to 12:00 a.m. and on Friday and Saturday from 8:00 p.m. to 2:00 a.m. *Tr. at 29; ABRA Licensing File No. 74502*. The second substantial change is a Sidewalk Café Endorsement to allow for the seating of 39 patrons from 12:00 p.m. to 10:00 p.m. on Friday, Saturday and Sunday and from 2:00 p.m. to 10:00 p.m. on Monday through Thursday. *ABRA Licensing File No. 74502*.

2. The Applicant's establishment is located in the Columbia Heights neighborhood in Ward 1 at 3410 11<sup>th</sup> Street, N.W., where it has operated since 2005. *ABRA Licensing File No. 74502*. It is located in a C2A Zone. *Transcript, December 2, 2009 (hereinafter Tr. 12/2/09)* at 22; *ABRA Exhibit No. 1*. The establishment is bound by Park Road, N.W. to the west, Monroe Street, N.W. to the east, 13<sup>th</sup> Street N.W. to the north and 11<sup>th</sup> Street N.W. to the south. *Tr. 12/2/09*, at 23; *ABRA Exhibit No. 1*. The neighborhood is comprised of a mixture of commercial and residential buildings. *Tr. 12/2/09*, at 28-32, 42-43; *ABRA Exhibits No. 10 and 11*. There are approximately 15 Alcoholic Beverage Control (ABC) licensed establishments within 1,200 feet of the Applicant's establishment. *Tr. 12/2/09*, at 22; *See ABRA Exhibit No. 1*. Within 1,200 feet of Acuario, three establishments have ABC Board approved sidewalk cafes or summer garden endorsements. *See ABRA Exhibit No. 1*. There are no schools, recreation centers, public libraries or day care centers located within 400 feet of the establishment. *See ABRA Exhibit No. 1*.

3. The establishment has a certificate of occupancy for 39 patrons. *Tr. 12/2/09*, at 39; *See ABRA Licensing File No. 74502*. The Applicant's hours of sale and service of alcohol are Sunday from 10:00 a.m. to 2:00 a.m., Monday to Thursday from 8:00 a.m. to 2:00 a.m. and Friday and Saturday from 8:00 a.m. to 3:00 a.m. *See ABRA Licensing File No. 74502*.

4. By letter dated July 8, 2009, ANC 1A protested the Application for an Entertainment Endorsement. *See ABRA Protest File No. 74502-09/069P*. ANC 1A's letter indicates that the granting of an Entertainment Endorsement would impact the peace, order, and quiet, of the neighborhood. *See ABRA Protest File No. 74502-09/069P*. ANC 1A was represented by Commissioner Betty Pair who attended and participated in the Protest Hearing held December 2, 2009. *See generally Transcript dated 12/9/09*. Subsequent to the hearing, ANC 1A and the Licensee entered into a Voluntary Agreement (VA) dated December 14, 2009. *See Board Order No. 2010-317*. The VA permits, among other things, the Licensee to offer live entertainment in the form of karaoke on Friday and Saturday only from 8:00 p.m. to 1:00 a.m. *See ABRA Board Order No. 2010-317*.

5. The Protestants, represented by Tim Turner, filed a letter of protest against the Entertainment Endorsement dated July 31, 2009 setting forth its concerns about the establishment's impact on the peace, order and quiet of the neighborhood. *See ABRA Protest File No. 74502-09/069P*. Specifically, the Protestants are concerned that the noise from the entertainment will disturb the neighborhood. *See ABRA Protest File No. 74502-09/069P*. The Protestants are also concerned regarding the Applicant's alleged lack of adherence to a previous Voluntary Agreement (VA) and to the District of Columbia rules and regulations. *See ABRA Protest File No. 74502-09/069P*.

6. The Board called ABRA Investigator Corrales, who prepared the Protest Investigation Report in this matter, as its witness. *Tr. 12/2/09*, at 18. She was assigned to conduct an investigation regarding the protest of the Licensee's two Applications for an Entertainment Endorsement and a Sidewalk Café Endorsement. *Tr. 12/2/09*, at 19.

Investigator Corrales conducted a regulatory inspection and all of the Applicant's licenses were properly posted as were the licenses required by other District of Columbia agencies. *Tr. 12/2/09*, at 24. She testified that the establishment was clean and orderly and that there were no signs of trash, excessive pedestrian or vehicular traffic, or excessive noise emanating from the premises. *Tr. 12/2/09*, at 24-25, 30, 38. The jukebox was playing at a low volume at the time of the regulatory inspection. *Tr. 12/2/09*, at 37-38; 53.

7. Investigator Corrales and other ABRA investigators visited the establishment on 24 separate occasions between October 3, 2009 and November 21, 2009. *Tr. 12/2/09*, at 26-27; *ABRA Exhibit No. 1*. During the times the establishment was monitored, the ABRA investigators did not observe noise, trash, or litter. *Tr. 12/2/09*, at 26, 28; *ABRA Exhibit No. 1*. Investigators also noted that there was plenty of parking outside the establishment. *Tr. 12/2/09*, at 26, 42. Investigator Corrales requested a crime analysis from the Metropolitan Police Department (MPD) for a listing of all radio runs made to the 3410 11<sup>th</sup> Street N.W. address. *Tr. 12/2/09*, at 26. There were 19 calls for service over the course of one year and none of the calls resulted in referrals to ABRA. *Tr. 12/2/09*, at 26, 55-56. She testified that the establishment does not present a "party atmosphere" and that most patrons are there to eat and drink beer. *Tr. 12/2/09*, at 41.

8. Mr. Daniel Reynolds who resides at 3513 11<sup>th</sup> Street N.W., testified on behalf of the licensee. *Tr. 12/2/09*, at 66. Mr. Reynolds is a frequent customer of the Applicant's and he often assists with odd jobs around the establishment. *Tr. 12/2/09*, at 70, 73-74, 78, 81. He travels between his house and the establishment no fewer than 20 times a day. *Tr. 12/2/09*, at 70-71, 78. He testified that he has never witnessed noise, trash, prostitution, or crime in or around the establishment. *Tr. 12/2/09*, at 67, 76. Mr. Reynolds stated that the east side of the block where the establishment is located is mostly commercial and has abandoned buildings. *Tr. 12/2/09*, at 74-75. He does not believe that the granting of the Entertainment Endorsement would impact the peace, order and quiet of the neighborhood. *Tr. 12/2/09*, at 82.

9. Tim Turner, representing the Protestants, called Ms. Carmen Martinez as his first witness. *Tr. 12/2/09*, at 140. She testified that she is the owner of the establishment. *Tr. 12/2/09*, at 141. She also testified that she has complied with requirements to post a sign on the outside of the establishment and that there is no noise emanating from the establishment. *Tr. 12/2/09*, at 146-149.

10. Mr. Turner next called Richard Dubeshter to testify on behalf of the Protestants. *Tr. 12/2/09*, at 150. Mr. Dubeshter stated that he lives at 1102 Monroe Street N.W. and he has lived in the neighborhood for more than nine years. *Tr. 12/2/09*, at 151, 171. He stated that it has been a challenge to get the establishment to do certain things such as address the noise levels. *Tr. 12/2/09*, at 151. He cannot hear noise from the establishment inside his house; however, the patrons who exit the establishment late at night are very noisy. *Tr. 12/2/09*, at 152, 159-160, 172. They play their car radios loudly and urinate on Mr. Dubeshter's property. *Tr. at 152, 154, 161-162*. He also states that patrons exiting the establishment rustle his garbage cans, contributing to the late night noise. *Tr.*

12/2/09, at 171. He stated that the music is Latino and so he assumed that it is attributable to the Applicant's patrons. *Tr. 12/2/09*, at 152. He believes that granting an Entertainment Endorsement for seven days a week will only exacerbate the noise problems. *Tr. 12/2/09*, at 157.

11. Mr. Dubeshter does not believe that the signs hung by the Applicant are adequate to meet the requirements of the establishment's VA. *Tr. 12/2/09*, at 153. He walks down the alley to avoid walking in front of the establishment because it is not a pleasant experience for him. *Tr. 12/2/09*, at 153. He has also witnessed motorcycles that are parked on the sidewalk in front of the establishment. *Tr. 12/2/09*, at 154. He has not experienced loitering or crowding outside the establishment. *Tr. 12/2/09*, at 155. Mr. Dubeshter also could not testify as to whether the Applicant has complied with other Board orders. *Tr. 12/2/09*, at 157.

12. Mr. Dubeshter stated that the Applicant no longer takes its trash out late at night or early in the morning. *Tr. 12/2/09*, at 158. He appreciates that they are no longer dumping bottles at 2:00 a.m. *Tr. 12/2/09*, at 158, 165. Mr. Dubeshter is opposed to the Board granting the licensee an Entertainment Endorsement because he believes that karaoke will only exacerbate an already noisy situation. *Tr. 12/2/09*, at 161, 181, 183. He then stated that he would be agreeable to certain hours such as 12:00 a.m. or 1:00 a.m., but not to every night of the week. *Tr. 12/2/09*, at 165-166. He believes that karaoke on weekends would be a fair compromise. *Tr. 12/2/09*, at 166-168. Mr. Dubeshter believes the only way to mitigate the noise and rowdy behavior is to have the licensee stop serving alcoholic beverages at a reasonable hour and to have the licensee prevent the patrons from becoming inebriated. *Tr. 12/2/09*, at 173-174, 178-180, 182. He stated that the departing patrons are more of an issue for him than the music emanating from the establishment. *Tr. 12/2/09*, at 173-175. The establishment needs to operate more like a restaurant and less like a bar. *Tr. 12/2/09*, at 177-179.

13. The Applicant stated that they have agreed to limit the karaoke to only weekend nights. *Tr. 12/2/09*, at 184.

14. The hearing on the second Application for a substantial change to allow for a Sidewalk Café Endorsement was held January 27, 2010. *See generally Transcript 1/27/10, (hereinafter Tr. 1/27/10)*. ANC 1A was not a protestant to this Application.

15. The Protestants to the second Application were a Group of Five or More Individuals represented by Tim Turner. *Tr. 1/27/10*, at 3. He requested that because the Applicant does not have the support of the ANC, the Application should be dismissed by the Board. *Tr. 1/27/10*, at 5, 35. The establishment currently has a VA dated December 14, 2009, with the ANC but Mr. Turner is concerned that the Applicant does not currently comply with it. *Tr. 1/27/10*, at 6-7. Mr. Turner himself has lodged eight to ten complaints with ABRA. *Tr. 1/27/10*, at 10, 37-38. He believes the peace, order and quiet of the neighborhood is being threatened and that the Applicant doesn't even abide by the terms of the existing VA. *Tr. 1/27/10*, at 10, 36. One of his complaints is that the trash

truck arrived before 8:00 a.m. on January 7, 9 and 14, 2010. Tr. 1/27/10, at 38-39. He has also witnessed the establishment open for business after 3:00 a.m. Tr. 1/27/10, at 38.

16. Mr. Turner testified that the establishment and the ANC have not entered into a VA for this Sidewalk Café Endorsement. Tr. 1/27/10, at 34. He is concerned that allowing a sidewalk café will negatively affect the neighborhood's peace, order and quiet. Tr. 1/27/10, at 34. He is also concerned that he did not learn of any of the Application details until the hearing, rather than at an ANC meeting. Tr. 1/27/10, at 34, 43, 47. He has asked that the Board not approve the Application until the ANC supports it. Tr. 1/27/10, at 35, 57. He testified that closing the sidewalk café at 10:00 p.m. would be reasonable if he was confident that the Applicant would adhere to that closing time. Tr. 1/27/10, at 36, 43. Mr. Turner also stated that the Protestants would have withdrawn their protest if the Applicant did not have alleged violations so soon after entering into the VA. Tr. 1/27/10, at 43, 48.

17. Mr. Turner called Richard DuBeshter as a witness. Tr. 1/27/10, at 7. Mr. DuBeshter lives at 1102 Monroe Street N.W. and has been a resident at that address for over nine years. Tr. 1/27/10, at 32. He testified that the Applicant is not to take its trash out to the dumpster after 6:00 pm, yet they were heard taking the trash out at 4:00 a.m. Tr. 1/27/10, at 8-9, 19-21. There is no rear entrance or exit to the establishment, so the trash has to be removed through the front door and then hauled down the street and around to the alley. Tr. 1/27/10, at 21-22. Additionally, the Applicant agreed not to have trash trucks arrive before 9:00 a.m. on weekdays and 10:00 a.m. on weekend mornings. Tr. 1/27/10, at 9, 16. Thirdly, Mr. DuBeshter testified that he has heard the establishment open after hours as late as 4:30 a.m. Tr. 1/27/10, at 9. He is disturbed late at night and he attributes that to the Applicant. Tr. 1/27/10, at 12. He does not trust that the Applicant will be quiet and will observe the requirements of the VA. Tr. 1/27/10, at 14-15. He stated that allowing the establishment to have outdoor seating will simply create more noise. Tr. 1/27/10, at 28-29. Mr. DuBeshter does not think the Applicant has been a very good neighbor, and he does not believe they will be responsible with the sidewalk café if it is approved. Tr. 1/27/10, at 29. He testified that other licensed establishments in the neighborhood do not create disturbances. Tr. 1/27/10, at 31.

18. The Applicant testified that the sidewalk café would contain five tables with two chairs each for table. Tr. 1/27/10, at 52. She does not believe the patrons will be noisy because they will be consuming food. Tr. 1/27/10, at 52. Another commercial business on her block has outdoor seating. Tr. 1/27/10, at 53. She wants to terminate service on the sidewalk café at 10:00 pm because when business is slow, the establishment closes early anyway. Tr. 1/27/10, at 54.

## CONCLUSIONS OF LAW

19. Pursuant to D.C. Official Code § 25-313(a) (2001), an Applicant must demonstrate to the Board's satisfaction that the establishment for which a substantial change to a liquor license is sought is appropriate for the neighborhood in which it is

located. The Board concludes that the Applicant has demonstrated that the Applications for an Entertainment Endorsement and a Sidewalk Café Endorsement, with the conditions imposed by the Board as listed below, would be appropriate for the area in which the establishment is located.

20. The Board recognizes that pursuant to D.C. Official Code § 1-309.10(d) and D.C. Official Code § 25-609, an ANC's properly adopted written recommendations are entitled to great weight from the Board. See Foggy Bottom Ass'n v. District of Columbia ABC Bd., 445 A.2d 643 (D.C. 1982). In this case, ANC 1A sent a protest letter to the Board, dated July 8, 2009, stating its concerns regarding the impact of the Application for an Entertainment Endorsement on the peace, order, and quiet of the neighborhood. Ordinarily, the Board would find ANC 1A's protest concerns to merit consideration and to be entitled to great weight in this case. However, because ANC 1A submitted a VA subsequent to the hearing, thus withdrawing its protest to the first Application, the Board gives great weight to the VA in lieu of any testimony offered by ANC 1A at the time of the Protest hearing. As noted above, ANC 1A was not a Protestant to the second Application.

21. Pursuant to D.C. Official Code § 25-313(b)(2) (2001) and 23 DCMR § 400.1(a) (2004), the Board must determine under the appropriateness standard whether the Licensee's two Applications will have an adverse effect on the peace, order, and quiet of the neighborhood. The Board did not find based upon the testimony of Investigator Corrales and Mr. Reynolds, that the granting of the applications would adversely affect the peace, order, and quiet of the neighborhood. Indeed, Investigator Corrales' visits to the establishment did not reveal any significant problems with peace, order, and quiet that were attributable to the establishment. Specifically, she indicated that during the 24 visits she and other ABRA investigators made to the establishment, they did not observe loitering, trash, intoxicated patrons, or public urination. Neither she nor the other ABRA investigators heard excessive noise emanating from the establishment.

22. In addition to the numerous visits, a regulatory inspection conducted by Investigator Corrales revealed that the Applicant was complying with ABC regulations in that the license and other permits were posted properly. She also observed that the establishment was clean and orderly. Finally, the Board reviewed the calls for service to that address and none of the calls resulted in investigative referrals to ABRA.

23. The crux of this Protest, according to the Protestants' Protest Information Form and the testimony provided at the two Protest hearings, is the concern that by granting entertainment in the form of karaoke and the use of a sidewalk café, the establishment will operate more like a bar and less like a restaurant. The Protestants expressed concerns that the applicant has not shown a good faith effort to comply with the conditions already on the license and there is no assurance that the Applicant will adhere to the new VA.

24. The Board is not dismissive of these concerns and it takes into consideration the testimony of neighborhood residents Tim Turner and Richard DuBeshter. However, the

Board will only consider those issues related to the two applications at hand and will not revisit issues raised by Mr. DuBeshter such as the licensee's hours of operations or the state of inebriation of the patrons. With regard to peace, order and quiet, Mr. Dubeshter testified that he cannot hear noise from the establishment inside his house and he stated that the Applicant is no longer dumping their trash in the early morning hours. Moreover he stated that allowing the Applicant to offer karaoke entertainment on the weekends would be a fair compromise to the Applicant's request. Additionally, Mr. Turner testified that closing the sidewalk café at 10:00 p.m. would be reasonable if the Applicant will adhere to the closing time. Accordingly, the Board finds that the two applications are appropriate for the location and does not adversely impact the peace, order and quiet of the neighborhood.

25. The Board gives great weight to ANC 1A's efforts and success to enter into a VA with the Applicant regarding the request for an Entertainment Endorsement. Because the Board has already approved the terms and conditions of the VA, it is not necessary to impose any further restrictions on the granting of this Application. Additionally, the Board grants the Application for the Sidewalk Café and limits the seating to ten seats, in accordance with the compromise offered by the Applicant, and the hours of service and sales of alcoholic beverages on the sidewalk café will terminate at 10:00 p.m., seven days a week.

## **ORDER**


For the reasons stated in the findings of fact, conclusions of law, and the entire record herein, it is hereby **ORDERED** by the Board on this 14<sup>th</sup> day of April, 200, that the two Applications to substantially change the operations of the establishment to allow for an Entertainment Endorsement and a Sidewalk Café Endorsement for Giron & Martinez, Inc., t/a Acuario at 3410 11<sup>th</sup> Street, N.W., Washington, D.C., is **GRANTED**.

It is **FURTHER ORDERED** that the following conditions are hereby imposed on the Applicant and shall become a term of the license:

1. The Applicant's hours of entertainment shall be from 8:00 p.m. to 1:00 a.m. on Friday and Saturday;
2. The Applicant's hours of sales and service on the Sidewalk Café for ten seats shall terminate at 10:00 p.m., seven days a week.



District of Columbia  
Alcoholic Beverage Control Board



---

Charles Brodsky, Chairperson




---

Mital M. Gandhi, Member



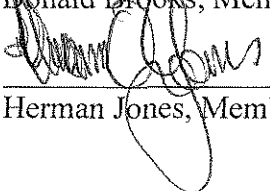
---

Nick Alberti, Member



---

Donald Brooks, Member



---

Herman Jones, 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, 941 North Capitol Street, N.E., Suite 7200, Washington, D.C. 20002.

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).