

**DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**
441 4th Street, N.W.
Washington D.C. 20001

2010 OCT 19 PM 4:10

Appeal of Ward 5 Improvement Association

Appeal No. 18114

DISTRICT OF COLUMBIA'S PRE-HEARING STATEMENT

The Appellee, the District of Columbia Department of Consumer and Regulatory Affairs ("Appellee" or "DCRA"), by and through undersigned counsel, respectfully submits its pre-hearing statement in opposition to the June 11, 2010 appeal filed by the Appellant, the Ward 5 Improvement Association. The appeal alleges that DCRA erred in its April 21, 2010 decision to issue certificate of occupancy ("CO") no. 1001838 to Stadium Group, LLC for the use of 2127 Queens Chapel Road, NE ("the Property"). The Board must deny this appeal because 1) Appellant lacks standing, and 2) DCRA did not err because a nightclub that offers nude dancing entertainment is not a sexually-oriented business establishment ("SOBE") under the Zoning Regulations.

SUMMARY OF THE ISSUES

On April 21, 2010, DCRA issued a temporary and conditional CO to Stadium Group, LLC to operate a "restaurant with nightclub" known as the Stadium Club at the Property. See the April 21st CO attached hereto as Exhibit A. A "restaurant with nightclub" is a permitted use as a matter of right in a C-M-2 zone. See 11 DCMR § 801.2. When DCRA issued the April 21st CO, it understood that the Stadium Group, LLC intended to provide live nude dancing entertainment to its patrons. After the club's owner complied with the CO's conditions, DCRA issued Stadium

BOARD OF ZONING ADJUSTMENT
District of Columbia

CASE NO. 18114

EXHIBIT NO. 22

Board of Zoning Adjustment
District of Columbia
CASE NO.18114
EXHIBIT NO.22

Group, LLC a permanent CO for a "restaurant with nightclub" on June 22, 2010. *See* the June 22nd CO attached hereto as Exhibit B.

The substance of the appeal alleges that DCRA erred in issuing the April 21st CO by permitting a sexually-oriented business establishment to operate in a C-M-2 zone. SOBE's are only permitted in a C-M-2 zone by a variance. Should the Board decide this case on the merits, it must address the issue of whether a nightclub that provides live nude dancing is a SOBE as defined by 11 DCMR § 199.1.

DCRA's interpretation of 11 DCMR § 199.1 is that a nude dancing establishment is not considered a SOBE under the Zoning Regulations. Further, DCRA only issued a CO to Stadium Group, LLC after receiving assurances from the club's owners that the club would be operated in compliance with the Zoning Regulations and the regulations of the Alcoholic Beverage Regulation Administration ("ABRA"). *See* letter of Keith Forney attached hereto as Exhibit C. Specifically, DCRA understood that the performances would be limited to nude dancing, that there would be separation between the performers and the patrons, and that there would be no sexual contact between performers and patrons. *See id.*

THE APPEAL MUST BE DISMISSED

1) Appellant Lacks Standing

11 DCMR § 3112.2 states, "Any person aggrieved by any order, requirement, decision, determination, or refusal made by an administrative officer or body, including the Mayor of the District of Columbia, in the administration or enforcement of the Zoning Regulations may file a timely appeal with the Board[.]" Thus, a person who is not "aggrieved" lacks standing to bring an appeal. The Board has consistently held that for a person to be "aggrieved," that person must demonstrate that he/she has an interest that will be more significantly, distinctly, or uniquely

affected than that of other persons in the general public. *See Appeal No. 16849 of Robert Lehrman* (2002) at p. 5; *Appeal No. 16059 of Dudley Cannada* (Order Upon Reconsideration, February 20, 1998) at p. 2. Additionally, the Board requires that there must be “a direct connection between any error on the part of DCRA... and any particular damage to the appellant as a result.” *See Appeal No. 17430 of Rodut Associates of DC, LP* (2006) at p. 7.

Appellant, the Ward 5 Improvement Association, is an unincorporated non-profit association created on June 11, 2010 (the same day this appeal was filed) by Abigail and Don Padou. *See Exhibit D* (also attached to Appellant’s appeal). Both Abigail and Don Padou reside at 1335 Lawrence St., NE and share the same phone number. *Id.* Aside from these two individuals, there is no evidence that the Ward 5 Improvement Association has any other members. Under DC Code § 29-971.07, an unincorporated non-profit may only assert a claim on behalf of its members if “one or more members of the non-profit association have standing to assert a claim in their own right[.]”

Here, Appellant has not demonstrated that any of its members are “aggrieved” within the meaning of 11 DCMR § 3112.2. In prior cases, the Board has found that neighbors can appeal the issuance of a building permit or certificate of occupancy, but only when those neighbors live in close proximity or can see the subject property from their home. *See e.g. Appeal No. 16849 of Robert Lehrman* at p. 5 (finding appellant had standing because he could see the violation from his house). Neither is the case here. The only two known members of the Ward 5 Improvement Association reside approximately 1.4 miles away from the Property. *See Google Maps* print out attached as Exhibit E. The Padous have not shown that DCRA’s decision to issue the CO has affected their interests in any way that can be distinguished from those of any member of the general public. *See Appeal No. 16059 of Dudley Cannada* (Order Upon Reconsideration) at p.2

(holding that being a longtime resident of the District is insufficient to give a person standing).

D.C. Superior Court has already ruled that the Padous lacked standing to challenge the approval of Stadium Club's liquor license. *See* Order of Judge Josey-Herring attached as Exhibit F.

Contrary to Appellant's assertion, DC Code § 6-641.07(f) does not give automatic standing to non-profit associations. It merely eliminates the filing fee requirement. *See* DC Code § 6-641.07(f). That section still requires that the appeal be taken by an "aggrieved" person or "or organization authorized to represent such person." *Id.* For these reasons, the Board must dismiss this appeal.

2) DCRA Did Not Err

DCRA did not err in issuing either the April 21st CO or the June 22nd CO. A restaurant or nightclub that provides nude dancing is not a SOBE under the definition in 11 DCMR § 199.1.

Under the Zoning Regulations, a SOBE is defined as:

Sexually-oriented business establishment - an establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals, films, materials, and articles, or an establishment that presents as a substantial or significant portion of its activity, live performances, films, or other materials, that are distinguished or characterized by their emphasis on matters depicting, describing, or *related to specified sexual activities and specified anatomical areas*.

These establishments may include, but are not limited to, bookstores, newsstands, theaters, and amusement enterprises. If an establishment is a sexually-oriented business establishment as defined here, it shall not be deemed to constitute any other use permitted under the authority of this title.

See 11 DCMR § 199.1 (italics added).

"Specified anatomical areas" are defined as:

Parts of the human body as follows:

- (a) Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and

(b) Human genitals in a discernibly turgid state, even if completely and opaquely covered.

See 11 DCMR § 199.1.

“Specified sexual activities” are defined as

The following activities:

(a) Acts of human masturbation, sexual intercourse, sexual stimulation or arousal, sodomy, or bestiality; and

(b) Fondling or other erotic touching of human genitals, pubic region, buttock, or breast.

See 11 DCMR § 199.1.

In order for the Stadium Club to be a SOBE under these definitions, its live performances must be characterized by their emphasis on specified sexual activities and specified anatomical areas. Both of these elements- “activities” and “areas” -must be present. Since nude dancing is not a specified sexual activity under the definition, DCRA has interpreted this to mean that there must be more than simple nude dancing for a business to be considered a SOBE.

DCRA’s application of this law is fully supported by the Board’s prior handling of this issue. In *California Steak House*, the appellant was challenging the revocation of its CO after DCRA determined the establishment was a SOBE. See *Appeal No. 13967 of California Steak House, Inc.* (Nov. 22, 1983). The Board stated, “The use of the conjunction ‘and’ in the definition of sexually-oriented business establishment requires that both specified activities and specified areas be found in order for an establishment to fall within the definition.” *Id.* at 12. In finding against California Steak House, the Board noted, “the activities [occurring at appellant’s establishment] clearly go beyond the limits of dancing in the nude.” *Id.* at 13.

Appellant’s statement that “every court or administrative board that considered the matter have found that nude dancing is a sexually-orientated business” is simply not true. In *Jefferson*

Grill, the ABC Board suspended a club's liquor license for violations of 23 DCMR § 904.3 (1997). *See In re Jefferson Grill, Inc.*, ABC Bd. Order No. 2005-1, Jan. 5, 2005, 52 D.C. Reg. 743 (Jan. 28, 2005). The Board noted that the establishment was permitted to provide nude dancing performances, but found that the club had exceeded the scope of what was allowed by law. *Id.* at ¶ 1. In that case, the ABC Board found that the nude dancers were "permitt[ing] patrons of the establishment to fondle the dancer's breasts, genital region, and buttocks while stimulating the patron's genitals with their buttocks. *Id.* ¶ 29. Further, "dancers would lay on their back on stage with their legs open such that their vagina was exposed, stimulate their own vagina in plain view, and permit male patrons to fondle their vagina." *Id.* It was these activities, and not mere nude dancing, that caused the ABC Board to conclude that the club had violated the law.

The *Diavatis* and *Upper Ga. Ave. Planning Comm.* cases cited by Appellant do not shed any light on the issue before the Board as neither case contains an analysis of what constitutes a SOBE. In *Diavatis*, a neighbor to an alleged SOBE sought an injunction. *See President and Directors of Georgetown College for Georgetown University v. Diavatis*, 470 A.2d 1248 (D.C. 1983). There, the issue as to whether the establishment in question had actually violated the Zoning Regulations was not before the Court. *Id.* at 1251. In fact, the Court of Appeals made a point of stating that "the trial court never made a finding that a zoning violation had occurred[.]" *Id.* In *Upper Ga. Ave. Planning Comm.*, the Court of Appeals, in reviewing a decision of the ABC Board, noted in dicta that a restaurant with nude go-go dancers "apparently meets the definition of a 'sexually-orientated business establishment'", but it conducted no analysis of that term. *See Upper Ga. Ave. Planning Comm. v. District of Columbia Alcoholic Beverage Control Bd.*, 500 A.2d 987, 992 and n.4 (D.C. 1985).

Further, DCRA's interpretation is consistent with other District law. The statutes that regulate the issuance of ABRA licenses specifically state that licensed nightclubs may provide "nude performances."¹ See DC Code § 25-113(a)(4)(B) (2001 ed.). Another ABRA statute requires that nude dancers "perform only upon a stage at least 18 inches above the immediate floor level and removed at least 3 feet from the nearest customer." See DC Code § 25-372.

Accordingly, DCRA did not err in issuing either the April 21st or June 22nd COs and this appeal must be dismissed.

Respectfully Submitted,

PETER J. NICKLES
Attorney General
for the District of Columbia

MELINDA M. BOLLING
General Counsel

October 19, 2010


JAY A. SURABIAN (DC Bar # 977657)
Assistant Attorney General
Department Of Consumer And
Regulatory Affairs
Office of the General Counsel
1100 4th Street, SW, 5th Floor
Washington, DC 20024
(202) 442-8403 (office)
(202) 442-9447 (fax)
jay.surabian@dc.gov

¹ "Nude performance" means *dancing* or other entertainment by a person whose genitals, pubic region, or buttocks are less than completely and opaquely covered and, in the case of a female, whose breasts are less than completely and opaquely covered below a point immediately above the top of the areola. See DC Code § 25-101(34) (defining "Nude performance") (italics added).

CERTIFICATE OF SERVICE

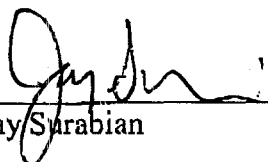
I hereby certify that a copy of the foregoing Pro-Hearing Statement was served by first class mail, this 19th day of October 2010, to the following:

Stadium Group, LLC
c/o Professional Registered Agents, Inc.
2600 Virginia Avenue, NW, Suite 1112
Washington, DC 20037

RF Holdings, LLC
c/o Keith Forney
2127 Queens Chapel Rd., NE
Washington, DC 20018

Ward 5 Improvement Association
c/o Don Padou
1335 Lawrence St., NE
Washington, DC 20017
Don.padou@yahoo.com

ANC 5B
2100 New York Ave., NE
Washington, DC 20002



Jay Sarabian

Department of Consumer and Regulatory Affairs

Permit Operations Division

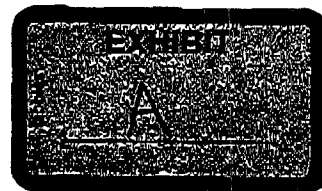
1100 4th Street SW

Washington DC 20024

Tel. (202) 442 - 4689

Fax (202) 442 - 4862

TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442 9557

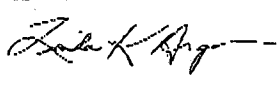
C_{of}O

CERTIFICATE OF OCCUPANCY

THIS CERTIFICATE MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS MAIN ENTRANCE

PERMIT NO. CO1001838

Date: 04/21/2010

Address of Use: 2127 QUEENS CHAPEL RD NE		Zone: C-M-2	Ward: 6	Square: 4258	Suffix:	Lot: 0034
Description of Occupancy: Temporary Conditional Certificate: Restaurant with Nightclub with accessory parking [Not a Sexually Oriented Business Establishment] Maximum Occupancy Load 396; with 349 seats Subject to the following conditions: 1. An executed covenant shall be recorded or a lot consolidation subdivision encompassing the two subject lots shall be applied for. 2. Unless revised or reissued this Certificate shall expire on May 21, 2010.						
Permission Is Hereby Granted To: The Stadium Group Lic		Trading As: STADIUM		Floor(s) Occupied 1ST FLOOR		PERMIT FEE: \$78.00
Property Owner: Wfj Lic		Previous Use(s): Night Club - A-2		Occupant Load: 396		BZA Number:
Type of Application: Load Change		Occupied Sq. Footage: 14000	Approved Use(1): Night Club - A-2			
Conditions/ Restrictions: As a condition precedent to the issuance of this Certificate, the owner agrees to conform with all conditions set forth herein, and to maintain the use authorized hereby in accordance with the approved application and plans on file with the District Government and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property and to inspect all spaces whose use is authorized by this Certificate and to require any changes which may be necessary to ensure compliance with all the applicable regulations of the District of Columbia.						
Director: Linda K. Argo 		Permit Clerk Stacie Williams		Expiration Date:		
TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL, CALL THE DC INSPECTOR GENERAL AT 1-800-521-1639 FOR CONSTRUCTION INSPECTION INQUIRIES CALL (202) 442-9557 TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557.						

Department of Consumer and Regulatory Affairs

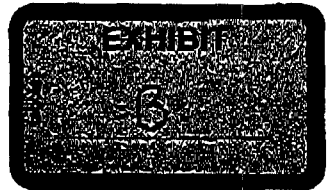
Permit Operations Division

1100 4th Street SW

Washington DC 20024

Tel. (202) 442 - 4589

Fax (202) 442 - 4862

C_{of}O

CERTIFICATE OF OCCUPANCY

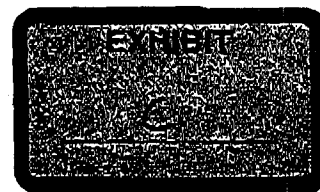
THIS CERTIFICATE MUST ALWAYS BE CONSPICUOUSLY DISPLAYED AT THE ADDRESS MAIN ENTRANCE

PERMIT NO. CO1002471

Date: 06/22/2010

Address of Use: 2127 QUEENS CHAPEL RD NE		Zone: C-M-2	Ward: 5	Square: 4258	Suffix:	Lot: 0034
Description of Occupancy: Restaurant with Nightclub with accessory parking [Not a Sexually Oriented Business Establishment] Maximum Occupancy Load 396; with 349 seats.						
Permission Is Hereby Granted To: The Stadium Group, Llc.	Trading As: STADIUM CLUB	Floor(s) Occupied First	PERMIT FEE: \$122.10			
Property Owner: Wfj Llc	Previous Use(s): Restaurants - A-2	Occupant Load: 396	BZA Number:			
Type of Application: Ownership Change	Occupied Sq. Footage: 14000	Approved Use(1): Restaurants - A-2				
Conditions/ Restrictions: Subject to easement for access over the property line As a condition precedent to the issuance of this Certificate, the owner agrees to conform with all conditions set forth herein, and to maintain the use authorized hereby in accordance with the approved application and plans on file with the District Government and in accordance with all applicable laws and regulations of the District of Columbia. The District of Columbia has the right to enter upon the property and to inspect all spaces whose use is authorized by this Certificate and to require any changes which may be necessary to ensure compliance with all the applicable regulations of the District of Columbia.						
Director: Linda K. Argo	Permit Clerk Doris Minor		Expiration Date:			
TO REPORT WASTE, FRAUD OR ABUSE BY ANY DC GOVERNMENT OFFICIAL, CALL THE DC INSPECTOR GENERAL AT 1-800-421-1659						
FOR CONSTRUCTION INSPECTION INQUIRIES CALL (202) 442-9557						
TO SCHEDULE INSPECTIONS PLEASE CALL (202) 442-9557.						

2010 OCT 19 PM 4:11

**FEI Construction Company****A Division of Forney Enterprises, Inc.**

April 1, 2010

Matt LeGrant
Chief Zoning Division
Department of Consumer and Regulatory Affairs
1100 4th Street, SW
Washington, DC 20024

Sub: Request for a Certificate of Occupancy for the Stadium Club Operations

Mr. LeGrant:

Thank you for the meeting to discuss the operations of the club. As we indicated the club will be in strict compliance with the zoning as well as the ABC Liquor license requirements. As such, there will be a 3 foot cordon between the patrons and all nude dancers. The dancers will perform their dance routines on one of four main stages which are 3 to 4 ft off the ground or on one of the table top platforms which are 18" off the ground. There will be NO contact of a sexual nature between the patrons and the dancers permit in the club. As we pointed out, we will have approximately 10 security personnel in and around the club at all times all having radio communications with each other and the central office. In the central office we maintain two monitors which display the views from a bank of cameras all around establishment which give us 100% video coverage of the entire establishment such that we can immediately dispatch security to any area should any violations of our no contact rule between a naked dancer and a patron occur.

As you are aware we will not have our sprinkler system operational until April 9th, therefore we are hereby requesting a temporary C of O based on our having an approved fire watch program in place in lieu of the sprinkler system for a period of 10 days. We are submitting to the fire marshal our fire watch plan today and have included a fire watch procedural manual for your review/records.

Please feel free to contact me should you have any questions or need for clarification.

Sincerely

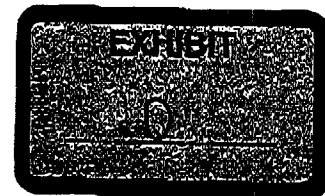
Keith Forney
CO-Owner

Enclosure: Fire Watch Plan

CC: Lennox Douglas

2010 OCT 19 PM 4:11

WARD 5 IMPROVEMENT ASSOCIATION



Articles of Association

1. The Ward 5 Improvement Association is an Unincorporated Nonprofit Association pursuant to DC Code § 29-971.
2. The purpose of the Ward 5 Improvement Association is to engage in civic activities intended to improve the quality of life of Ward 5 residents and business owners. The Ward 5 Improvement Association has no real property and will not engage in any real property transactions.
3. Membership: Membership is open to any resident or business owner of Ward 5 upon a majority vote by existing members.
4. Income and Dues: None.
5. Mailing address: 1335 Lawrence St NE, Washington DC 20017.
6. Meetings: Meetings of the association shall be governed by Roberts Rules of Order (10th Edition).
7. These articles may be amended upon majority vote of existing members.

Member 1:

A handwritten signature in black ink, appearing to be "A. Padou".

6/11/10

Abigail Padou
1335 Lawrence St NE
Washington DC 20017
(202) 832-4038

Date

Member 2:

A handwritten signature in black ink, appearing to be "D. Padou".

6/11/10

Don Padou
1335 Lawrence St NE
Washington DC 20017
(202) 832-4038

Date

A large, stylized handwritten signature in black ink, likely belonging to the Notary Public.

Notary Public

6/16/10

Date

JUDE U. NKPAO
NOTARY PUBLIC
DISTRICT OF COLUMBIA
MY COMMISSION EXPIRES
JULY 31, 2010

2010 OCT 19 PM 4:12

WARD 5 IMPROVEMENT ASSOCIATION

2010 OCT 19 PM 4:12

June 11, 2010

To Whom It May Concern:

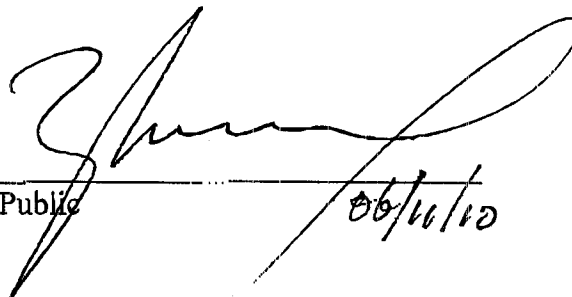
On June 11, 2010 the membership of the Ward 5 Improvement Association unanimously voted to authorize Don Padou to appeal to the Board of Zoning Adjustment the issuance of a Certificate of Occupancy (CO#1001838) issued to the Stadium Group LLC for 2127 Queens Chapel Road NE.



Don Padou
President, Ward 5 Improvement Association
1335 Lawrence Street NE
Washington, DC 20017



Abigail Padou
Secretary, Ward 5 Improvement Association
1335 Lawrence Street NE
Washington, DC 20017



Notary Public

JUDE U. NKPADO
NOTARY PUBLIC
DISTRICT OF COLUMBIA
MY COMMISSION EXPIRES
JULY 31, 2010

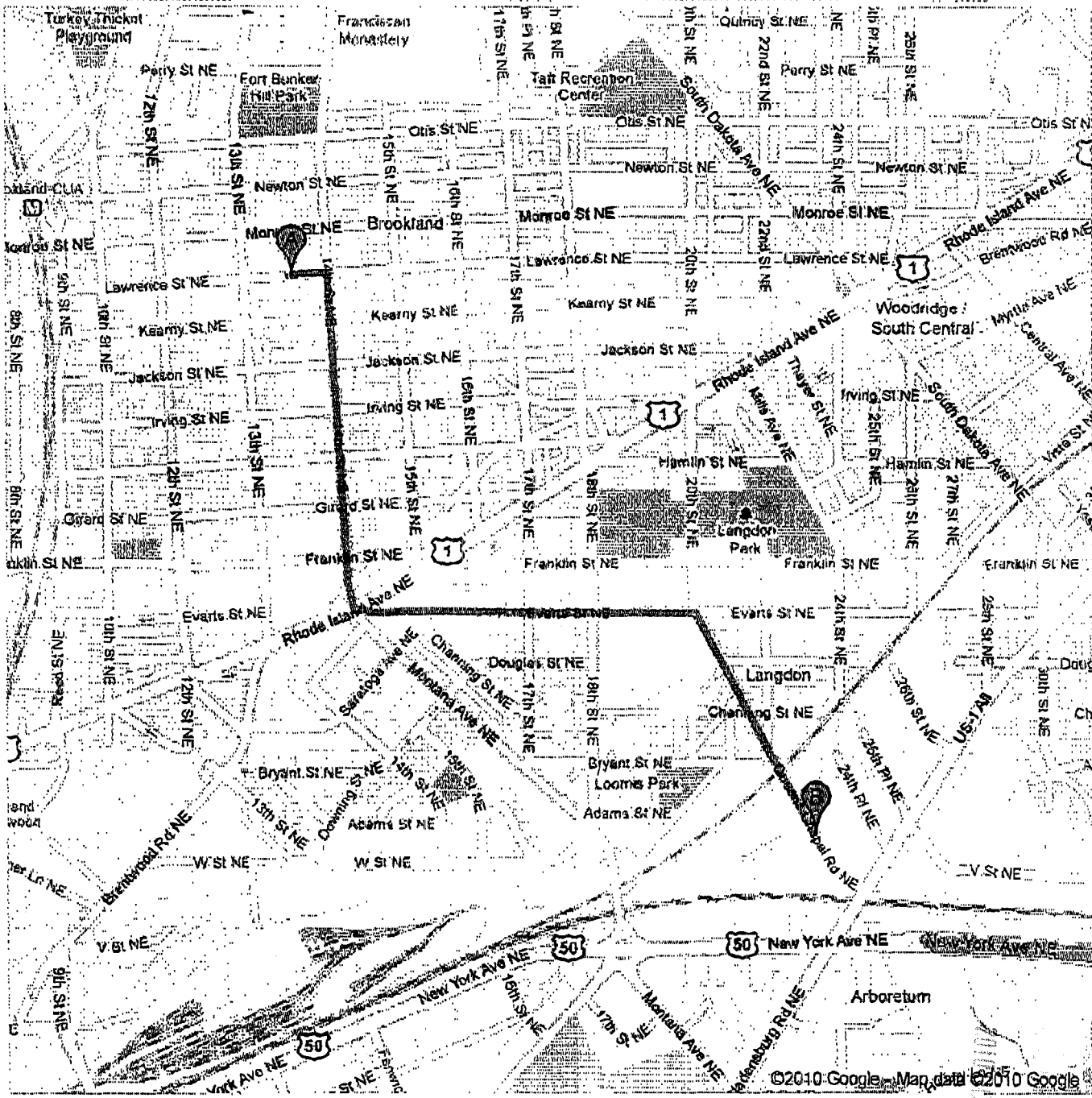


Directions to 2127 Queens Chapel Rd NE, Washington D.C., DC 20018
1.4 mi – about 28 mins

Save to
Download
phone at g

EXHIBIT

Walking directions are in beta.
Use caution – This route may be missing sidewalks or pedestrian paths.



10/19/10 11:41:12

 1335 Lawrence St NE, Washington D.C., DC 20017

-
- | | |
|--|--------------|
| 1. Head east on Lawrence St NE toward 14th St NE | go 305 ft |
| About 1 min | total 305 ft |
|  2. Turn right at 14th St NE | go 0.5 mi |
| About 10 mins | total 0.6 mi |
|  3. Turn left at Rhode Island Ave NE | go 62 ft |
| | total 0.6 mi |
|  4. Turn right at Evarts St NE | go 0.5 mi |
| About 10 mins | total 1.1 mi |
|  5. Turn right at Queens Chapel Rd NE | go 0.4 mi |
| Destination will be on the left | total 1.4 mi |
| About 6 mins | |

 2127 Queens Chapel Rd NE, Washington D.C., DC 20018

These directions are for planning purposes only. You may find that construction projects, traffic, weather, or other events may cause conditions to differ from the map results, and you should plan your route accordingly. You must obey all signs or notices regarding your route.

Map data ©2010 Google

Directions weren't right? Please find your route on maps.google.com and click "Report a problem" at the bottom left.

EXHIBIT

2010 OCT 19 PM 4:12

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division**

DON PADOU, et al.
Plaintiffs,

v.

**DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE
CONTROL BOARD
Defendant.**

Case No. 2010 CA 002750 B

Judge Anita Josey-Herring

Calendar 11

ORDER

This matter is before the Court on Defendant, District of Columbia Alcoholic Beverage Control Board's Motion to Dismiss. The Board filed the Motion, pursuant to Super Ct. Civ. R. 12(b)(6), on June 22, 2010. Defendants attached a Memoranda of Points and Authorities in Support of its Motion to Dismiss, which included Defendants Exhibit No. 1 and No. 2. On July 7, 2010, Plaintiffs, Don Padou and Abigail Padou, filed an Opposition to the Motion to Dismiss.

FACTUAL HISTORY

This case arises out of a dispute regarding an alleged violation of Constitutional rights under 42 U.S.C. § 1983 and 42 U.S.C. § 1985. Plaintiffs, Don and Abigail Padou ("Padous"), filed an initial Complaint for declaratory judgment and injunctive relief against, Defendant, The District of Columbia Alcohol Beverage Control Board ("Board"), on April 2, 2010. The Padous argued that the Board failed to follow proper licensing procedures, including the holding of hearings required by law, with regard to the relocation, safekeeping and transfer of ownership of the Black Ride III ("Black Ride") liquor license (currently owned and operated by Stadium Group LLC) from 900

First Street S.E., Washington, D.C. to 2121 Queens Chapel Road, N.E., Washington, D.C. They further argued that the Board's failure to follow proper licensing procedures violated their Constitutional right to petition the government for redress of grievances pursuant to 42 U.S.C. §§ 1983 and 1985.

In the present Motion, the Board moves this Court to dismiss the Complaint pursuant to Super. Ct. R. Civ. P. 12(b)(6). The Board argues that the Padous' premise is fundamentally flawed because they complain about the results of the process and not a lack of process. The Board contends that the Padous' liberty interest in their First Amendment right to petition the government was not violated because the Padous themselves admit they petitioned the government even though they may not have liked the Board's response. Furthermore, citing *Diamond v. Charles*, the Board argues that the Padous lack standing to bring the claim because they cannot show (1) concrete injuries, personal to themselves; (2) injury fairly traceable to the Defendant's conduct; and (3) injury that will "likely" be redressed if the relief they seek is granted. *Diamond v. Charles*, 476 U.S. 54, 70 (1986). They also contend that the Padous do not fit within the group allowed to bring a claim under D.C. Code §25-601.

LEGAL STANDARD

Rule 12(b)(6) of the D.C. Superior Court Rules of Civil Procedure provides, in part, that dismissal for failure to state a claim upon which relief can be granted is proper only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Owens v. Tiber Island Condominium Ass'n*, 373 A.2d 890, 893 (D.C. 1977) (citing to *Conley v. Gibson*, 355 U.S. 41, 45 (1957)). A complaint should not be dismissed merely because the court doubts that a

plaintiff will prevail on a claim. *Duncan v. Children's Nat'l Medical Ctr.*, 702 A.2d 207, 209 (D.C. 1997) (citing to *McBryde v. Amoco oil Co.*, 404 A. 2d 200, 203 (D.C. 1979)). A 12(b)(6) motion may not rely on any facts that do not appear on the face of the Complaint itself. *Kitt v. Pathmakers, Inc.*, 672 A.2d 76, 79 (D.C. 1996). Notwithstanding, however, if matters in a 12(b)(6) motion rely on any facts outside the face of the complaint that was presented to the court, the rules require the motion to be treated as one for summary judgment and disposed of as provided in Super. Ct. R. Civ. P. 56. *Kitt v. Pathmakers, Inc. et al.*, 672 A.2d 76 (1996).

To prevail on a Motion for Summary Judgment, the moving party must demonstrate, based upon the pleadings, discovery, and any affidavits or other materials submitted, that there is no genuine issue as to any material fact in dispute and that the movant is therefore entitled to judgment as a matter of law. *Grant v. May Department Stores Co.*, 786 A.2d 580, 583 (D.C. 2001); D.C. Super. Ct. Civ. R. 56(c). A trial court, when considering a motion for summary judgment, must view the pleadings in the light most favorable to the non-moving party and may grant the motion only if a reasonable jury could not find for the non-moving party as a matter of law. *Grant*, 786 A.2d. at 583 (citing *Nader v. De Toledano*, 408 A.2d 31, 42 (D.C. 1979)); *Bailey v. District of Columbia*, 668 A.2d. 812, 816 (D.C. 1995).

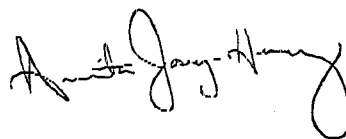
ANALYSIS

In light of the fact that the Board included exhibits in its Motion to Dismiss that were outside of the initially filed April 2, 2010 Complaint, the Court must view the Motion as one for Summary Judgment. Viewing the facts of this case in the light most favorable to the non-moving party, this Court finds that the Padous lack the requisite

standing to bring their claims and thus, as a matter of law, summary judgment is appropriate. D.C. Code §25-601 enumerates the persons and entities that have standing to protest against the issuance or renewal of a liquor license, including: (1) an abutting property owner; (2) a group of no fewer than 5 residents or property owners "sharing common grounds" for protest; (3) an incorporated citizens association located in the affected area; (4) an affected ANC; (5) the Mayor, in the case where the District owns property within a 600 foot radius of the establishment; (6) the designated custodian of property owned by the United States that is within a 600 mile radius of the establishment; or (7) the Metropolitan Police Department District Commander where the establishment resides. The Padous, although residents of the Northeast D.C. neighborhood, cannot be classified in any of these categories and have failed to explain in their Opposition any reason, other than those listed in the D.C. Code, why they should have standing to bring their claim. For these reasons, this Court must grant the Board's Motion to Dismiss, construed as a Motion for Summary Judgment.

Therefore, it is, on this 23rd day of July, 2010, hereby:

ORDERED that Defendant, The District of Columbia's, Motion for Summary Judgment is **GRANTED**.



Anita Joscy-Herring
Associate Judge
(Signed in Chambers)

Copies to:

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-- And --

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NOTES/COMMENTS:

please find the enclosed Pre-hearing Statement to be
filed in this case.
thanks!

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