THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:	)	
Linda's Market, Inc. t/a Economy Market	) License Number:	76126
	) Case Number:	09-CMP-00720
	) Order No.:	2010-345
Holder of a Retailer's Class B License at premises 1804 D Street, N.E. Washington, D.C. 20002	)	

BEFORE: Charles Brodsky, Chairperson
Nick Alberti, Member
Donald Brooks, Member

ALSO PRESENT: Linda's Market, Inc., t/a Economy Market, Respondent

Paul L. Pascal, Esq., on behalf of the Respondent

Amy Caspari, Assistant Attorney General,
on behalf of the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On February 23, 2010, the Alcoholic Beverage Control Board (Board) served a Notice of Status Hearing and Show Cause Hearing (Notice), dated February 3, 2010, on Linda's Market, Inc., t/a Economy Market (Respondent), at premises 1804 D Street, N.E., Washington, D.C., charging the Respondent with the following violation:

Charge I: The Respondent permitted the sale of an individual container of beer, malt liquor, or ale with a capacity of 70 ounces or less, as well as spirits (liquor) sold in half-pints or smaller volumes in violation of D.C. Official Code § 25-346(b)(2) (2009), for which the Board may take action pursuant to D.C. Official Code § 25-823(1) (2009).

The matter proceeded to a Show Cause Hearing where the Government and the Respondent presented evidence through the testimony of witnesses and the submission of documentary evidence. The Board, having considered the evidence, the testimony of witnesses, the arguments of counsel, and the documents comprising the Board's official file, makes the following:

FINDINGS OF FACT

1. The Board issued a Notice of Status Hearing and Show Cause Hearing, dated February 3, 2010. (*See* Alcoholic Beverage Regulation Administration (ABRA) Show Cause File Number 09-CMP-00720). The Respondent holds a Retailer's Class B License and is located at 1804 D Street, N.E., Washington, D.C. (*See* ABRA Licensing File No. 76126).

2. The Show Cause Hearing in this matter was held on April 21, 2010. The Notice to Show Cause, dated February 3, 2010, charges the Respondent with the violation enumerated above. (*See* ABRA Show Cause File Number 09-CMP-00720).

3. The Government presented its case through the testimony of one witness, ABRA Investigator David Bailey. *Transcript* (*Tr.*), 4/21/10 at 16. Furthermore, the Government submitted a number of exhibits, including: a report from the Committee on Public Works and the Environment dated April 11, 2008, regarding the "The Ward 8 Anti-Sale of Single Containers of Alcoholic Beverages Amendment Act of 2007" (Exhibit B-1); a report from the Committee on Public Works and the Environment dated April 11, 2008, regarding the "Mt. Pleasant Anti-Sale of Single Containers of Alcoholic Beverages Amendment Act of 2008" (Exhibit B-2); Case Report 09-CMP-00720 (Exhibit A-1); State v. Feldman, 202 A.2d 259 (Conn. App. Ct. 1964) (Exhibit A-2); 27 C.F.R. pt. 7, 25 (2003). (Exhibit A-4); an article titled: "Spirited debate: some lawmakers think flavored malt beverages need tighter regulation" by Michelle Blackstone found in State Legislatures (Exhibit A-5). and 800 Water St., Inc. v. D.C. Alcoholic Bev. Control Bd., No. 09-AA-238, 2010 D.C. App. LEXIS 204 (D.C. 2010) (Exhibit A-6). (*See* ABRA Show Cause File Number 09-CMP-00720).

4. The Government sought to prove that the Respondent violated D.C. Official Code § 25-346(a) because the individual alcoholic beverage sold to Investigator Bailey was under 70 ounces and is considered beer under the ABC Code. *Tr.*, 4/21/10 at 10. In contrast, the Respondent argued that the District of Columbia does not have a labeling law and that the federal regulations are not incorporated into the ABC Code. *Tr.*, 4/21/10 at 14. Furthermore, the Respondent argued that the Government failed to meet its burden of proof because it failed to present evidence on how the product was manufactured and failed to classify the product as beer, ale, malt liquor, wine, or spirits. *Tr.*, 4/21/10 at 40, 52, 55.

5. The Board takes administrative notice that alcoholic fermentation is the only process by which alcohol can be created. Furthermore, the Board takes administrative notice that the Respondent is located in Ward 6.

6. The Government cited 800 Water St., Inc. v. D.C. Alcoholic Bev. Control Bd., No. 09-AA-238, 2010 D.C. App. LEXIS 204 (D.C. 2010). *Tr.*, 4/21/10 at 64. The Government stressed that a court would be deferential to the Board's interpretation of Title 25 "so long as the interpretation is reasonable and not plainly wrong or inconsistent with the legislative purpose." 800 Water St., Inc. v. D.C. Alcoholic Bev. Control Bd., No. 09-AA-238, 2010 D.C. App. LEXIS 204, *4 (D.C. 2010), *Tr.*, 4/21/10 at 64. Furthermore, the case brought to the Board's attention states that "[i]ndividual words of a statute are to be read in the light of the statute taken as a whole, and where possible, courts should avoid constructions at variance with the policy of the legislation as a whole. 800 Water St., Inc., No. 09-AA-238, 2010 D.C. App. LEXIS at *5-*6.

7. The Government also provided the Board with legislative history related to § 25-346(a)(2). *Tr.*, 4/21/10 at 65. According to Exhibit B-1, Councilmember Alexander stated that the purpose of the legislation was to "encourage responsible drinking and discourage drinking outside." (ABRA Show Cause File Number 09-CMP-00720, Exhibit B-1, at 4). Councilmember Marion Barry, who introduced the bill stressed that he supported the legislation because "single-sales contribute[d] to a bad environment and social ills" and negatively impacted public health. (ABRA Show Cause File Number 09-CMP-00720, Exhibit B-1, at 5). Finally, on another occasion, Councilmember Barry stated that "[w]e. . . need to eliminate single sales." (ABRA Show Cause File Number 09-CMP-00720, Exhibit B-1, at 7).

8. The Government also submitted portions of the Code of the Federal Register produced by the Alcohol and Tobacco Tax and Trade Bureau related to malt beverages. *Tr.*, 4/21/10 at 72. Under section 7.10 of Chapter 27 of the Code of Federal Regulations, a malt beverage is defined as any "beverage made by alcoholic fermentation of. . .malted barley with hops, or their parts, or their products and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom. 27 C.F.R. § 7.10 (2003); (ABRA Show Cause File Number 09-CMP-00720, Exhibit A-4). Further, under section 7.11, "[a]lcohol falvoring materials and other ingredients containing alcohol may be used in producing a malt beverage provided these alcohol ingredients constitute less than 0.5 percent alcohol by volume. . . of the finished malt beverage." 27 C.F.R. § 7.11; (ABRA Show Cause File Number 09-CMP-00720, Exhibit A-4). The Government argued that the products sold by the Respondent to Investigator Bailey had to conform to Chapter 27. *Tr.*, at 4/21/10 at 75.

9. The Government also presented the Board with State v. Feldman, 202 A.2d 259 (Conn. App. Ct. 1964). *Tr.*, 4/21/10 at 76. Based on this case, the Government argued that the Board could take the label of an alcoholic beverage as prima facie evidence of the beverage's ingredients. Feldman, 202 A.2d at 261; *Tr.*, 4/21/10 at 76.

10. Investigator Bailey entered the Respondent's establishment on August 10, 2009. *Tr.*, 4/21/10 at 17. Upon entering, he went directly to a cooler located on the left side of the Respondent's establishment. *Tr.*, 4/21/10 at 17. He observed that the Respondent had stocked his cooler with Boone's Farm Fuzzy Navel. *Tr.*, 4/21/10 at 19. The label on the

front of the bottle stated: "malt beverage with natural flavors, artificial colors. Contains sulfites, FD&C yellow No. 5 and flavored beer." *Tr.*, 4/21/10 at 19, 21, 37. In addition, the label also stated that the product had an alcohol content of four percent. *Tr.*, 4/21/10 at 23. The label also contained the words: "flavored beer." *Tr.*, 4/21/10 at 23. According to Investigator Bailey, the liquid contained in the bottle was an "orangish-yellow cloudy color." *Tr.*, 4/21/10 at 24. The bottle held 9.4 ounces. *Tr.*, 4/21/10 at 12.

11. Investigator Bailey took the Boone's Farm product and purchased it from the Respondent for $3.26. *Tr.*, 4/21/10 at 20, 26. He then returned to the ABRA office and stored it in the agency's evidence cabinet. *Tr.*, 4/21/10 at 20. Finally, Investigator Bailey filled out an evidence transmittal report in reference to his earlier transaction at the Respondent's establishment. *Tr.*, 4/21/10 at 36-37. Investigator Bailey admitted that the contents of the bottle were not tested in any way. *Tr.*, 4/21/10 at 27.

12. Investigator Bailey stated that he was aware that a notice was sent out to Ward 6 licensees that notified them what products they could and could not sell. *Tr.*, 4/21/10 at 33. Investigator Bailey testified he had never seen the notice himself. *Tr.*, 4/21/10 at 34.

CONCLUSIONS OF LAW

13. The Board has the authority to suspend or revoke the license of a licensee who violates any provision(s) of Title 25 of the D.C. Official Code pursuant to D.C. Official Code § 25-823(1)(2001). Additionally, pursuant to the specific statutes under which the Respondent was charged, the Board is authorized to levy fines. D.C. Code § 25-830 and 23 D.C.M.R. 800, *et seq.*

14. The Board finds that the Government has proven that the Respondent violated D.C. Official Code § 25-346(b)(2) by permitting the sale of an individual container 9.5 ounce of Boone's Farm Fuzzy Navel, a malt beverage containing alcohol, to Investigator Bailey in Ward 6.

15. There is no doubt that the Respondent sold the 9.5 ounce of Boone's Farm Fuzzy Navel to Investigator Bailey. Nevertheless, the Respondent claims that no violation of D.C. Official Code § 25-346(b)(2) occurred because the Government did not prove that the product was beer.

16. The Board finds no merit in the Respondent's arguments that the Government failed to meet its burden of proof and finds that the Boone's Farm Fuzzy Navel is clearly considered a beer under the ABC Code.

17. D.C. Official Code § 25-346(b)(2) states that a Class B Licensee in Ward 6 is prohibited from selling "an individual container of beer. . .with a capacity of 70 ounces or less." As defined in D.C. Official Code § 25-101(10), "beer [is] a fermented beverage of any name or description manufactured from malt, wholly or in part, or from any substitute for malt." Finally, D.C. Official Code § 25-766 reads: "A statement that is false or misleading with respect to any material fact shall be prohibited."

18. The Board is entitled to infer that a manufacturer's labeling is truthful and accurate unless proven otherwise. D.C. Official Code § 25-766 forbids materially false statements by licensees in regards to alcoholic beverages. As a result, it is reasonable to assume that all manufacturers' labels are accurate because manufacturers have a legal obligation to ensure that they are accurate under the ABC Code. Indeed, if the Board or Licensees could not trust manufacturers' labels, this would make it impossible for the District of Columbia to regulate alcoholic beverages or for Licensees to comply with the law because no one would be able to determine the contents of various alcoholic beverages in an economical fashion.

19. In this matter, the Government presented the labeling of the Boone's Farm Fuzzy Navel to the Board and the Respondent offered no evidence that the labeling was inaccurate. Therefore, the Board finds that the product's labeling is conclusive evidence of the contents of the Boone's Farm Fuzzy Navel bought by Investigator Bailey. The evidence presented by the Government demonstrates that Boone's Farm Fuzzy Navel is a beer. First, the product's label states that the product is a "malt beverage" and contains "flavored beer." As a result, it can be easily inferred that the product contains malt because no evidence to the contrary has been presented. Indeed, there is no logical reason for the manufacturer to call the product a malt beverage unless it contained malt. Second, there is no other way to create alcohol other than through fermentation. As a result, by adding beer to the beverage the manufacturer ensured that Boone's Farm Fuzzy Navel is a fermented beverage. Therefore, based on these facts, the Board concludes that Boone's Farm Fuzzy Navel is a beer because it contains malt and is a fermented beverage.

20. The Board is further persuaded to conclude that Boone's Farm Fuzzy Navel is a beer under the ABC Code based on the federal regulations submitted by the Government. 27 C.F.R. § 7.10 states that a malt beverage is defined as any "beverage made by alcoholic fermentation of. . .malted barley with hops, or their parts, or their products and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom." Although not binding on the District of Columbia, the definition of malt beverages provided by the Alcohol and Tobacco Tax and Trade Bureau provides the most logical way to interpret the term "malt beverages." As a result, the Board is further convinced that Boone's Farm Fuzzy Navel, which is described as a malt beverage on its label, is a beer under the ABC Code because it is created through a process of alcoholic fermentation and contains malt.

21. Finally, the Board notes that ruling in favor of the Respondent would be contrary to public policy. In enacting the ban on the sale of single containers of alcoholic beverages, the District of Columbia Council was concerned that individuals were drinking in public and sought to prevent the sale of small individual containers of beer and beer-like beverages entirely. As a result, if the Board were to hold against the Government this would undermine the Council's intent and give retailers and manufacturers a loophole to avoid the ban and once again encourage drinking in public. Consequently, the Board finds that the term beer found in D.C. Official Code § 25-101(10) and D.C. Official Code § 25-346(b)(2) should be interpreted broadly in order to capture the true spirit of the law.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Board, on this 26th day of May, 2010, finds that the Respondent, Linda's Market, Inc., t/a Economy Market at premises 1804 D Street, N.E., Washington, D.C., holder of a Retailer's Class B License, violated D.C. Code § § 25-346(b)(2).

The Board hereby **ORDERS** that:

1. The Respondent shall pay a fine in the amount of $500.00, by no later than thirty (30) days from the date of this Order.

District of Columbia
Alcoholic Beverage Control Board

Charles Brodsky, Chairperson

Nick Alberti, Member

Donald Brooks, Member

Pursuant to Section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official 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 the service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington D.C. 20001.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official 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, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (April 2004) 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).