THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
Po Boy Jim 2, LLC t/a Po Boy Jim 2	Case No.: License No: Order No:	19-PRO-00064 ABRA-105468 2019-586
Application to Renew a Retailer's Class CR License		
at premises 1934 9th Street, N.W. Washington, D.C. 20001		

BEFORE: Donovan Anderson, Chairperson
Mike Silverstein, Member
James Short, Member
Bobby Cato, Member
Rema Wahabzadah, Member
Rafi Aliya Crockett, Member

ALSO PRESENT: Po Boy Jim 2, LLC, t/a Po Boy Jim 2, Applicant

Dan Orlaskey, on behalf of a Group of Five or More Individuals and Abutting Property Owners Evan Schlom and Paul Alvaro Marin, Protestants

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING RECONSIDERATION

In Board Order No. 2019-495, the Alcoholic Beverage Control Board dismissed the protest filed by Evan Schlom and Paul Marin (collectively, the "Petitioners") for failing to establish that their properties abutted the establishment operated by Po Boy Jim 2, LLC, t/a Po Boy Jim 2, (Applicant) in accordance with D.C. Official Code § 25-601(1). Subsequently, the Petitioners requested reinstatement on the grounds that their condominium units abut the Applicant's establishment.

Mr. Schlom owns condominium Unit 302 and Mr. Marin owns Unit 402 in their building. The building where the Petitioners reside shares a lot line with the building where the establishment is located. Based on pictures of the buildings, the Applicant's premise occupies a two story building, while the Petitioners' units are located on the third and fourth floors of a four story building. The floor of Unit 302 appears to run along the roof of the Applicant's building, while Unit 402 is located completely above the Applicant's premises. In light of these facts, the Board reinstated the protest filed by the owner of Unit 302, but affirmed the dismissal of the protest filed by Mr. Marin, the owner of Unit 402. *In re Po Boy Jim 2, LLC, t/a Po Boy Jim 2*, Case No. 19-PRO-00064, Board Order No. 2019-544, 2 (Jul. 10, 2019).

Subsequently, Mr. Marin has filed a motion for reconsideration requesting the reinstatement of his protest. *Mot. for Recon.*, at 1. Mr. Marin argues that his dismissal was in error. *Id.* First, Mr. Marin argues that the Board should look to the lot line as the property line, not whether his condominium physically touches the licensee's establishment, and that the Board should deem the Applicant's property as extending beyond the roof. *Id.* at 2. In support, Mr. Marin cites the Board's decision in *Park Place at 14th*, which found that two properties abutted despite not sharing a common wall. *Id.* at 3, 4 *citing In re Park Place, t/a The Park Place at 14th*, Case No. 13-PRO-00153, Board Order No. 2013-586, 2 (D.C.A.B.C.B. Dec. 4, 2013). Mr. Marin also noted that the Applicant had previously applied for a roof deck, which purportedly shows ownership of the area above the establishment. *Id.* at 3. Mr. Marin further argues that the Board should not rely on *Reverie*, which requires condominiums to share a wall or ceiling, because his unit is located in a separate building, and that that decision contradicts the Board's decision in *Park Place at 14th*. *Mot. for Recon.*, at 5. The Applicant did not file a response.

The Board affirms its prior decision dismissing the owner of Unit 402 for failing to demonstrate that his property abutted the Applicant's establishment. The Board's prior decision is correct because Unit 402 does not encompass the entire building, and its limited property lines do not touch any of the Applicant's property lines. *In re Po Boy Jim 2, LLC, t/a Po Boy Jim 2*, Board Order No. 2019-544 at 2.

An abutting property owner is granted standing to protest the renewal of a liquor license under D.C. Official Code § 25-601(1). In determining whether two properties abut, the Board follows § 101.2, which states that "In establishing the distance between one or more places . . . the distance shall be measured linearly by the Board and shall be the shortest distance between the *property lines of the places*." 23 DCMR § 101.2 (West Supp. 2019) (emphasis added).

The Board has issued several decisions interpreting § 25-601(1) and 23 DCMR § 101.2 over the past several years. In *Park Place at 14th*, issued in 2014, the Board reversed the dismissal of a limited liability company because it did not share a common wall with the licensee. *In re Park Place, t/a The Park Place at 14th*, Board Order No. 2013-586, at 13-4. In that case, the Board noted that the limited liability company and the licensee occupied neighboring lots that shared property lines. *Id.* at 2. Nevertheless, there is no indication in that opinion that the limited liability company's property was subdivided in any way. *Id.*

In *Reverie*, issued in 2018, the Board denied standing to a group of condominium owners located in the same building as the license holder. *In re Spero, LLC, t/a Reverie, Case No. 17-PRO-00088*, Board Order No. 2018-045, 2 (D.C.A.B.C.B. Jan. 31, 2018). In denying standing,

the Board said that "Similar to the Board's [prior] holding that properties that do not share a property line and that are separated by [an] alley do not constitute abutting properties, condominiums or apartments that do not share a wall or ceiling with the licensed establishment cannot constitute abutting properties." *Id.* at 2. The Board notes that this interpretation conforms with § 101.2 because the property lines of a condominium or apartment do not constitute the entire building or "place." § 101.2.

Most recently, in an advisory opinion issued in May 2019, the Board further interpreted section § 101.2 for the purposes of determining whether a Retailer's Class A License could be issued to 5100 Wisconsin Avenue, N.W., in compliance with the distance requirement created by D.C. Official Code § 25-333. *An Interpretation of D.C. Official Code § 25-333*, Board Order No. 2019-446, 1 (D.C.A.B.C.B. May 22, 2019) (Advisory Opinion). In the advisory, the Board noted that in 2009 the Board addressed a question raised by an applicant about how to measure distances from its proposed location in Cleveland Park. *Id.* at 4. In response, the Board indicated that the use of the words "property lines of the places" in § 101.2 "directed the Board to consider [the applicant's] location as a tenant within a larger strip mall," and should not consider areas not under the ownership or control of the applicant. *Id.* at 5. In turn, the Board instructed the 2009 applicant that it would measure the distance by looking at the "leased property line rather than the record lot line." *Id.*

In the same advisory, the Board discussed how to measure distances when a lot contained multiple buildings sharing the same lot and address. *Id.* at 2. In the advisory, the Board distinguished the proposal for 5100 Wisconsin Avenue, N.W., because the Wisconsin Avenue location shared its address with other buildings on the lot, which differed from the Board's decision in 2009, because that store had its own address in the strip mall. *Id.* at 5. Therefore, the Board advised the requestor that the property line of the proposed store located on Wisconsin Avenue, N.W., included the lot line of another building with the same address located on the same lot. *Id.*

Based on this precedent, the Board is satisfied that its interpretation is correct for a number of reasons. First, the use of the phrase "property lines of the place" does not limit the location of the property line to the lot line, the address line, the lease line, or any other line. Instead, this phrase allows for a fact based determination as to the scope of the property based on the nature of the premises and ownership. As a result, it is reasonable to determine that lot owners have property lines that match the scope of their lot, while owners of subdivided units, such as condominiums, only have property lines that match the scope of their property, which in most cases, limits their property lines to their ceilings, floors, and walls.

Second, the Board's records show that the Board has been consistent in this interpretation since 2009. Contrary to the argument made in the motion, the Board does not agree that *Park Place at 14th* and *Reverie* contradict in anyway. *Mot. for Recon.*, at 5. Indeed, the Board was well aware of its decision in *Park Place at 14th*, when it issued *Reverie,* as *Reverie* directly cites the earlier case. *In re Spero, LLC, t/a Reverie*, Board Order No. 2018-045 at 2. Further, these cases do not contradict because the protestant in *Park Place at 14th* owned the whole lot and its property extended beyond its walls, while there is no evidence that the owner of Unit 402 owns

anything beyond Unit 402.[1] As a result, there is no contradiction or failure to follow precedent. *See Mot. for Recon.*, at 5.

Third, in accordance with the Board's recent advisory, limiting the property lines to the walls and ceilings of Unit 402 is reasonable when it is a separately owned Unit with its own specific address. Furthermore, the Board has not been directed to anything in the record that shows that the owner of Unit 402 owns any other property in common with the other condominium owners that abuts the Applicant's establishment. As a result, limiting the scope of Unit 402's property lines to its walls and ceilings in this case is reasonable.

And fourth, evidence that the Applicant previously applied for a summer garden that potentially could have touched Unit 402 is not sufficient to grant standing. ABRA's records show that the agency never issued the Applicant a summer garden permit for the roof; as a result, the Applicant's establishment stops at its roof. Moreover, nothing in § 25-601(1) and § 101.2 requires the Board to treat "air rights" as property lines. *See Mot. for Recon.*, at 4.

ORDER

Therefore, the Board, on this 7th day of August, hereby **DENIES** the motion for reconsideration. The ABRA shall deliver a copy of this order to the parties.

[1] The Board disagrees that the location of the units in the same or neighboring building has any relevance. *Mot. for Recon.*, at 5; *In re Spero, LLC, t/a Reverie*, Board Order No. 2018-045 at 2 ("condominiums and apartments that do not share a wall or ceiling with the licensed establishment cannot constitute abutting properties.").

District of Columbia
Alcoholic Beverage Control Board

Donovan Anderson, Chairperson

Mike Silverstein, Member

James Short, Member

Bobby Cato, Member

Rema Wahabzadah, Member

Rafi Aliya Crockett, 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).