

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

In the Matter of:)	
)	
Albo Corp.)	Case No.: 17-PRO-00064
t/a Eleven Market)	License No: 060236
)	Order No: 2018-380
Application to Renew a)	
Retailer's Class B License)	
)	
at premises)	
1936 11th Street, N.W.)	
Washington, D.C. 20001)	

BEFORE: Donovan Anderson, Chairperson
Nick Alberti, Member
Mike Silverstein, Member
James Short, Member
Bobby Cato, Member

ALSO PRESENT: Albo Corp., t/a Eleven Market, Applicant

Anita Norman, Commissioner, on behalf of Advisory Neighborhood
Commission 1B, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

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

INTRODUCTION

The Alcoholic Beverage Control Board (Board) approves the Application to Renew a Retailer's Class B License filed by Albo Corp., t/a Eleven Market, (hereinafter "Applicant" or "Eleven Market").

Procedural Background

The Notice of Public Hearing advertising Eleven Market's Application was posted on September 15, 2017, and informed the public that objections to the Application could be filed on

or before November 13, 2017. *ABRA Protest File No. 17-PRO-00064*, Notice of Public Hearing [*Notice of Public Hearing*]. The records of the Alcoholic Beverage Regulation Administration (ABRA) indicate that Advisory Neighborhood Commission (ANC) 1B has filed a protest against the Application. *ABRA Protest File No. 17-PRO-00064*, Roll Call Hearing Results.

The parties came before the Board's Agent for a Roll Call Hearing on November 13, 2017, where the above-mentioned objector was granted standing to protest the Application. On January 24, 2018, the parties came before the Board for a Protest Status Hearing. Finally, the Protest Hearing in this matter occurred on May 2, 2018, and May 16, 2018.

The Board recognizes that an ANC's properly adopted written recommendations are entitled to great weight from the Board. D.C. Code §§ 1-309.10(d), 25-609; *Foggy Bottom Ass'n v. District of Columbia Alcoholic Beverage Control Bd.*, 445 A.2d 643, 646 (D.C. 1982). Accordingly, the Board "must elaborate, with precision, its response to the ANC[']s issues and concerns." *Foggy Bottom Ass'n*, 445 A.2d at 646. The Board notes that it received a properly adopted written recommendation from ANC 1B. The ANC's issues and concerns shall be addressed by the Board in its Conclusions of Law, below.

Based on the issues raised by the Protestants, the Board may only grant the Application if the Board finds that the request will not have an adverse impact on the peace, order, and quiet; residential parking and vehicular and pedestrian safety; and real property values of the area located within 1,200 feet of the establishment. D.C. Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2018).

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. Eleven Market has submitted an Application to Renew a Retailer's Class B License at 1936 11th Street, N.W., Washington, D.C. *Notice of Public Hearing*. ABRA Investigator Earl Jones, Jr., investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 17-PRO-00064, Protest Report* (Jan. 2018) [*Protest Report*]. Eleven Market operates as a convenience store and sells items like snacks, drinks, tobacco products, as well as alcoholic beverages. *Id.* at 8. The proposed establishment is located in an ARTS-1 zone. *Protest Report*, at 4. Sixty-four licensed establishments are located within 1,200 feet of the proposed location. *Id.* at 5-6. There are no schools, recreation centers, public libraries, or day care centers located within 400 feet of the establishment. *Id.* at 7. According to the public notice, Eleven Market's hours of operation run from 8:00 a.m. to 12:00 a.m., except on Sunday when the store opens at 9:00 a.m. *Id.* at 1.

2. ABRA Investigator Jones monitored the establishment on several occasions in January 2018 and May 2018. *Id.* at 8; *Supplemental Protest Report*, 3 (May 2018). During this

monitoring, the investigator did not observe any issues related to peace, order, and quiet; loitering; or litter. *Id.* During his visits, Investigator Jones only observed patrons walk to the establishment, and did not observe anyone drive to the premises. *Transcript (Tr.)*, March 2, 2018 at 18-19. He did not observe any loitering or any significant litter. *Tr.*, March 16, 2018 at 21-24. During an inspection of the store, he witnessed no violations and observed no drug paraphernalia on display. *Id.* at 28.

3. The records of the Metropolitan Police Department indicate that 16 calls for service were directed towards Eleven Market's location. *Protest Report*, at 9. None of the calls led to violations of the District's alcohol laws. *Id.* at 9-10. The violation history of the establishment indicates that on June 14, 2017, Eleven Market received a \$5,000 fine and five stayed suspension days for violating D.C. Official Code §§ 25-781(a) and 25-783 for selling alcohol to a minor and failing to take reasonable steps to ascertain the minor's age. *In re Albo Corporation, t/a Eleven Market*, Case No. 16-CC-00156, Board Order No. 2017-352, 2 (D.C.A.B.C.B. Jun. 14, 2017). Furthermore, in 2015, Eleven Market twice paid citations regarding violation of the prohibition against selling go-cups found at D.C. Official Code § 25-741. *Protest Report*, at 10.

4. A settlement agreement approved in 2008 and attached to the license currently restricts Eleven Market's activities. *In Albo Corporation, t/a 11 Market*, Case No. 9753-06/007P, Board Order No. 2008-197, 1 (D.C.A.B.C.B. May 14, 2008). Specifically, among other restrictions, Eleven Market cannot sell single 12 ounce containers of beer. *Id.* at *Settlement Agreement*, § 2. The establishment must post "No Loitering" signs and log its calls to MPD. *Id.* at § 4. Finally, the establishment cannot stack merchandise in a manner to block the visibility of the interior of the establishment from outside the establishment. *Id.* at § 7.

II. Bereket Tumebo

5. Bereket Tumebo indicated that Eleven Market does not sell containers under 16 ounces. *Id.* at 36. He indicated that the establishment cleans the area around the store. *Id.* at 36. He also indicated that loitering is not an issue. *Id.* at 37.

III. Desta Enkenyelesh

6. Desta Enkenyelesh indicated that she operates a law abiding establishment. *Id.* at 40. She has not heard any complaints about the operation of Eleven Market from nearby residents. *Id.* at 40-41. She also has called the police when people appear to be loitering but many times those people have the right to stand in public. *Id.* at 42. Ms. Enkenyelesh further indicated that the majority of her sales come from the sale of single containers and that the financial viability of her store is dependent on those sales. *Id.* at 43-44.

IV. Commissioner Anita Norman

7. ANC 1B Commissioner Anita Norman is aware that Eleven Market's settlement agreement prevents the sale of single containers of beer that are 12 ounces or less. *Id.* at 48. She is also aware that establishments in the neighborhood sell single containers of alcohol in larger formats, such as 16, 20, and 24 ounces. *Id.* at 48-49.

8. Commissioner Norman indicated that some of Eleven Market's neighbors were concerned about people "hanging out" and "drinking in front of the establishment." *Id.* at 50, 55. Nevertheless, these people were not available to testify at the hearing. During one visit, she also observed that the trash can in front of the establishment had some trash around the can and that the advertisements on Eleven Market's windows were covering too much space. *Id.* at 50-51, 68. The Board notes that the neighbors complaining about loitering were not called to testify and Commissioner Norman did not observe any loitering herself during her visit. *Id.* at 51.

V. Commissioner Jerry Johnson

9. ANC 1B Commissioner Jerry Johnson indicated that the area around the store features a wine bar and bus stop. *Id.* at 86-87.

CONCLUSIONS OF LAW

10. The Board may approve an Application to Renew a Retailer's Class B License when the proposed establishment will not have an adverse impact on the neighborhood. D.C. Code §§ 25-104, 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2018). Specifically, the question in this matter is whether the Application will have a negative impact on the peace, order, and quiet; residential parking and vehicular and pedestrian safety; and real property values of the area located within 1,200 feet of the establishment. D.C. Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2018)

I. The Establishment is Appropriate For The Neighborhood.

11. Under the appropriateness test, "the applicant shall bear the burden of proving to the satisfaction of the Board that the establishment for which the license is sought is appropriate for the locality, section, or portion of the District where it is to be located . . ." D.C. Code § 25-311(a). The Board shall only rely on "reliable" and "probative evidence" and base its decision on the "substantial evidence" contained in the record. 23 DCMR § 1718.3 (West Supp. 2018). The substantial evidence standard requires the Board to rely on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clark v. D.C. Dep't of Employment Servs.*, 772 A.2d 198, 201 (D.C. 2001) *citing Children's Defense Fund v. District of Columbia Dep't of Employment Servs.*, 726 A.2d 1242, 1247 (D.C.1999).

12. In determining appropriateness, the Board must consider whether the applicant's future operations will satisfy the reasonable expectations of residents to be free from disturbances and other nuisances—not just whether the Application complies with the minimum requirements of the law. D.C. Council, Bill 6-504, the "District of Columbia Alcoholic Beverage Control Act Reform Amendment Act of 1986," Committee on Consumer and Regulatory Affairs, 38 (Nov. 12, 1986); *see Panutat, LLC v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 269, 277 n. 12 (D.C. 2013) ("However, in mandating consideration of the effect on peace, order, and quiet, § 25-313(b)(2) does not limit the Board's consideration to the types of noises described in § 25-725."). As part of its analysis, the Board should evaluate each "unique" location "according to the particular circumstances involved" and attempt to determine the "prospective" effect of the

establishment on the neighborhood. *Le Jimmy, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 433 A.2d 1090, 1093 (D.C. 1981). Furthermore, the analysis may also include the Applicant's efforts to mitigate or alleviate operational concerns, the "character of the neighborhood," the character of the establishment, and the license holder's future plans. *Donnelly v. District of Columbia Alcoholic Beverage Control Board*, 452 A.2d 364, 369 (D.C. 1982) (saying that the Board could rely on testimony related to the licensee's "past and future efforts" to control negative impacts of the operation); *Upper Georgia Ave. Planning Comm. v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 992 (D.C. 1985) (saying the Board may consider an applicant's efforts to "alleviate" operational concerns); *Citizens Ass'n of Georgetown, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 410 A.2d 197, 200 (D.C. 1979); *Gerber v. D.C. Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1196 (D.C. 1985); *Sophia's Inc. v. Alcoholic Beverage Control Bd.*, 268 A.2d 799, 800-801 (D.C. 1970).

13. "In determining the appropriateness of an establishment, the Board shall consider . . . [t]he effect of the establishment on peace, order, and quiet, including the noise and litter provisions set forth in §§ 25-725 and 25-726." D.C. Code § 25-313(b)(2); *see also* D.C. Code §§ 25-101(35A), 25-314(a)(4). Among other considerations, the Board is instructed to consider "noise, rowdiness, loitering, litter, and criminal activity." 23 DCMR § 400.1(a) (West Supp. 2018). The "Board shall [also] consider . . . [t]he effect of the establishment upon residential parking needs and vehicular and pedestrian safety . . ." D.C. Code § 25-313(b)(3); *see also* D.C. Code §§ 25-101(35A), 25-314(a)(4). Among other considerations, the Board is instructed to consider the availability of both private and public parking, any parking arrangements made by the establishment, whether "[t]he flow of traffic . . . will be of such pattern and volume as to . . . increase the [reasonable] likelihood of vehicular [or pedestrian] accidents . . ." 23 DCMR § 400.1(b), (c) (West Supp. 2018). Finally, in considering the impact on real property values, the Board must examine whether the establishment is having a negative effect on real property values. D.C. Code § 25-313(b)(1). The Board has noted in the past that the presence of blight may have a negative impact on property values. *In re Historic Restaurants, Inc., t/a Washington Firehouse Restaurant, Washington Smokehouse*, Case No. 13-PRO-0031, Board Order No. 2014-107, ¶ 48 (D.C.A.B.C.B. Apr. 2, 2014) *citing In re Rail Station Lounge, LLC, t/a Rail Station Lounge*, Case No. 10-PRO-00153, Board Order No. 2011-216, ¶ 62 (D.C.A.B.C.B. Jun. 15, 2011).

14. In this case, Investigator Jones and Eleven Market's witnesses indicated that they have not witnessed an ongoing problem with illegal loitering. *Supra* at ¶¶ 2, 5-6. The investigator did not observe any patrons drive to the store and there is no evidence of dangerous traffic conditions in the record. *Id.* at ¶ 2. There is also no evidence that Eleven Market is located in a blighted building. As a result, the Board finds sufficient evidence to find the establishment appropriate and renew Eleven Market's license.

15. The Board is aware that the ANC has requested that the Board forbid the establishment from selling single containers of alcohol ranging in size from 12 to 40 ounces. *Tr.*, 3/2/18 at 9. Yet, during the hearing the ANC only produced hearsay statements regarding loitering issues, and only pointed to one instance where the trash can outside the establishment was improperly maintained. *Supra* at ¶¶ 8; *Compton v. Dist. of Columbia Bd. of Psychology*, 858 A.2d 470, 478-79 (D.C. 2004) (saying that "administrative findings and conclusions based exclusively

on hearsay [are subject] to exacting scrutiny” and that “reversal may be warranted if an agency places undue confidence in hearsay evidence that is too unreliable to justify the weight given to it”). Based on this paltry evidentiary showing, there are no grounds for denying renewal or imposing the requested condition.

II. The Establishment’s Prior Violations Do Not Merit Denying Renewal.

16. Under § 25-315, “[t]he Board shall consider the licensee's record of compliance with this title and the regulations promulgated under this title and any conditions placed on the license during the period of licensure, including the terms of a settlement agreement.” D.C. Code § 25-315(b)(1). While the establishment has committed various violations in the past, the Board does not find that these violations rise to the level of rendering Eleven Market inappropriate.

III. The Board Has Satisfied the Great Weight Requirement By Addressing ANC 1B’s Issues and Concerns.

17. ANC 1B’s written recommendation submitted in accordance with D.C. Code § 25-609(a) indicated that its protest was based on concerns regarding Eleven Market’s impact on peace, order, and quiet; residential parking and safety; and real property values. The Board notes that it specifically addressed these concerns in Paragraphs 14 and 15.

IV. The Application Satisfies All Remaining Requirements Imposed by Title 25.

18. Finally, the Board is only required to produce findings of fact and conclusions of law related to those matters raised by the Protestants in their initial protest. *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 (West Supp. 2018). Accordingly, based on the Board’s review of the Application and the record, the Applicant has satisfied all remaining requirements imposed by Title 25 of the D.C. Official Code and Title 23 of the D.C. Municipal Regulations.

ORDER

Therefore, the Board, on this 13th day of June 2018, hereby **APPROVES** the Application to Renew a Retailer's Class B License at premises 1936 11th Street, N.W. filed by Albo Corp., t/a Eleven Market.

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

The parties are also **ADVISED** that the settlement agreement remains in effect.

The ABRA shall deliver a copy of this order to the Parties.

District of Columbia
Alcoholic Beverage Control Board




Donovan Anderson, Chairperson



Nick Alberti, Member



Mike Silverstein, Member



James Short, Member



Bobby Cato, Member

Pursuant to D.C. Official Code § 25-433(d)(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. 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, 430 E Street, 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).