

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

In the Matter of:)	
)	
S&G, Inc.)	Case No.: 21-PRO-00064
t/a Park Market)	License No.: ABRA-94178
)	Order No.: 2022-011
Application to Renew a)	
Retailer's Class A License)	
)	
at premises)	
3400 13th Street, N.W.)	
Washington, D.C. 20010)	

BEFORE: Donovan Anderson, Chairperson
Bobby Cato, Member
Rafi Aliya Crockett, Member
Jeni Hansen, Member
Edward S. Grandis, Member

ALSO PRESENT: S&G, Inc., t/a Park Market, Applicant

Jeff Jackson, Designated Representative on behalf of the Applicant

Jerry Malmo, Designated Representative, on behalf of A Group of Residents and Property Owners, Protestants

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 A License filed by S&G, Inc., t/a Park Market (hereinafter "Applicant" or "Park Market") where there is no evidence that Park Market is having a substantial impact on the peace, order, and quiet of the neighborhood or otherwise not in compliance with any enforceable term of its settlement agreement. The Board notes that circumstances beyond the control of the Applicant have rendered the portion of the agreement related to the location of the dumpster

unenforceable; therefore, the Board will not enforce that portion of the agreement in accordance with the common law of contracts. The Board's reasoning, order, and advisories to the parties are described below.

Procedural Background

The Notice of Public Hearing advertising Park Market's Application was posted on May 21, 2021, and informed the public that objections to the Application could be filed on or before July 26, 2021. *ABRA Protest File No. 21-PRO-00064*, Notice of Public Hearing [*Notice of Public Hearing*]. The records of the Alcoholic Beverage Regulation Administration (ABRA) indicate that a group of residents and property owners (Protestants) has filed a protest against the Application. *ABRA Protest File No. 21-PRO-00064*, Roll Call Hearing Results.

The parties came before the Board's Agent for a Roll Call Hearing on August 16, 2021, where the above-mentioned objector was granted standing to protest the Application. On September 22, 2021, the parties came before the Board for a Protest Status Hearing. Finally, the Protest Hearing in this matter occurred on October 21, 2021.

Based on the issues raised by the Protestants, the Board may only grant the Application if the request will not have an adverse impact on the peace, order, and quiet 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. 2021). In particular, the Protestants in this case raised specific issues regarding Park Market's compliance with the trash and graffiti provisions of its settlement agreement. *Protest Letter*, at 1 (Jul. 17, 2021).

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. Park Market has submitted an Application to Renew a Retailer's Class A License at 3400 13th Street, N.W., Washington, D.C. *Notice of Public Hearing*.
2. ABRA Investigator Earl R. Jones, Jr., investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 21-PRO-00064, Protest Report* (Oct. 2021) [*Protest Report*].
3. The proposed establishment is in a RF-1 (residential) zone. *Protest Report*, at 4. Twenty-three licensed establishments are located within 1,200 feet of the proposed location. *Id.* at 5. There are no schools, recreation centers, public libraries, or day care centers located within 400 feet of the establishment. *Id.* at 6. The establishment's hours of operation and alcohol sale hours run from 9:00 a.m. to midnight every day of the week. *Id.* at 2. Park Market's

investigative history indicates that it has never committed any violations of the District's alcohol laws in the past. *Id.* at 9.

4. ABRA investigators visited the establishment on 8 separate occasions between September 24, 2021, and October 10, 2021. *Id.* at 12, 2021. *Id.* at 7-8. During these visits, investigators observed no violations. *Id.* at 8. Based on his observations, Park Market operates a small convenience store that sells snack items and alcohol. *Id.* at 31. When Investigator Jones visited the establishment, he did not observe any litter in the immediate vicinity of the establishment. *Transcript (Tr.)*, October 21, 2021 at 17. He also did not observe any graffiti present at the establishment during his visit but is aware that graffiti was observed by one of the Protestants. *Id.* at 18; *Protest Report at Exhibit No. 8*. He also observed that the establishment's dumpster was not being kept in the rear of the premises as required by the establishment's settlement agreement. *Tr.*, 10/21/21 at 19-21.

5. Investigator Jones is aware that Park Market is subject to a settlement agreement. *Id.* at 19. In pertinent part, the settlement agreement provides that

6. *Public Space and Trash.* Applicant shall keep the sidewalk (up to an including the curb), tree box(es), curb, and abutting alley clean and free of litter, bottles, and other debris in compliance with D.C. Code and Municipal Regulations. Applicant shall police these areas sufficiently during operating hours to ensure that refuse and other materials are promptly removed. *Applicant agrees to obtain a dumpster to be placed in the rear of the building.* Applicant shall ensure that the area around the dumpster is kept clean at all times and the dumpster is placed such that it does not encroach on the abutting properties and so that no garbage is placed on abutting properties. Applicant shall maintain regular trash removal service.
8. *Graffiti and Tagging.* Applicant will be responsible for ensuring that the area surrounding the Premises remains free of graffiti. If Applicant's premises is defaced by graffiti or tagging, it is Applicant's responsibility to ensure that the graffiti is removed from the Premises.

In re S&G, Inc., t/a Park Market, ABRA License No. 094178, Board Order No. 2016-093, *Settlement Agreement*, §§ 6, 8 (D.C.A.B.C.B. Feb. 24, 2016) (emphasis added).

6. Investigator Jones discussed the issue of the dumpster with the Applicant's representative. *Tr.*, 10/21/21 at 19. In response, the Applicant's representative indicated that the construction of residential properties adjoining the premises prevents the storage of the dumpster in the rear. *Id.* The dumpster is now stored by the front door because nearby residents objected to having the dumpster stored at the side of the business near residents. *Id.* at 28-29.

II. Gebre Kahassai

7. Gebre Kahassai owns the establishment and has owned the establishment since 2013. *Id.* at 39-40. During his ownership, he has never received complaints about loitering or intoxicated persons. *Id.* at 40. He further tries to make sure that the area outside the establishment is free

from trash and litter. *Id.* He also attempts to remove graffiti quickly. *Id.* at 41-42. Trash is picked up three days per week. *Id.* at 42. He also cleans the tree box every other day, although he admitted he did not do so in the past because he believed the District would clean the tree box. *Id.* at 43, 49.

8. Mr. Kahassai does not own his building. *Id.* at 43. His establishment also has no rear access. *Id.* at 43, 71. When he rented the premises, there was no rear to the establishment and the dumpster was kept to the side of the building. *Id.* at 54-55, 57. As such, the trash must be stored either in front of the premises or the side of his premises. *Id.* at 65-66.

III. Jerry Malmo

9. Jerry Malmo could not dispute the owner's testimony that he has no access to the rear of the premises. *Id.* at 73.

CONCLUSIONS OF LAW

10. The Board may approve an Application to Renew a Retailer's Class A 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. 2021). 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. 2021).

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. 2021). 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).

a. Park Market is not having a negative impact on peace, order, and quiet.

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. 2021).

14. Under § 25-315, “[t]he Board shall also 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).

15. In this case, Park Market has no prior history of violations and monitoring by ABRA revealed no ongoing concerns related to peace, order and quiet. *Supra*, at ¶ 3. Moreover, there is no evidence that the trash or litter problem, if there is one at all, cannot be addressed through ABRA’s enforcement process. Furthermore, § 8 of the Applicant’s settlement agreement requires that graffiti be cleaned up but does not provide a specific time frame; therefore, the Board does not have good cause to find the Applicant’s efforts to clean up graffiti on the property inadequate at this time.

16. Furthermore, in the matter of the requirement of § 6, that “Applicant agrees to obtain a dumpster to be placed in the rear of the building,” the facts show that circumstances beyond the control of Park Market render it impossible for the business to comply with that specific provision. The Board notes that a settlement agreement “. . . is akin to a contract; therefore, the Board relies on principles of contract law to interpret it. *In re Daci Enterprises, LLC, t/a Dacha Beer Garden*, ABRA License No. 092773, Board Order No. 2015-376 (D.C.A.B.C.B. Aug. 5, 2015). In that vein, “*It is well settled that when, due to circumstances beyond the control of the parties the performance of a contract is rendered impossible, the party failing to perform is exonerated.*” *Island Dev. Corp. v. Dist. of Columbia*, 933 A.2d 340, 348–49 (D.C. 2007) (emphasis added). In this case, the limited record before the Board shows that Park Market has

no access to the rear and the rear is occupied by one or more premises. *Supra*, at ¶¶ 6, 8. Therefore, this provision of the settlement agreement is rendered unenforceable until circumstances change.

17. For these reasons, the Board finds the establishment appropriate and is satisfied with the Applicant's record of compliance as of the date of this protest.

II. The Board Imposes Conditions on the License.

18. In light of the Board's findings regarding appropriateness, the Board finds it necessary to impose conditions on the Applicant's license. *See In re Dos Ventures, LLC, t/a Riverfront at the Ball Park*, Case No. 092040, Board Order No. 2014-512. ¶ 49 (D.C.A.B.C.B. Nov. 13, 2013) (saying "[i]n practice, the Board has imposed conditions when it is shown that there are valid concerns regarding appropriateness that may be fixed through the imposition of specific operational limits and requirements on the license"). Under § 25-104(e), the Board is granted the authority to impose conditions on a license when ". . . the inclusion of conditions will be in the best interest of the [neighborhood] . . ." D.C. Code § 25-104(e). The Board will impose conditions to clarify the unenforceable nature of the specific settlement agreement provision related to the location of the dumpster in order to avoid future confusion.

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

19. 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. 2021). 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 12th day of January 2022, hereby **APPROVES** the Application to Renew a Retailer's Class A License at premises 3400 13th Street, N.W., filed by Park Market. The Board issues the following **CONDITIONS**:

1. The following portion of § 6 of the settlement agreement shall be deemed unenforceable unless it is demonstrated in an enforcement proceeding or during a protest that the licensee has sufficient access to the rear of the premises to place its dumpster in compliance with the settlement agreement. As noted above, § 6 states that "Applicant agrees to obtain a dumpster to be placed in the rear of the building." In light of the unenforceability of this provision at this time, the Applicant is free to store its dumpster in any other location permitted by law until circumstances change.
2. All other portions of the settlement agreement shall remain in full force and effect until terminated or amended.

3. The Protestant is **ADVISED** that if it believes that Park Market is in violation of any other portion of its settlement agreement, an appropriate complaint may be filed with ABRA's Enforcement Division.
4. Park Market is **ADVISED** that it remains free to negotiate for the termination or amendment of the agreement with any other party to its settlement agreement. Nothing in this Order shall be deemed to prohibit Park Market from seeking the unilateral termination or amendment of the agreement pursuant to D.C. Official Code § 25-446.
5. The Applicant is **ADVISED** to ensure that its trash storage complies with all applicable laws, including the laws regarding the storage of trash administered by the D.C. Department of Public Works and the use of public space administered by the D.C. Department of Transportation.

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

District of Columbia
Alcoholic Beverage Control Board

eSigned via SeamlessDocs.com
Donovan Anderson
Key: ac430b9b59d5f0e4b730060d1dccc8

Donovan Anderson, Chairperson

eSigned via SeamlessDocs.com
Bobby Cato
Key: 256d3fca02e146d7f4b75bd7917d20d

Bobby Cato, Member

eSigned via SeamlessDocs.com
Rafi Aliya Crockett, Member
Key: b560a91845e19e4016155e5c12f81cc

Rafi Crockett, Member

eSigned via SeamlessDocs.com
Jeni Hansen, Member
Key: 821729312509447491b56f9c2a41899

Jeni Hansen, Member

eSigned via SeamlessDocs.com
Edward Grandis, Member
Key: 5027bda7f9f0040ec14adeb52541ce5

Edward S. Grandis, 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).