THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:	)	
Khyber Pass Corporation t/a Afghan Grill	)	License No.: 60278 Case No.: 09-CMP-00575 Order No.: 2010-320
Holder of a Retailer's Class CR License at premises 2309 Calvert St., N.W. Washington, D.C. 20008	)	

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

ALSO PRESENT: Amy Caspari, Assistant Attorney General,
Office of the Attorney General, District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On February 3, 2010, the Alcoholic Beverage Control Board (Board) served a Notice of Status Hearing and Show Cause Hearing (Notice), dated October 21, 2009, on Khyber Pass Corporation, t/a Afghan Grill (Respondent), at premises 2309 Calvert St., N.W., Washington, D.C., charging the Respondent with the following violation:

Charge I: The Respondent violated D.C. Code § 25-762(a) by increasing the occupancy of the licensed establishment without the approval of the Board, for which the Board may take the proposed 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 October 21, 2009. (*See* Alcoholic Beverage Regulation Administration (ABRA) Show Cause File Number 09-CMP-00575). The Respondent holds a Retailer's Class CR License and is located at 2309 Calvert St., N.W., Washington, D.C. (*See* ABRA Licensing File No. 60278).

2. The Show Cause Hearing in this matter was held on February 3, 2010. The Notice to Show Cause, dated October 21, 2009, charges the Respondent with the violation enumerated above. (*See* ABRA Show Cause File Number 09-CMP-00575).

3. The Government presented its case through the testimony of one witnesses, ABRA Investigator Erin Mathieson. *Transcript (Tr.)*, 2/3/10 at 9. The Government also submitted Case Report 09-CMP-00575. (ABRA Show Cause File Number 09-CMP-00575, Exhibit A).

4. Investigator Mathieson testified that she went to the Respondent's establishment on June 16, 2009, at approximately 2:00 p.m., in order to inspect the establishment's sidewalk café. *Tr.*, 2/3/10 at 10. Upon arriving, the Investigator counted twenty-two chairs and nine tables in the establishment's sidewalk café. *Tr.*, 2/3/10 at 12. She then spoke with the owner and Respondent, Habib Noori. *Tr.*, 2/3/10 at 12. During her conversation with the Respondent, she advised him that he was only approved for fourteen seats and six tables. *Tr.*, 2/3/10 at 13. She then counted the tables and chairs again in the Respondent's presence. *Tr.*, 2/3/10 at 13.

5. Investigator Mathieson further testified that the tables were set up individually in the sidewalk café and either had two or four chairs surrounding each table. *Tr.*, 2/3/10 at 13. Investigator Mathieson believed that the chairs were set up so that "a person could sit in them." *Tr.*, 2/3/10 at 14. The Investigator also stated that the Respondent's establishment appeared to be open for business. *Tr.*, 2/3/10 at 15.

6. The Respondent presented its case through the testimony of one witness, Habib Noori, the Respondent. *Tr.*, 2/3/10 at 18.

7. The Respondent testified that he was not at the establishment when the table and chairs in the sidewalk café were set up. *Tr.*, 2/3/10 at 19. The Respondent further testified that when he received the violation it was between 2:00 p.m. and 2:30 p.m. in the afternoon. *Tr.*, 2/3/10 at 19. He stated that his establishment did not have any customers at the time and he did not serve beverages and food outside. *Tr.*, 2/3/10 at 19. He also stated that the extra chairs and tables were set up accidently and being used by the staff to sit in. *Tr.*, 2/3/10 at 19. Finally, the Respondent stated that the Respondent occasionally leaves

all of its tables and chairs outside because the establishment does not have sufficient room inside to store them all. *Tr.*, 2/3/10 at 19. Furthermore, the Respondent stated that when he stores his tables and chairs outside, he locks them. *Tr.*, 2/3/10 at 19. The Respondent stated that some of the extra chairs and tables are brought back inside when there are not enough tables inside the restaurant. *Tr.*, 2/3/10 at 29.

8. The Respondent also testified that he has two new employees who were unfamiliar with the rules and that he failed to instruct them in the District's outdoor seating regulations. *Tr.*, 2/3/10 at 25.

9. The Respondent stated that his license allows him to open from 11:00 a.m. to 11:00 p.m. *Tr.*, 2/3/10 at 20. Because business is slow, the Respondent is only opening from 4:00 p.m. to 10:00 p.m. *Tr.*, 2/3/10 at 20, 24.

CONCLUSIONS OF LAW

10. 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.*

11. The Board finds that the Government has proven the charge against the Respondent. The Respondent violated D.C. Code § 25-762(a) by having twenty-two chairs and nine tables in the establishment's sidewalk café when the establishment was only approved for fourteen seats and six tables.

12. The Board notes that D.C. Code § 25-762(a)-(b) states that: "Before a licensee may make a change in the interior or exterior, or a change in format, of any licensed establishment, which would substantially change the nature of the operation of the licensed establishment as set forth in the initial application for the license, the licensee shall obtain the approval of the Board in accordance with *§ 25-404*. . . In determining whether the proposed changes are substantial, the Board shall consider whether they are potentially of concern to the residents of the area surrounding the establishment, including changes which would. . . [e]xpand the operation of the licensed establishment to allow for permanent use of exterior public or private space or summer gardens." D.C. Code § 25-762(a), 25-762(b)(2).

13. The Board agrees with the Government's argument that, for the purposes of D.C. Code § 25-762, it is irrelevant whether a mistake was made by the Respondent or his employees. The only factor relevant for the Board is whether the Respondent increased his seating capacity and occupied more public space than was allowed. Therefore, because testimony by both Investigator Mathieson and the Respondent both agree that this occurred, the Board finds the Respondent in violation of D.C. Code § 25-762.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Board, on this 14th day of April, 2010, finds that the Respondent, Khyber Pass Corporation, t/a Afghan Grill (Respondent), at premises 2309 Calvert St., N.W., Washington, D.C., holder of a Retailer's Class CR License, violated D.C. Code § 25-762(a).

The Board hereby **ORDERS** that:

1. The Respondent shall pay a fine in the amount of $1,000.00 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

Herman Jones, 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).