

DISTRICT OF COLUMBIA

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ALCOHOLIC BEVERAGE CONTROL BOARD

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FACT FINDING HEARING

IN THE MATTER OF:

David Sakai, t/a
International House of Pong
1010 Wisconsin Ave NW
License No. 84905
Retailer CR
ANC 2E
License in Extended DCMR 23-405
Status

THURSDAY, MAY 15, 2014

The Alcoholic Beverage Control Board met in the Alcoholic Beverage Control Hearing Room, Reeves Building, 2000 14th Street, N.W., Suite 400S, Washington, D.C. 20009, Ruthanne Miller, Chairperson, presiding.

PRESENT:

RUTHANNE MILLER, CHAIRPERSON
NICK ALBERTI, MEMBER
DONALD BROOKS, MEMBER
HERMAN JONES, MEMBER
MIKE SILVERSTEIN, MEMBER
HECTOR RODRIGUEZ, MEMBER
JAMES SHORT, MEMBER

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P R O C E E D I N G S

9:52 A.M.

CHAIRPERSON MILLER: Welcome to the ABC Board. I'm Ruthanne Miller. I'm the chairperson and to my far right is Mr. Nick Alberti. Next to me is Mr. Hector Rodriguez. And Mr. Mike Silverstein is to my left. Mr. Donald Brooks will be joining us very shortly. So we have four in attendance right now. We will have five and three constitutes a quorum.

Copies of today's hearing calendar agenda are available at the receptionist's desk. The proceedings are recorded by a court reporter and today we have a calendar on a day that we don't normally meet to hear safekeeping cases, in particular, such as yours is the first one, and particularly those located in Georgetown area. DC Official Code 25-791 deals with temporary surrender of license in safekeeping. It requires licensees to surrender their license to the Board for safekeeping when a license is discontinued.

1 Many of the cases that we're going
2 to hear today involve licenses that have been
3 in safekeeping for an extended period of time
4 with little or no activity with respect to
5 operations.

6 So we want to hear from you with respect
7 to the status of the license, how long it's
8 been in safekeeping, what's been happening
9 since we last met with you which I believe was
10 last August.

11 I think with that I'm going to let
12 you begin unless you have any documents you
13 need to give to us.

14 MR. KLINE: No, we're pleased to
15 inform the Board that Mr. Sakai has entered
16 into an agreement to transfer the license to
17 a party that wants to use it at 3073 Canal
18 Street. Apparently, there's an existing
19 carryout there. The plan is to expand the
20 carryout to the second floor and turn the
21 premises into a full-service restaurant.
22 We're advised that the transferee will file a

1 transfer application within 30 days of today,
2 probably sooner than that, but certainly
3 within 30 days.

4 CHAIRPERSON MILLER: Okay, so you
5 didn't bring the agreement with you?

6 MR. KLINE: I do have a copy of
7 the agreement.

8 CHAIRPERSON MILLER: You do.

9 MR. KLINE: If the Board wants to
10 see it, sure.

11 CHAIRPERSON MILLER: Okay, good.

12 MR. ALBERTI: I think the director
13 is going to do other duties as assigned.
14 Thank you. Thank you, Fred.

15 CHAIRPERSON MILLER: Thank you.
16 So this is a proposed agreement? It doesn't
17 look like it's signed by all the parties.

18 MR. KLINE: If you flip through
19 it, it's all signed. All the signatures
20 should be there.

21 CHAIRPERSON MILLER: I guess I was
22 looking at the last page and it didn't have

1 purchaser and escrow agent sign.

2 MR. KLINE: It's done in
3 counterparts.

4 CHAIRPERSON MILLER: Oh. Okay.

5 MR. KLINE: There are signatures
6 on different pages.

7 CHAIRPERSON MILLER: I see. Okay,
8 thank you.

9 Do board members have questions?
10 Mr. Alberti?

11 MR. ALBERTI: I do, yes.

12 CHAIRPERSON MILLER: Okay.

13 MR. ALBERTI: So if it's signed,
14 help me out here.

15 What's the date of execution of
16 this?

17 MR. KLINE: It was signed on March
18 26th and then it was amended on May 7th.

19 MR. ALBERTI: I haven't had a
20 chance to read this, and my question to you is
21 the license hasn't been transferred.

22 MR. KLINE: Correct.

1 MR. ALBERTI: And this sale is for
2 -- is to purchase the license, is that what
3 this is for?

4 MR. KLINE: Correct.

5 MR. ALBERTI: I haven't read it.

6 MR. KLINE: I understand, I
7 understand.

8 MR. ALBERTI: This is to purchase
9 the license, so it has been signed and
10 executed, is that correct?

11 MR. KLINE: That's correct.

12 MR. ALBERTI: So we're in that
13 limbo state where Mr. Sakai really doesn't own
14 the license.

15 MR. KLINE: Well, he does until --
16 I mean what we have is what we lawyers call an
17 executory contract. It means there's an
18 agreement to do something which is to sell the
19 license to the transferee.

20 MR. ALBERTI: And if the
21 transferee doesn't file a transfer
22 application, what happens? Is that covered in

1 here?

2 MR. KLINE: Yes, I mean the
3 transferee is obligated to file a transfer
4 application and ultimately the license is
5 subject to your jurisdiction.

6 MR. ALBERTI: Oh, I understand.
7 So I understand that. So if the transferee
8 decides that he's not -- he wants to back out
9 and doesn't file a transfer --

10 MR. KLINE: He's got all his money
11 up at this point, so he's going to be in a
12 tough situation. He's got -- according to the
13 amendment, he's got --

14 MR. ALBERTI: Does the license
15 revert back to Mr. Sakai?

16 MR. KLINE: I don't think he much
17 cares because there's \$37,000 in escrow which
18 is going to be his.

19 MR. ALBERTI: Okay, fine.

20 MR. KLINE: So.

21 MR. ALBERTI: Just technically it
22 would revert back to Mr. Sakai.

1 MR. KLINE: Yes. But what I'm
2 representing to the Board is what I've been
3 informed by the transferee is that they will
4 file a transfer application within 30 days.

5 MR. ALBERTI: Absolutely. So
6 we're in that kind of limbo where I'm not sure
7 in the legal mind here, but I'm not sure who
8 owns the license right now.

9 MR. KLINE: Right now, he owns the
10 license.

11 MR. ALBERTI: Until such time that
12 the transfer application is approved, he owns
13 the license?

14 MR. KLINE: Yes.

15 MR. ALBERTI: If it's not
16 approved? If it's not approved, who owns the
17 license?

18 MR. KLINE: He owns the license.
19 My legal opinion for whatever it's worth --

20 MR. ALBERTI: All right, okay. I
21 just want to understand -- I just want your
22 understanding of this document. I understand

1 where we are.

2 MR. KLINE: If I could go a little
3 further?

4 MR. ALBERTI: All right.

5 MR. KLINE: My legal opinion, for
6 whatever it's worth, is that ABC licenses only
7 transfer with the permission of the ABC Board.
8 No one can sell a license unless you approve
9 it.

10 MR. ALBERTI: Right, right. And
11 I'm ignoring that fact.

12 MR. KLINE: I never ignore that.

13 MR. ALBERTI: I know.

14 (Laughter.)

15 MR. KLINE: Because in this room,
16 to me that's most important. We can enter
17 into agreements, but until such time as you
18 approve a transfer, no title can change hands.

19 MR. ALBERTI: Absolutely.

20 MR. KLINE: Because the law says
21 you must approve a transfer.

22 MR. ALBERTI: Absolutely. And I

1 sort of misspoke. I was trying to understand
2 what your contract said about the fact that if
3 it's not transferred --

4 MR. KLINE: They are required to
5 file an application for transfer.

6 MR. ALBERTI: Fine. It doesn't
7 say when, right?

8 MR. KLINE: Well, I'm representing
9 to you they're going to do it within 30 days.

10 MR. ALBERTI: All right, got you.

11 CHAIRPERSON MILLER: Any other
12 questions? Do you know the name of the
13 establishment?

14 MR. KLINE: I don't know that
15 they've picked a name yet.

16 CHAIRPERSON MILLER: They're
17 existing now though.

18 MR. KLINE: The existing place is
19 -- I don't know the name. I know it's a sushi
20 place, but I don't know --

21 CHAIRPERSON MILLER: Oh, it's a
22 sushi place.

1 MR. KLINE: I don't know the name
2 and I don't know that they intend to keep the
3 sushi place.

4 CHAIRPERSON MILLER: Okay.

5 MR. KLINE: I know it is an
6 existing carryout sushi place is what the
7 transferee has representing to me. And it's
8 on one floor and the plan is to expand it to
9 two floors and convert it to a full-service
10 restaurant with a CR ABC license.

11 CHAIRPERSON MILLER: Okay. And
12 that's at 1010 Wisconsin Avenue, is that
13 right, it's on the first page.

14 MR. KLINE: 3073 is Canal Street.
15 1010 is what was initially approved for Mr.
16 Sakai.

17 CHAIRPERSON MILLER: Oh, okay.
18 3073 Canal Street, NW is the proposed
19 location.

20 CHAIRPERSON MILLER: Okay, good.
21 Are there other questions?

22 MR. ALBERTI: No.

1 CHAIRPERSON MILLER: Okay, we'll
2 look for the transfer application within 30
3 days.

4 MR. ALBERTI: It's a little more
5 complicated than that.

6 CHAIRPERSON MILLER: Go ahead, I
7 think we can put other deadlines on it.

8 MR. ALBERTI: I'm a trust, but
9 verify person, so don't take this to heart.

10 MR. KLINE: I understand.

11 MR. ALBERTI: But I want to avoid
12 a shell game here where this gets transferred
13 to another owner. The other owner doesn't do
14 anything with it for another year and we have
15 another vacant -- a license now that for
16 another year sitting in Georgetown not being
17 used.

18 MR. KLINE: Understood.

19 MR. ALBERTI: So I'm reluctant to
20 condone the continuation of this license with
21 a transfer without some stipulation of when
22 the transferee uses this license because it's

1 still a license sitting out there, not used,
2 in Georgetown. And he can very well sell it
3 to someone who then now sits two years and we
4 look at it in two years and go oh, you only
5 had it two years. We were faced with a case
6 in Adams Morgan where someone bought a license
7 in 2009 and has never used it. One would
8 suspect that the person never had an intention
9 of using it. They had a building where they
10 would like to place it, but they had no intent
11 to use it in that building. I don't want that
12 to be the case here.

13 So I don't know what we do. But I
14 would put some stipulation on this license
15 gets canceled unless the transferee uses it in
16 such and such a time and maybe we have to have
17 another hearing, but I think something has --
18 I think there has to be some deadline for the
19 use of this license. I don't care who owns
20 it.

21 MR. KLINE: Two points if I may,
22 Mr. Alberti. First, let me say that obviously

1 the Board has changed its policy with respect
2 to licenses in safekeeping. And putting my
3 other hat on as a representation of the
4 Restaurant Association, we applaud that. This
5 business of licenses sitting in safekeeping
6 indefinitely doesn't do the city any good,
7 doesn't do the restaurant industry any good.

8 But having said that, I think it's
9 appropriate to understand that there were
10 people that went out there and invested money
11 and spent money based on a different set of
12 expectations.

13 So I think that in terms of all of
14 a sudden, and I think the Board has been
15 mindful of that fact and hasn't moved too
16 quickly and then all of a sudden said okay,
17 this is what we're doing. We're going to
18 cancel all the licenses. And we appreciate
19 that.

20 I think that what you do here is
21 you monitor and you make sure that the license
22 is used. You make sure that there is

1 progress. You make sure that an application
2 isn't filed, approved, and then you don't hear
3 from them for two years and maybe --
4 obviously, this place is going to have to be
5 built out. So what I in response -- I'm
6 trying to think through how to address your
7 concerns.

8 I think if the Board said all
9 right, you have to file your application
10 within 30 days and then in six months we want
11 a report as to where you are, go ahead and
12 schedule another fact finding and bring the
13 transferee in at that time as to well, what
14 progress have they made? Have they built this
15 place out? Are they moving forward? In terms
16 of setting a definite date, given my
17 experience, with restaurant construction, I'd
18 be a little nervous about that. I've got
19 someone who has been building a restaurant for
20 15 months now and a hard deadline would scare
21 me to death frankly with any restaurant
22 construction. I always take what the clients

1 tell me in terms of when they're going to be
2 ready.

3 MR. ALBERTI: I appreciate that,
4 Mr. Kline. I appreciate that. My thoughts
5 probably aren't much far from your advice, but
6 I want to talk it through with the Board. Do
7 we want to talk here or do we want to go in
8 the back and talk? I have some suggestions on
9 what I'd like to see happen. But I don't know
10 if you want to talk about it with Legal. Do
11 you want to talk about it with Legal because
12 I'm not sure --

13 MR. KLINE: That was going to be
14 my second point and not to put too fine a
15 point on it, but the Board is somewhat
16 constrained by what is and isn't in the
17 regulations and in the statute. First and
18 foremost, court of laws and I'd say well, when
19 they called me up and said we've got all these
20 fact finding hearings, I have to tell you my
21 initial response was well, I looked in this
22 book, 23 DCMR, and I looked in this book the

1 DC Code. I couldn't find anything about this,
2 so what are we going to be talking about? So
3 I just ask the Board to be mindful as to what
4 the law is and I encourage you, of course, to
5 confer with counsel.

6 MR. ALBERTI: Yes.

7 CHAIRPERSON MILLER: Okay.

8 MR. ALBERTI: Administrative
9 boards, and judges, and lawyers interpret the
10 law.

11 MR. KLINE: I'm aware of it.

12 (Laughter.)

13 CHAIRPERSON MILLER: Okay, if
14 board members, and this is our first case of
15 the morning, so if board members have some
16 concerns they want to discuss with our general
17 counsel before we go any further on this case,
18 then we can do that.

19 MEMBER RODRIGUEZ: And Madam
20 Chairperson, can we have some legal advice on
21 this matter?

22 CHAIRPERSON MILLER: Certainly.

1 So I don't think that will take that long to
2 do that. I'm going to read the instructions
3 and we'll take a vote to do that.

4 As the chairperson of the
5 Alcoholic Beverage Control Board for the
6 District of Columbia, in accordance with
7 Section 405 of the Open Meetings Amendment Act
8 of 2010, I move this ABC Board hold a closed
9 meeting for the purpose of seeking legal
10 advice from our counsel dealing with
11 International House of Pong's license in
12 safekeeping.

13 Is there a second?

14 MEMBER RODRIGUEZ: Seconded.

15 CHAIRPERSON MILLER: Mr. Rodriguez
16 has seconded the motion. I'm going to take a
17 roll call.

18 Mr. Brooks?

19 MEMBER BROOKS: I agree.

20 CHAIRPERSON MILLER: Mr. Alberti?

21 MR. ALBERTI: I agree.

22 CHAIRPERSON MILLER: Mr.

1 Rodriguez?

2 MEMBER RODRIGUEZ: I agree.

3 CHAIRPERSON MILLER: Ms. Miller
4 agrees. Mr. Silverstein?

5 MR. SILVERSTEIN: I agree.

6 CHAIRPERSON MILLER: The motion
7 passes by a vote of 5-0-0 and we'll recess
8 briefly to confer with counsel and get back to
9 you very shortly.

10 (Off the record.)

11 CHAIRPERSON MILLER: So we're back
12 on the record, having had an opportunity to
13 confer with our counsel. So I want to
14 articulate where I think the Board is going
15 and then others can speak up if they have
16 anything to add or correct.

17 So I'm sorry, Mr. Sakai, the
18 license didn't work out with you, but I know
19 that the license has been in safekeeping since
20 2010 and you all have provided us an agreement
21 to transfer the license. And represented that
22 the applicant would be filing an application

1 to transfer with the Board within 30 days.

2 So first of all, there are two
3 different parties here. First is you, the
4 transferor. So we want to say to you that if
5 this all goes through, there's no problem.
6 It's over for you. If the agreement falls
7 through, it's the Board's view that we have
8 been going over the past year within six-month
9 increments and at this point we would be
10 putting you on notice that we would be
11 canceling the license in six months if --

12 MR. ALBERTI: No, immediately. I
13 thought our agreement -- I thought our
14 agreement back there was that if we didn't
15 have a transfer application in 30 days, the
16 license would be canceled. I thought that was
17 the agreement of the Board.

18 CHAIRPERSON MILLER: No, I'm
19 sorry.

20 MR. ALBERTI: I'm looking around
21 and I think that that's what the Board agreed
22 to. Maybe other board members would like to

1 speak to that?

2 MEMBER BROOKS: I agree with Mr.
3 Alberti.

4 CHAIRPERSON MILLER: I think
5 that's a little tight, the 30 days to cancel
6 the license.

7 MR. ALBERTI: Well, it's been
8 represented to us that it's imminent. We have
9 a signed agreement for the contract. I mean
10 all this person has to do is come in and file
11 a transfer application. I don't know what is
12 so draconian about that?

13 CHAIRPERSON MILLER: Well, that
14 wasn't my understanding so I would say that we
15 could do 60 days then and there's no big loss
16 or adverse impact on the community by an extra
17 30 days.

18 MEMBER RODRIGUEZ: I agree with
19 the Board. I think it was my understanding it
20 was six months. That was my understanding.

21 MR. ALBERTI: Mr. Silverstein?

22 MR. SILVERSTEIN: If it's

1 imminent, let's do it.

2 MR. ALBERTI: Then I move that we
3 give the licensee six months for the new owner
4 to submit a transfer application and if the
5 transfer application isn't submitted within 30
6 days, the license be canceled.

7 MEMBER BROOKS: I'll second.

8 CHAIRPERSON MILLER: Wait, I don't
9 understand what you said, Mr. Alberti.

10 MR. SILVERSTEIN: Do you want to
11 restate that?

12 MEMBER ALBERTI: I would move that
13 if there is not a transfer application filed
14 for this license within 30 days that we cancel
15 the license, given the evidence that there is
16 a contract pending with a potential new owner.
17 There actually is a contract with a new owner
18 to buy this. It's been signed. It's been
19 acted upon. It's in effect. There is nothing
20 holding back that new owner from coming
21 forward with a transfer.

22 MR. KLINE: Madam Chair, if I may?

1 CHAIRPERSON MILLER: Yes.

2 MR. KLINE: I would respectfully,
3 I mean it's been represented to me that it
4 will be filed within 30 days and in an over
5 abundance of caution given that things happen,
6 I don't think it's unreasonable to extend that
7 to 60 days. I mean I understand the concern
8 that this thing not drag, but I mean this
9 Agency can have issues with timing. Other
10 people can have issues with timing. It's just
11 from a practical standpoint cancellation of
12 the license obviously represents a valuable
13 asset. I would just request that it be 60
14 days even though the transferee has
15 represented that it would be done within 30
16 and we fully expect that to be done.

17 CHAIRPERSON MILLER: Thank you. I
18 think that's the safer route and it's just for
19 an extra 30 days.

20 MR. ALBERTI: I would say, I would
21 say, I would note that this negotiation
22 started no later than March 26th. That's when

1 the initial contract was signed. I mean
2 that's 60 days almost from today. And we
3 still don't have a transfer application before
4 us. I mean how long do we wait here?

5 CHAIRPERSON MILLER: I don't see -
6 - in balancing the equities, I don't see a
7 hardship on the community if that's what we're
8 protecting in providing an additional 30 days.
9 We don't have the transferee here to even
10 inquire anything further.

11 MEMBER RODRIGUEZ: Madam Chair, I
12 don't see any prejudice in this or undue
13 stress on this. I think 60 days is a
14 reasonable amount of time to consider. And
15 make things easier for everybody to operate.

16 MR. SILVERSTEIN: I will go with
17 60 days. It's better than six months. I
18 think everyone understands this is public --

19 MR. ALBERTI: Well, for the sake
20 of efficiency, I withdraw my motion.

21 MR. SILVERSTEIN: Thank you, sir.

22 CHAIRPERSON MILLER: Okay, so if

1 the license is not transferred or used within
2 60 days of today, it will be canceled.

3 MR. ALBERTI: Transferred. Is it
4 the motion transferred, transfer application,
5 transferred? What is the motion?

6 Because it could actually have
7 transfer application and take three months to
8 ratify that transfer, so what is the motion?
9 I don't want to -- you know, I'm already
10 holding these guys' toes to the fire and yet
11 you seem to be even doing it even more. So I
12 don't understand your stance. If you're going
13 to say that we have to -- it has to be
14 transferred in 60 days, that's even more
15 draconian.

16 CHAIRPERSON MILLER: I'm sorry, I
17 meant to say that the transfer application
18 needs to be filed within 60 days. Is that
19 clear?

20 MR. ALBERTI: Yes, it needs to be
21 clear.

22 CHAIRPERSON MILLER: I said is

1 that clear?

2 MR. ALBERTI: Yes, that is clear.

3 CHAIRPERSON MILLER: Is that clear
4 to the parties?

5 MR. KLINE: Yes.

6 CHAIRPERSON MILLER: Okay. That
7 in my view covers what applies specifically to
8 the transfer and I think that the Board would
9 like to put on notice and the transferee is
10 not here, but --

11 MR. ALBERTI: Do we have a motion
12 to that effect?

13 CHAIRPERSON MILLER: You want a
14 motion?

15 MR. ALBERTI: Yes, a motion to
16 vote on it because I don't agree with it. I'm
17 still am in the 30-day mark.

18 CHAIRPERSON MILLER: Mr. Brooks
19 has stepped out.

20 All right, I move that the
21 transferee of this license needs to file an
22 application for transfer within 60 days or the

1 license at issue before us today will be
2 canceled.

3 MR. RODRIGUEZ: I second the
4 motion, Madam Chair.

5 CHAIRPERSON MILLER: Okay. Any
6 other comments or questions. All those in
7 favor, say aye?

8 (Ayes.)

9 All those opposed?

10 MR. ALBERTI: No.

11 MR. BROOKS: No.

12 CHAIRPERSON MILLER: The motion
13 passes 3 to 2. So I was just going to
14 articulate that how the Board intends to
15 proceed and that is once a transfer
16 application is filed, the Board will be
17 calling the transferee in for a fact finding
18 to determine the plans for putting that
19 license into use. And we'll be giving the
20 transferee six months to show any specific
21 plans or whatever of how -- what it needs to
22 do in order to put that license to use and the

1 Board will likely cancel the license within a
2 year if it's not put to use. However, that is
3 subject to whatever we hear at the fact
4 finding hearing or whatever goes on at those
5 fact finding hearings.

6 Anything else, board members?

7 MR. ALBERTI: I would just like to
8 say from my point of view, at six months we
9 need to let the new owner and I'm saying this
10 so that we can get the message out there, that
11 the new owner needs to show significant
12 progress towards the use of this license at
13 the six-months mark and at one-year mark, they
14 need to assure us that the license, with
15 reasonable expectation that this license will
16 be operable in a very short time. And I can't
17 really define that, but we're not talking
18 another year past the one-year mark. We're
19 talking -- we'll want to hear from them. But
20 there really is an expectation that we -- that
21 the Board is convinced that that license will
22 be used in a very, very short time.

1 MR. RODRIGUEZ: Madam Chair, may I
2 make a statement here?

3 CHAIRPERSON MILLER: Sure, Mr.
4 Rodriguez.

5 MR. RODRIGUEZ: The Board has
6 changed its policy with respect to licenses
7 and we want to get the word out to everyone
8 and the Board is pretty steadfast on that.
9 We've gone through some very serious
10 deliberations on it. There is a policy that
11 we're going to be enforcing and I think we
12 want to be fair to everyone and get the word
13 out to everyone we're going to hold to that
14 policy. Thank you.

15 CHAIRPERSON MILLER: Any
16 questions?

17 MR. KLINE: No, thank you.

18 CHAIRPERSON MILLER: Okay, thank
19 you very much.

20 (Whereupon, at 10:27 a.m., the
21 fact finding hearing was concluded.)
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