

**OFFICE OF THE DIRECTOR OF EXCISE AND LICENSES
CITY AND COUNTY OF DENVER, COLORADO**

RECOMMENDED DECISION

**IN THE MATTER OF THE APPLICATION OF HOTEL RESTAURANT LLC, DOING
BUSINESS AS ROCKBAR, FOR RENEWAL OF ITS HOTEL AND RESTAURANT
LIQUOR LICENSE AND DANCE CABARET LICENSE FOR THE PREMISES KNOWN
AND DESIGNATED AS 3015 E. COLFAX AVE., DENVER, COLORADO**

Upon prior notice of hearing, this matter came to hearing on September 19, 2012 at 6:00 p.m., at the Department of Excise and Licenses, 201 W. Colfax Avenue, Dept. 206, Denver, Colorado, pursuant to an application filed by Hotel Restaurant LLC, doing business as Rockbar (“Applicant” or “Licensee”), for renewal of its hotel and restaurant liquor license and its dance cabaret license for the premises known and designated as 3015 Colfax Avenue, Denver, Colorado.¹

APPEARANCES

The Applicant was represented by attorneys Adam P. Stapen and Jon Stonbraker of the firm of Dill Dill Carr Stonbraker & Hutchings, PC. Assistant City Attorney Daniel Douglas appeared on behalf of the Denver Department of Excise and Licenses (“Licensing Authority” or “City”).

There were several interested persons who attended the hearing in opposition to the renewal applications, including two representatives of registered neighborhood organizations and other individuals who identified themselves as residents or business owners or managers of businesses within the designated area. There were also several persons who attended the hearing in support of the renewal applications, including the owner and two business managers.

PRELIMINARY ISSUES

The City Attorney and Applicant’s counsel agreed that the City had the burden of going forward with evidence to establish the existence of “good cause” to deny the renewal of the Rockbar’s licenses.

However, Applicant’s counsel raised preliminary issues regarding (1) the scope of issues to be considered and (2) whether interested members of the public could participate in the hearing.

(1) *Scope of issues to be considered at the hearing.*

¹ The licenses were due to expire on August 8, 2012. However, the Order for Hearing issued by the Director of the Department of Excise and Licenses directed that, “Licensee’s hotel and restaurant liquor license and dance cabaret license shall be temporarily extended past the current expiration date, pending the outcome of the renewal hearing.”

Applicant's counsel argued that the scope of the hearing must be limited to the issue of whether Rockbar improperly operated an outdoor patio. The City Attorney argued that the scope of the hearing included any issue that would establish "good cause" for nonrenewal as defined in section 12-47-103(9), C.R.S. Their respective arguments turned primarily on an interpretation of the order for hearing itself.

The Director amended his original order for hearing twice, apparently because of scheduling issues. The third and final order, setting the hearing for September 19, 2012, was issued on August 23, 2012 and was captioned Third Amended Order for Hearing ("Order for Hearing").

The Order for Hearing described the scope of the hearing as follows:

Evidence and testimony will be taken regarding whether "good cause" exists to deny Licensee's liquor license renewal application in accordance with § 12-47-103(9). Specifically, the Department has information that Licensee operated an outdoor patio in violation of its temporary modification permit issued in September 2011, and in violation of its February 2011 Stipulation regarding the suspension of its hotel and restaurant liquor license for the unlawful sale of an alcohol beverage to an underage person. The renewal hearing shall also apply to Licensee's City-issued dance cabaret license, pursuant to D.R.M.C. Section 32-20, as its dance cabaret license covers the same premises.

Applicant's counsel argued that scope of the hearing must be limited to the issue described in the second sentence, namely, that the Director had information that the Licensee operated an outdoor patio in violation of a temporary permit and in violation of a stipulation resulting from a liquor code violation. Counsel argued that the second sentence, which begins with the word "Specifically", must be interpreted as narrowing the scope of the first sentence. In other words, the second sentence limits the scope of the specific "evidence and testimony [that] will be taken" (first sentence) by identifying the particular factual grounds that the Director believes might exist to warrant nonrenewal for good cause. Allowing the City to present "evidence and testimony" regarding any other possible factual basis for nonrenewal, without prior notice to the Licensee, would constitute "trial by ambush" and a violation of the Licensee's due process rights in a process that threatens to deprive the Licensee of a property right, namely, its hotel and restaurant liquor license and its cabaret license.

The City Attorney argued that the second sentence does not narrow the scope of permissible evidence described in the first sentence. Instead, it merely identifies a potential factual basis for nonrenewal about which the Director had specific information at the time he issued the Order for Hearing. The operative sentence is the first sentence, which expressly permits evidence and testimony regarding "good cause" as defined in section 12-47-103(9), and that definition broadly includes various potential grounds for nonrenewal other than the specific basis for nonrenewal mentioned in the second sentence concerning the possible improper operation of an outdoor patio. In other words, the second sentence merely provides a specific example of a possible factual basis that might constitute good cause for nonrenewal, without limiting the broader scope of the first sentence.

Furthermore, according to the City Attorney, the Licensee had notice that additional grounds might arise in the hearing because Licensee's discovery request produced documents relating to

grounds for nonrenewal other than the specific informational item identified in the Order for Hearing. Thus, Licensee could not claim surprise because materials provided by the City to the Licensee clearly indicated that the City intended to address more issues than just the specific issue mentioned in the Order for Hearing.

After considering the arguments of counsel, the Hearing Officer agreed with the City and concluded that the permissible scope of the hearing could include any grounds that would constitute “good cause” for nonrenewal.

In the opinion of the Hearing Officer, the first sentence must be given its full effect, namely, that “evidence and testimony will be taken regarding whether ‘good cause’ exists to deny Licensee’s liquor license renewal application”. If the Director had intended to limit the scope of the first sentence, then the Order for Hearing could have used unambiguous limiting language in the remainder of the paragraph, such as “only”, “shall be limited to”, etc. The Hearing Officer does not believe it is reasonable to narrow the scope of the hearing to something less than “good cause” absent clear language to that effect in the Order for Hearing.

Furthermore, the witness testimony that was provided during the hearing demonstrate that members of the public came prepared to give testimony on issues other than the specific issue mentioned in the Order for Hearing. Clearly these members of the public interpreted the scope of the hearing more broadly than urged by the Licensee, which supports the reasonableness of the interpretation urged by the City.

The Hearing Officer is also not persuaded by Licensee’s arguments regarding due process protections relating to property rights. Although a liquor license is a property right entitled to due process protection, a licensee does not have property rights in the renewal of that license. Therefore, in license renewal proceedings, a licensee need not be afforded the same procedural due process protections that are associated with property rights. As stated by the Colorado Court of Appeals in *Morris-Schindler, LLC v. City & County of Denver*, 251 P.3d 1076 (Colo. App. 2010), at 1085:

A liquor license, like any business or professional license, is a property right which is entitled to due process protection. *LDS, Inc. v. Healy*, 197 Colo. 19, 589 P.2d 490 (1979). However, a licensee has no vested right to renewal of a license. *Ficarra v. Dep’t of Regulatory Agencies*, 849 P.2d 6, 17-18 (Colo.1993) (bail bond license); *Board of Comm’rs v. Buckley*, 121 Colo. 108, 117, 213 P.2d 608, 612 (1949) (liquor license); *Pomponio v. City Council*, 526 P.2d 681, 682 (Colo.App.1974) (not published pursuant to C.A.R. 35(f)) (liquor license). Therefore, a licensee has no property right in the renewal of a license and need not be provided procedural due process protections attendant to a property right. *Ficarra*, 849 P.2d at 19-20. (Emphasis added.)

Licensee also seemed to suggest that the renewal hearing might be analogous to a criminal prosecution, which would also require due process protections of reasonable notice. However, the Hearing Officer does not believe the analogy is persuasive. The nonrenewal of a liquor license is not even a sanction, *Morris-Schindler, LLC v. City & County of Denver*, 251 P.3d 1076 (Colo. App. 2010). Therefore, nonrenewal cannot be equated to criminal prosecution, where personal liberty and property rights might be at stake.

(2) Neighborhood participation in the hearing.

Applicant's counsel also objected to allowing any "party in interest" or representative of an organized neighborhood group to present evidence or cross-examine witnesses.² Counsel urged that only the City or the Applicant should be permitted to present evidence and cross-examine witnesses.

As Applicant's counsel noted, the only explicit statutory authority for participation in a liquor licensing hearing by a "party in interest" or representative of an organized neighborhood group is in section 12-47-311, C.R.S., and applications for renewal of a liquor license are expressly excluded from the provisions of subsection (1) that require a public hearing and public notice within certain time frames after an application is received. Applicant's counsel therefore argued that none of section 12-47-311 applies to a renewal hearing, including the provisions of subsection (5) that allow participation by parties in interest and representatives of neighborhood organizations. Thus, counsel argued that the legislature intended to exclude such participation in renewal hearings, and therefore the Hearing Officer must exclude such participation, unless such individuals were called as witnesses by the City or the Licensee.

The City Attorney argued that the exception for renewal hearings in section 12-47-311(1) applies only to the provisions of subsection (1) that require a hearing and a public posting of notice within specific time frames, and that the remainder of the section, including the provisions allowing participation by "parties in interest" and representatives of neighborhood organizations, apply to renewal hearings.

In addition, the City Attorney noted that section 12-47-302(1), C.R.S., requires that public notice of a renewal hearing must be posted in the neighborhood on the licensed premises at least ten days before the hearing. Counsel argued that the purpose for posting public notice of the public hearing in the neighborhood would be defeated if members of the public from the neighborhood were excluded from participating in the public hearing.

The Hearing Officer agreed with the City Attorney's arguments. Since the statutory requirements for posting public notice of a renewal hearing³ are essentially the same as the statutory requirements for posting public notice of a hearing for a new license⁴, it seems likely that the legislature intended to afford the same rights of neighborhood participation in both types of hearings. Furthermore, since section 12-47-311(1) requires hearings on applications, it was necessary for the General Assembly to exclude renewal applications from such mandatory hearings in order to harmonize that section with section 12-47-302, which makes hearings discretionary with the local licensing authority. Therefore, the exception for renewal hearings

2 In the liquor code, a "party in interest" is defined in section 12-47-311 (5), C.R.S., for purposes of applications under the liquor code to include any adult resident of the neighborhood and the owner or manager of any business located in the neighborhood.

3 Section 12-47-302 (1), C.R.S.

4 Section 12-47-311 (1), C.R.S.

relates only to the mandatory scheduling of a hearing, rather than to the question of who may participate in a hearing.

However, the issue became moot since the City Attorney decided to call as witnesses for the City those individuals who were present at the hearing wishing to testify and who were a representative of a neighborhood organization, a resident of the neighborhood, or a business owner or manager of a business within the neighborhood.

EXHIBITS ADMITTED AT HEARING

The following exhibits were admitted into evidence during the hearing.

1. City's Exhibit C-1, was admitted into evidence by stipulation. Exhibit C-1 is a Stipulation dated February 11, 2011 between the Licensee Hotel Restaurant, LLC, doing business as Rockbar, and the Office of the Denver City Attorney. In the Stipulation, Rockbar admitted to one violation of the liquor code for unlawful sale of an alcohol beverage to an underage person and agreed to a suspension of 14 days, with eight days held in abeyance for one year upon condition that Rockbar not commit or permit any violation of the liquor or beer codes on the licensed premises, that Rockbar not commit or permit any criminal violations of state statutes or the Denver Municipal Code on the licensed premises, and that Rockbar not violate any term, condition, or provision of the Stipulation.
2. City's Exhibit C-2 was admitted into evidence by stipulation. Exhibit C-2 is a document issued by the Colorado Liquor Enforcement Division dated September 8, 2011, captioned "Permit to Change, Alter or Modify of premises, Addition of an Optional Premise to existing H/R license Or addition of Related Facility to resort complex". The document certifies that Rockbar was granted temporary permission from September 12, 2011 to February 5, 2012 to change, alter, or modify its licensed premises. Witness testimony indicated that the purpose of the temporary permit was to allow Rockbar temporary use of a patio as part of the licensed premises.
3. City's Exhibit C-3 was admitted into evidence over the Applicant's objection during the testimony of a witness for the City, Denver Detective Kenneth Gurule. It is a listing of police calls to the address of the licensed premises at 3015 East Colfax Avenue for the period between August 1, 2011 and August 2, 2012.
4. Applicant's Exhibit A-1 was admitted into evidence by stipulation. Exhibit A-1 is a Hearing Posting Affidavit certifying that public notice of the renewal hearing was properly posted at the prescribed location for a minimum of ten days.
5. Applicant's Exhibit A-2 was admitted into evidence without objection. Exhibit A-2 is a printout dated September 19, 2012 (the date of the renewal hearing) from a web page of Denver's Department of Environmental Health, Restaurant Health Inspection Reporting System, concerning an inspection of the Rockbar on June 20, 2012.

6. Applicant's Exhibit A-3 was admitted into evidence without objection. Exhibit A-3 is the "Recommended Findings of Fact, Conclusions of Law, and Decision" in which a hearing officer recommended to the Director of the Department of Excise and Licenses that she approve Rockbar's 2006 applications for a hotel and restaurant liquor license and dance cabaret license. The exhibit shows that the Director signed the recommendation on May 30, 2006, indicating her tentative acceptance of the recommendation, subject to subsequent city inspections and issuance of the state license.
7. Applicant's Exhibit A-4 was admitted into evidence without objection. The exhibit is a "good neighbor agreement" dated May 18, 2006, concerning Rockbar's application for a hotel and restaurant license and dance cabaret license, signed by the owner, Jesse Morreale, and representatives of two neighborhood organizations, South City Park Neighborhood Association and Congress Park Neighbors, Inc.
8. Protestor's Exhibit P-1 was admitted into evidence over Applicant's objections during the testimony of witness Bonita Lahey. The exhibit is a letter dated September 19, 2012 (the day of the hearing) from Bonita Lahey, as President of South City Park Neighborhood Association (SCPNA), to the Department of Excise and Licenses, concerning Rockbar's hotel and restaurant license and dance cabaret license.
9. Protestor's Exhibit P-2 was admitted into evidence over Applicant's objections during the testimony of witness Maggie Price, a member of the board of directors of Congress Park Neighbors, Inc. The exhibit is a letter dated September 19, 2012 (the day of the hearing) from the President of Congress Park Neighbors, Inc. to the Department of Excise and Licenses, concerning Rockbar's hotel and restaurant license and dance cabaret license.
10. Protestor's Exhibit P-3 was admitted into evidence over Applicant's objections during the testimony of witness Thomas Rutter. The exhibit is a print out from the "Denver Crime Offenses Website" listing crime offenses reported during the period from January 31, 2010 to June 23, 2010 within 500 feet of 3015 East Colfax Avenue, the address of Rockbar's premises.

SUMMARY OF WITNESS TESTIMONY

The City called six witnesses, who testified as follows:

1. Bonita Lahey is President of the South City Park Neighborhood Association (SCPNA) and a resident of the neighborhood for 22 years. She testified that members have complained that no food is served at the Rockbar and that people do not feel safe going to the Rockbar. She discussed Exhibit P-1, a letter dated September 19, 2012 (the day of the hearing) from Ms. Lahey, as President of South City Park Neighborhood Association (SCPNA), to the Department of Excise and Licenses, concerning Rockbar's hotel and restaurant license and dance cabaret license. According to the letter and Ms. Lahey's testimony, Rockbar has violated two provisions of the 2006 good neighbor agreement between Rockbar and SCPNA and Congress Park Neighbors, Inc. (Applicant's Exhibit A-4): (a) Rockbar agreed to offer

“full food” service, but it “has never offered permanent restaurant or food service”; and (b) the owner agreed to provide 20 days’ advance written notice to the neighborhood organizations if it applied for a modification of the premises, but the owner opened a patio outside the Rockbar in the summer of 2011 and requested and was granted a temporary six-month liquor license for the patio, without giving any written notice to SCPNA. According to Ms. Lahey, the Agreement was attached to Rockbar’s liquor license in 2006, and, as stated in the letter, “[g]iven that an express precondition of the Agreement has been violated, and given Mr. Morreale’s apparent bad faith, SCPNA’s original support for the liquor and dance cabaret license must be considered void”.

2. Maggie Price is a board member of Congress Park Neighbors, Inc. and a resident of the neighborhood. She has not personally observed activities at the Rockbar that would adversely affect the public peace, health, safety, or welfare. She has heard complaints from other persons that the Rockbar does not always serve meals. In late September 2011 she visited the Rockbar around 11:30 on a day in the middle of the week. The Rockbar appeared to be closed even though it had advertised lunch. She also went to the Rockbar one evening in 2007 around 7 p.m., and full restaurant food service was not available. In addition, she submitted Exhibit P-2, a letter dated September 19, 2012 (the day of the hearing) from the President of Congress Park Neighbors, Inc. to the Department of Excise and Licenses, concerning Rockbar’s hotel and restaurant license and dance cabaret license. The letter is substantially similar to the letter from South City Park Neighborhood Association (Exhibit P1). It alleges the same two violations of the Rockbar’s Agreement with the two neighborhood organizations. However, the letter does not expressly allege that the Agreement or any of its terms or conditions were attached to the license, and Ms. Price testified that she did not know if the agreement was attached to the license. The letter concludes, “Given that express conditions of our Agreement have been violated by the Licensee/Applicant, CPN does not support the Licensee’s application for renewal of its Liquor License.”
3. Trent Thompson is vice-president of South City Park Neighborhood Association. He lives within the neighborhood association’s territory but does not live within the designated neighborhood of the Rockbar. He testified as to his belief that the Rockbar adversely affects the public health, welfare, and safety in the area. He said that he used a crime database on Denver government’s web site to conduct a crime statistics comparison between the vicinity of the Rockbar’s address and the vicinity of the nearby Bluebird’s address⁵ for the period from December 1, 2011 to May 20, 2012. He found that reported crimes were dramatically more violent near the Rockbar’s address and that there were many reports of aggravated assaults and drug trafficking. He acknowledged that the crime statistics are only for incidents reported at or near the Rockbar’s address, which also includes a hotel above the Rockbar, and that the reports do not show whether the incidents were within the premises of the Rockbar or attributable to the operation of the Rockbar. He also did not personally witness such incidents.

⁵ The testimony was unclear about whether the report was for incidents within 500 feet of each address or within 50 feet of each address.

4. Thomas G. Rutter is the owner of an apartment building at 1515 Milwaukee, three properties away from the Rockbar property. He has owned the building for about 20 years, and he lived in the building until about six or seven years ago. He was chairman of the zoning committee when Jesse Morreale bought the Rockbar property, including the hotel, and he testified in favor of Mr. Morreale obtaining his original liquor license, believing that the property would be transformed.⁶ He believes that the Rockbar has an adverse effect on the public health, welfare, and safety of the neighborhood. He has regularly received emails from his tenants complaining about the Rockbar, particularly about disturbances around the 2 a.m. closing time. As a result, he visited the area on August 18, 2012 a little before closing time. He witnessed 40-50 people on the sidewalk and in the middle of Colfax Avenue outside the Rockbar. He watched men walking down the middle of Milwaukee Street who were yelling and shouting at each other, and he called police about what he saw. He witnessed intoxicated behavior and a man urinating in a nearby yard. He said that such behavior has been going on since the Rockbar began operation. His concern has also been heightened by talking with neighbors and business owners nearby. He attended a meeting with Mr. Morreale in mid-May that was also attended by Councilman Brooks and a police chief. There were allegations that there was just as much objectionable behavior after Mr. Morreale bought the property as there had been previously.
5. Mr. Rutter then described his preparation of a document that was admitted as Exhibit P-3. The exhibit is a group of six printouts dated September 15, 2012 from the “Denver Crime Offenses Website”, each listing crime offenses reported within 500 feet of 3015 East Colfax Avenue, the Rockbar’s address. Each printout is for a different time period, and on each printout, Mr. Rutter circled the crimes reported specifically at the address of 3015 Colfax Avenue. The printouts show crimes reported during the following periods:
 - January 31, 2010 to June 23, 2010.
 - July 5, 2010 to December 18, 2010.
 - January 4, 2011 to June 27, 2011.
 - July 1, 2011 to December 27, 2011.
 - October 1, 2011 (overlap with previous report) to March 15, 2012.
 - March 24, 2012 to September 11, 2012.
6. Thus, the six printouts essentially cover from January 2010 through mid-September 2012. For this period, the reports show a total of approximately 167 crimes within 500 feet of the Rockbar’s address, of which about 45 were reported to have occurred specifically at the Rockbar’s address. The crimes listed include: Theft, drug possession, assault, criminal mischief, drug selling, menacing, and weapon flourishing. Mr. Rutter believes the threat to the public safety indicated by the crime reports, even if some of the criminal activity may be associated more with the hotel over the Rockbar than the Rockbar itself, demonstrate that there has been “a pattern of not being a responsible operator” of the premises.

⁶ Mr. Rutter’s testimony in support of the original application in 2006 is documented in Applicant’s Exhibit A-3, the recommended decision of the hearing officer who conducted the hearing on May 18, 2006 (which was accepted by the Director of the Department of Excise and Licenses on May 30, 2006).

7. Kenneth Gurule is a detective for the Denver Police Department. He described City's Exhibit C-3 as a police department listing of calls to the police dispatch center concerning incidents associated with the address 3015 East Colfax Avenue (location of the Rockbar) for the 12-month period between August 1, 2011 and August 2, 2012. During that period, the listing shows a total of about 223 calls to the police dispatcher concerning the address where the Rockbar is located. Det. Gurule acknowledged that he has no reason to believe that the incidents were caused by the operation of the Rockbar itself. Furthermore, many of the incidents may relate to events outside the premises of the Rockbar, such as the hotel above the Rockbar. Some of the types of calls received and their approximate number are:

- Disturbance (17)
- Domestic violence (12)
- Assault (6)
- Theft (5)
- Threats (2)
- Harassment (2)
- Intoxicated person (1)
- Criminal mischief (1)
- Weapon/concealed weapon (1)

8. Brad Worthington resides about four doors from the entrance to the Rockbar. He expressed concerns about adverse effects on the public health, welfare, and safety caused by the Rockbar. He said that the situation has been worse during this summer. When windows are open, there is a great deal of noise, especially around closing time. People stream out of the Rockbar screaming at each other, there have been drunks at stoops, and small groups sometimes continue with parties outside after closing. He is concerned about public safety, and he has called the police four or five times this summer. He has seen no sign of employees of the Rockbar outside trying to address the situation. He believes that the amount of noise is unreasonable for a public place. He has heard threats, swearing, and offensive utterances, but he has not personally witnessed any fights. He acknowledged that there are other bars nearby, but from his residence he can only see customers leaving the Rockbar.

The Applicant called two witnesses, who testified as follows:

1. Sean Yontz has been employed as the food and beverage manager for the Rockbar since 2005. He testified that the Rockbar has always had an operating kitchen and has served meals at all times when the Rockbar is open to the public. The hours of the restaurant have fluctuated over time, but the Rockbar has had a working kitchen at all times. The Rockbar no longer serves food at lunch time because it stopped being open for lunch, and it now opens at 6 p.m. He thinks that 25% of the Rockbar's gross income comes from the sale of food. When asked if the gross income from food sales could be less than 25%, he said that he does not know.
2. Jesse Morreale is the managing member of Hotel Restaurant, LLC and the owner of the building in which the Rockbar is located. He testified that when he originally sought a liquor

license in 2006, he negotiated a good neighbor agreement with South City Park Neighborhood Association and Congress Park Neighbor, Inc. (Applicant's Exhibit A-4) However, the agreement was intentionally not added as a condition to the licenses, and it was intentional that none of its terms or conditions were attached to the licenses.

3. Mr. Morreale disputed some of the testimony of the representatives of the neighborhood organizations and the statements in their neighborhood organizations' letters to the licensing authority (Exhibits P-1 and P-2). He said it was false that the Rockbar never offered permanent restaurant or full food service, as stated in the letters from the neighborhood organizations. The menus changed frequently in an attempt to cater to desires of customers. He referred to one menu that offered informal food items for customers who are standing. Also, last August he tried to operate as a more formal, full service restaurant. He hired a chef from the Barolo Grill, purchased additional kitchen equipment, offered new amenities such new television screens and a patio, began an advertising effort, and conducted outreach to the neighborhood.
4. In response to witness testimony regarding operation of the Rockbar in a manner that adversely affects the public health, safety, and welfare or that results in disorderly behavior, offensive language, etc., Mr. Morreale described efforts of the Rockbar, such as postings inside and outside the premises and having security staff roaming inside and outside the premise to monitor crowd behavior and intervene when necessary. He stated that the Rockbar has never received a citation for a noise violation, and he does not know of any time when the Denver Police Department has spoken with Rockbar management about excessive noise. He is not aware of any fights involving customers, and his staff makes efforts to stop offensive language both inside and outside the licensed premises. He does not know of any police calls caused by or attributable to the Rockbar, and no police citations have been issued to the Rockbar or its employees.
5. Mr. Morreale also disagreed with prior testimony concerning whether there was notice to the neighborhood organizations when he sought a temporary modification to use the patio. He referred to meetings with neighborhood organizations at which the patio was discussed. He believed that the spirit of the good neighbor agreement was that it would apply only to permanent modification of the premises, and not to the temporary modification to use the patio. But he acknowledged that the Agreement does not refer only to permanent modification, and he could provide no evidence that he provided written notice to either organization that he was seeking a temporary patio permit. Evasive goes to credibility.
6. Mr. Morreale testified that "generally" 25% of the gross income is from food sales, "sometimes less, sometimes more". He stated that he does not know if there are some years when less than 25% of the gross income is from food sales.
7. Mr. Morreale stated that he is "often" on site at the Rockbar and that he is present between 10 and 90% of the time at closing.

ADMINISTRATIVE NOTICE OF AGENCY FILE

In addition to the exhibits that were admitted into evidence during the hearing, counsel and witnesses made reference to documents that might appear in the Department of Excise and License's administrative file for the licensee. Subsequent to the hearing, the Hearing Officer reviewed the administrative file and viewed documents that might be relevant to the decision. Specifically, the file contains copies of the hotel and restaurant liquor licenses issued to the Applicant in 2006 through 2011. Because issues arose during the hearing about whether terms and conditions were attached to those licenses, the Hearing Officer has taken administrative notice of those licenses in issuing this Recommended Decision, as discussed below.⁷

APPLICABLE LAW

Good cause under the liquor code

The liquor code provides that, "The licensing authority may refuse to renew any license for good cause".⁸ "Good cause" is defined in section 12-47-103(9), C.R.S., as:

12-47-103. Definitions. As used in this article and article 46 of this title, unless the context otherwise requires:

(9) "Good cause", for the purpose of refusing or denying a license renewal or initial license issuance, means:

(a) The licensee or applicant has violated, does not meet, or has failed to comply with any of the terms, conditions, or provisions of this article or any rules and regulations promulgated pursuant to this article;

(b) The licensee or applicant has failed to comply with any special terms or conditions that were placed on its license in prior disciplinary proceedings or arose in the context of potential disciplinary proceedings;

(c) In the case of a new license, the applicant has not established the reasonable requirements of the neighborhood or the desires of its adult inhabitants as provided in section 12-47-301 (2); or

(d) Evidence that the licensed premises have been operated in a manner that adversely affects the public health, welfare, or safety of the immediate neighborhood in which the establishment is located, which evidence must include a continuing pattern of fights, violent activity, or disorderly conduct. For purposes of this paragraph (d), "disorderly conduct" has the meaning as provided for in section 18-9-106, C.R.S. (Emphasis added.)

⁷ In doing so, the Hearing Officer is mindful of the following statement of the Colorado Supreme Court in *Geer v. Stathopoulos*, 309 P.2d 606, 135 Colo. 146 (Colo. 1957): "Whether the facts administratively known be matter appearing in the records of the agency, or part of the record in the particular case pending before the agency, or is properly judicially cognizable by a court, the administrative body should make known by a clear statement in the record of the hearing the matters it has considered by virtue of administrative notice. If such material forms the basis of its findings and determination, the agency should so state in terms which will afford the reviewing court the opportunity to exercise its function of scanning the record for the purpose of ascertaining whether the agency acted arbitrarily or capriciously." (309 P.2d at 611)

⁸ Section 12-47-302(1), C.R.S.

For purposes of paragraph (d) above, section 18-9-106(1), C.R.S., defines “disorderly conduct” as follows:

§ 18-9-106. Disorderly conduct. (1) A person commits disorderly conduct if he or she intentionally, knowingly, or recklessly:

(a) Makes a coarse and obviously offensive utterance, gesture, or display in a public place and the utterance, gesture, or display tends to incite an immediate breach of the peace; or

(b) (Deleted by amendment, L. 2000, p. 708, §39, effective July 1, 2000.)

(c) Makes unreasonable noise in a public place or near a private residence that he has no right to occupy; or

(d) Fights with another in a public place except in an amateur or professional contest of athletic skill; or

(e) Not being a peace officer, discharges a firearm in a public place except when engaged in lawful target practice or hunting; or

(f) Not being a peace officer, displays a deadly weapon, displays any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon, or represents verbally or otherwise that he or she is armed with a deadly weapon in a public place in a manner calculated to alarm.

(Emphasis added.)

Regulation 47-900⁹ of the Colorado Liquor Rules also establishes standards of conduct for licensed premises as follows:

Regulation 47-900. Conduct of Establishment.

A. Orderliness, loitering, serving of intoxicated persons.

Each person licensed under Article 46, Article 47, and Article 48 of Title 12, and any employee or agent of such licensee shall conduct the licensed premises in a decent, orderly and respectable manner, and shall not permit on the licensed premises the serving or loitering of a visibly intoxicated person or habitual drunkard, nor shall the licensee, his employee or agent knowingly permit any activity or acts of disorderly conduct as defined by and provided for in Section 18-9-106, C.R.S., nor shall a licensee permit rowdiness, undue noise, or other disturbances or activity offensive to the senses of the average citizen, or to the residents of the neighborhood in which the licensed establishment is located. (Emphasis added.)

A violation of Regulation 47-900 would constitute good cause for nonrenewal because section 12-47-103(9)(a), C.R.S., defines “good cause” to include a violation of any regulation promulgated pursuant to the liquor code.

For hotel and restaurant licenses, the liquor code requires that meals be served and that food constitute at least 25% of gross income from food and drink, as follows:

12-47-411. Hotel and restaurant license - definition - rules. (1) Except as otherwise provided in subsection (2) of this section, a hotel and restaurant license shall be issued to persons selling alcohol beverages in the place where the alcohol beverages are to be consumed, subject to the following restrictions:

⁹ 1 CCR 203-2.

(a) Restaurants shall sell alcohol beverages as provided in this section only to customers of the restaurant and only if meals are actually and regularly served and provide not less than twenty-five percent of the gross income from sales of food and drink of the business of the licensed premises. (Emphasis added.)

A violation of section 12-47-411, C.R.S., would constitute good cause for nonrenewal because section 12-47-103(9)(a), C.R.S., defines “good cause” to include any violation of the liquor code (such as section 12-47-411).

In connection with the meal service requirements of section 12-47-411, Regulation 47-418 of the Colorado Liquor Rules requires that “All restaurants shall at all times, when meals are required to be served, maintain on the premises adequate personnel, foodstuffs and other necessary facilities, equipment and supplies for the preparation and serving of meals as defined by 1247103(20) C.R.S., as amended.” A violation of Regulation 47-418 would constitute good cause for nonrenewal because section 12-47-103(9)(a), C.R.S., defines “good cause” to include a violation of any regulation promulgated pursuant to the liquor code.

For purposes of these meal service requirements for hotel and restaurant licenses, it should also be noted that the liquor code defines “meal” to mean “a quantity of food of such nature as is ordinarily consumed by an individual at regular intervals for the purpose of sustenance”.¹⁰

Good cause under the municipal code (cabaret license)

Chapter 32 of Title II of the Denver Revised Municipal Code addresses City licenses, such as a cabaret license. Section 32-20 authorizes the Director to refuse to renew a license under certain circumstances, as follows:

Sec. 32-20. - Renewal.

(d) In addition to any other grounds specified in this Revised Municipal Code which authorize the director of excise and licenses to fail to renew a license, the director may refuse to renew a license for any one (1) or more of the following reasons:

(2) Any fact or condition exists which, if it had existed or had been known to exist at the time of the application for such license, would have warranted the director in refusing originally to issue such license.

FINDINGS AND CONCLUSIONS

After reviewing the testimony and exhibits received into evidence, as summarized below, and applying existing law, the Hearing Officer finds, concludes, and recommends as follows:

Grounds for nonrenewal relating matters specifically mentioned in the Order for Hearing

¹⁰ Section 12-47-103(20), C.R.S.

1. The Order for Hearing asserted that “the Department has information that Licensee operated an outdoor patio in violation of its temporary modification permit issued in September 2011, and in violation of its February 2011 Stipulation regarding the suspension of its hotel and restaurant liquor license for the unlawful sale of an alcohol beverage to an underage person”.
2. Good cause for nonrenewal would be established if the Licensee operated an outdoor patio in violation of the temporary modification permit (City’s Exhibit C-2), because such operation would be a violation of the liquor code.¹¹ However, there was no specific evidence presented during the hearing to establish such a violation, other than vague references that the patio may have been in operation after the temporary permit after it expired on February 5, 2012. Therefore, the Hearing Officer concludes that there is insufficient evidence to establish that the Licensee operated an outdoor patio in violation of the temporary modification permit.
3. If the Licensee violated the February 2011 Stipulation regarding the suspension of its hotel and restaurant liquor license, such violation would constitute good cause for renewal.¹² However, there was no evidence presented that the Licensee violated the Stipulation.

Grounds for nonrenewal relating to the good neighbor agreement

4. The 2006 good neighbor agreement (Applicant’s Exhibit A-4) stated that the neighborhood groups’ support was “conditioned upon the Owner’s stated intent that the Restaurant will offer full food and beverage service to patrons”. Furthermore, the Licensee agreed to give 20 days’ advance written notice to the neighborhood organizations if he “makes application to Excise and License for a modification of premises for the restaurant”. The representatives of the neighborhood groups testified that Rockbar violated these two provisions of the agreement that such violations are grounds for nonrenewal because the terms of the agreements were attached to the licenses as conditions.
5. Based on weight of the testimony as summarized above, the Hearing Officer finds that the Rockbar has not consistently provided full food service to patrons, at least to the extent required by section 12-47-418, C.R.S., and Regulation 47-418, an issue that is further discussed below. Furthermore, the Hearing Officer finds that the Rockbar did not provide advance written notice to the neighborhood groups as required by the agreement when he applied for a temporary modification to the licensed premises.¹³
6. However, the Hearing Officer can find no provision for including the terms of the agreement as conditions in the licenses in (a) the agreement itself, (b) the 2006 decision of the Director

¹¹ Section 12-47-103(9)(a), C.R.S., defines “good cause” to include a violation of the liquor code.

¹² Section 12-47-103(9)(b), C.R.S., defines “good cause” to include failure to comply with any terms or conditions placed on a license in disciplinary proceedings.

¹³ Mr. Morreale’s testimony indicated that he provided oral but not written notification. He also testified that he believed the agreement only applied to a permanent modification, not temporary modifications, but he acknowledged that the language of the agreement does not limit its application to permanent modifications.

of the Department of Excise and Licenses approving the license applications¹⁴ (Applicant's Exhibit A-3), or (c) the licenses themselves that appear in the administrative file of the Department of Excise and Licenses. Therefore, the Hearing Officer finds that the good neighbor agreement was not attached to the licenses, nor were the terms of the agreement made conditions of the licenses.

7. Therefore, the Hearing Officer concludes that any violation of the good neighbor agreement by the Rockbar does not constitute good cause for nonrenewal of its licenses.

Grounds for nonrenewal relating to the public health, welfare, or safety of the immediate neighborhood, including disorderly conduct

8. The City's witnesses provided substantial and credible testimony and documentary evidence that "the licensed premises have been operated in a manner that adversely affects the public health, welfare, or safety of the immediate neighborhood" as described in the definition of "good cause" for renewal set forth in section 12-47-103(9), C.R.S. Thomas Rutter and Brad Worthington testified convincingly about ongoing disturbances in the immediate vicinity of the Rockbar, especially around closing time and especially involving patrons streaming out of the Rockbar screaming, uttering, profanities, urinating on private property, yelling threats, etc. The testimony of Mr. Rutter was especially credible, since he testified in 2006 in support of the Rockbar's application for its licenses.
9. In addition, the various reports of crimes and police calls involving the address of the licensed premises and the immediate vicinity (Exhibits P-3 and C-3, as well as the crime database analysis described by witness Trent Thompson) provide strong evidence of ongoing activity that adversely affecting the public health, welfare, and safety in the immediate neighborhood.
10. The Hearing Officer recognizes that many of the reported crimes, police calls, and incidents of disorderly conduct likely did not occur at or on the licensed premises, and many of the reported incidents may not be the direct result of the operation of the licensed premises.¹⁵ Furthermore, the Hearing Officer is mindful of the testimony of Mr. Morreale and his manager that the Rockbar makes efforts to reduce disturbances both inside and outside the Rockbar.
11. Nevertheless, the sheer volume of police calls and crime reports involving the Rockbar's address and the immediate vicinity, together with the first-hand witness reports of disorderly

¹⁴ The recommended decision describes testimony in support of the application by representatives of South City Park Neighborhood Association and Congress Park Neighbors, Inc. Those representatives testified that their respective organizations voted to support the applications upon condition that the owner enter into a written agreement with their organization, which was completed in both cases and entered into the evidence of that 2006 hearing as an exhibit.

¹⁵ For example, some of the various police calls reporting domestic violence at the address of the licensed premises appearing on City's Exhibit C-3 may relate to disturbances at the hotel over the Rockbar, since the hotel has the same address as the Rockbar.

conduct of patrons leaving the Rockbar, provides convincing evidence that good cause exists for nonrenewal exists under section 12-47-103(9)(d), C.R.S.

12. The Hearing Officer therefore finds that the weight of the evidence supports a conclusion that “the licensed premises have been operated in a manner that adversely affects the public health, welfare, or safety of the immediate neighborhood”, including a continuing pattern of disorderly conduct, including unreasonable noise in a public place, as well as offensive utterances that tend to incite breaches of the peace.
13. Furthermore, based on the same evidence, I find that the Licensee has knowingly permitted acts of disorderly conduct and has permitted “rowdiness, undue noise, or other disturbances or activity offensive to the senses of the average citizen, or to the residents of the neighborhood in which the licensed establishment is located” in violation of Regulation 47-900. The testimony of the Applicant’s witnesses indicated that the Rockbar had security staff outside the Rockbar as well as inside the licensed premises. Thus, based on the evidentiary record, I find that the Licensee must have had both actual and constructive knowledge of such behavior and failed to effectively control it.
14. Accordingly, the Hearing Officer concludes that the City has established good cause for nonrenewal of the Rockbar’s licenses as defined in section 12-47-103(9)(a) and (9)(d), C.R.S.

Grounds for nonrenewal relating to restaurant meal service

15. Under its hotel and restaurant liquor license, Rockbar may sell alcohol beverages only if “meals are actually and regularly served” and only if meals provide 25% of the gross income from the sale of food and drink.¹⁶ Furthermore, Rockbar must “at all times, when meals are required to be served, maintain on the premises adequate personnel, foodstuffs and other necessary facilities, equipment and supplies for the preparation and serving of meals”.¹⁷
16. There was conflicting testimony about whether the Rockbar has complied with these meal service requirements. As previously noted, some of the City’s witnesses testified that in their experience meals were not always available when the Rockbar was open. In particular, the representatives of the two neighborhood organizations reported that their members have complained about a lack of full food service at the Rockbar. However, the Rockbar’s owner and manager disputed this in their testimony.
17. Several evidentiary items undermined the Licensee’s testimony that full food service has always been offered. First, the Rockbar’s owner and manager testified that food was always available, but they also indicated that the menus fluctuated frequently over time, ranging from formal restaurant fare prepared under the direction of a former chef of the Barolo Grill to a selection of very informal bar food for standing customers. This suggests that the

¹⁶ Section 12-47-411, C.R.S.

¹⁷ Regulation 47-418, 1 CCR 203-2.

Rockbar's efforts to provide full meal service may have been uneven. Second, and more importantly, both Mr. Morreale and his manager testified that they did not know whether the Rockbar annually met the requirement that 25% of their gross income was from food sales, and they conceded that the annual sales of food may sometimes be less than 25%. Finally, the report of Denver's Department of Environmental Health concerning a restaurant inspection of the premises on June 20, 2012 (Applicant's Exhibit A-2) seems to clearly indicate that, at least at that time, the Rockbar was not serving food, and the premises were not even being maintained to serve food. Specifically, the inspection report included the following comments:

"No food is served on the premises."

"Premises not maintained"

"Items unnecessary to the operation and maintenance of the facility are stored on the premises."

18. For these reasons, the Hearing Officer finds that the weight of the evidence establishes that the Rockbar has not consistently complied with requirements of section 12-47-411, C.R.S., and Regulation 47-418 that meals must be regularly served and provide at least 25% of the gross income from the sale of food and drink.
19. Therefore, the Hearing Officer concludes that good cause exists for nonrenewal of the licenses in accordance with sections 12-47-103(9)(a), C.R.S.

Grounds for nonrenewal relating to D.R.M.C. sec. 32-20 (cabaret license)

20. Under Section 32-20(d)(2) of the Denver Revised Municipal Code, the Director of the Department of Excise and Licenses may refuse to renew a license if "Any fact or condition exists which, if it had existed or had been known to exist at the time of the application for such license, would have warranted the director in refusing originally to issue such license." This section appears to provide a separate ground for nonrenewal of the cabaret license, in addition to the potential grounds for nonrenewal of the hotel and restaurant license under the state liquor code.
21. If the director had known at the time of Rockbar's original applications for licenses in 2006 that the premises would not be lawfully operated (that is, in violation of requirements such as food service and preservation of the public peace, health, welfare, and safety), then the Director would have been warranted in refusing to issue the original licenses for the Rockbar.
22. It may also be relevant that, in 2006 the two neighborhood groups and others in the neighborhood supported the applications. However, at the renewal hearing the two neighborhood groups withdrew their support for the licenses in accordance with the good neighbor agreement. Witness Tom Rutter also reversed his original support for the licenses. If such neighborhood opposition had existed in 2006, the Director would have been warranted in refusing to issue the applied-for license.

23. Therefore, the Hearing Officer concludes that grounds have been established for the Director to refuse renewal of the cabaret license in accordance with D.R.M.C. sec. 32-20.

ACCORDINGLY, having considered the evidence in its entirety, the Hearing Officer concludes that good cause exists to refuse to renew the hotel and restaurant liquor license and the cabaret license of Hotel Restaurant, LLC, doing business as Rockbar, for the premises known and designated as 3015 E. Colfax Ave, Denver, Colorado. **IT IS RECOMMENDED that the applications for renewal not be approved.**

RECOMMENDED this 26th day of September, 2012.

/s/ William A. Hobbs

William A. Hobbs
Hearing Officer

Any party in interest may file objections to the foregoing Recommended Decision within ten (10) calendar days from the date above.

All filings shall be made by email to the Director, tom.downey@denvergov.org, copying ruthie.sullivan@denvergov.org, john.jennings@denvergov.org, and any opposing parties.

The Director of the Department of Excise and Licenses will issue a **FINAL DECISION** in this matter following review and consideration of the Recommended Decision, and if applicable, any objections.

CERTIFICATE OF SERVICE

The undersigned hereby states and certifies that one true copy of the foregoing Recommended Decision was sent via email, on the date above, to the following:

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/s/ William A. Hobbs

William A. Hobbs
Hearing Officer