

1 GOVERNMENT OF THE DISTRICT OF COLUMBIA
2 ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
3 ALCOHOLIC BEVERAGE CONTROL BOARD
4

5 - - - - -X

6 IN THE MATTER OF: :

7 TBM Holdings, LLC: Case # 16-PR0-00076 :

8 t/a Driftwood Kitchen :

9 400 H Street NE :

10 License #86210 :

11 Retailer CR ANC 6C :

12 Application to Renew the Lic :

13 -- - - - -X

14 Wednesday, November 2, 2016

15

16 Whereupon, the above-referenced matter
17 came on for hearing at the Alcoholic Beverage
18 Control Board, Reeves Center, 2000 14th Street,
19 N.W., Suite 400S, Washington, D.C. 20009.

20

21

22

1 BOARD MEMBERS PRESENT

2 NICK ALBERTI, BOARD MEMBER

3 JAMES SHORT, BOARD MEMBER

4 MIKE SILVERSTEIN, BOARD MEMBER

5 JAKE PERRY, BOARD MEMBER

6 MAFARA HOBSON

7

8 ALSO PRESENT:

9 ANDREW SHULMAN

10 KRISTIN MARKHAM

11 KALEY WILLIAMS

12 ANDREW SHULMAN

13 TOBY CICCO

14

1 P R O C E E D I N G S

2 [9:36 A.M.] PROTEST HEARING (STATUS)

3 CHAIRPERSON ANDERSON: Good morning

4 everyone. I would like to welcome you to the

5 regularly scheduled meeting of the District of

6 Columbia Alcoholic Beverage Control Board.

7 Please note that today's calendar will be

8 conducted in accordance with the D.C. Code

9 Section 2574 of the Open Meetings Act. Today is

10 November 2, 2016. I would first like to

11 introduce members of the board today. To my far

12 right is Mr. Jake Perry, to my immediate right is

13 Mr. Nick Alberti, to my far left is Ms. Mafara

14 Hobson, to her is Mr. Mike Silverstein, and to my

15 immediate left is Mr. James Short. My name is

16 Donovan Anderson and I am the Chairman of the

17 Board. The Board has six members in attendance

18 for the conduct of business today and thus

19 constitutes a quorum.

20 I would like to mention two things before we

21 first get started. First of all, if you have

22 any electronic devices, pagers, cells phones or

1 such, please make certain that they are turned
2 off to avoid any interruption of the proceedings.

3 Second, there is a piece of paper on each
4 table. When you come forward as your case is
5 called, please take a seat at the table and
6 please sign in. This is to ensure the correct
7 spelling of your name for the record.

8 Additionally, when you introduce yourself for the
9 record, please spell your name aloud for the
10 court reporter. It is approximately 9:36 a.m.
11 and our first order of business today is a
12 protest hearing status on case #16-PRO-00076,
13 Driftwood Kitchen, license #86210. Will the
14 parties please approach and identify themselves
15 for the record, please?

16 MR. SHULMAN: Andrew Shulman, S-H-U-L-M-A-N.

17 CHAIRPERSON ANDERSON: And who are you, sir?

18 MR. SHULMAN: Pardon?

19 CHAIRPERSON ANDERSON: Who are you?

20 MR. SHULMAN: I am one of the protestants.

21 CHAIRPERSON ANDERSON: Okay.

22 MS. MARKHAM: Kristin Markham, M-A-R-K-H-A-M.

1 CHAIRPERSON ANDERSON: And you are?

2 MS. MARKHAM: A protestant as well.

3 MS. WILLIAMS: My name is Kaley Williams, K-
4 A-L-E-Y, Williams, and I am also a protestant.

5 CHAIRPERSON ANDERSON: You're a protestant?

6 MS. WILLIAMS: Yes.

7 CHAIRPERSON ANDERSON: And the licensee is
8 not here? What I'll do, and I apologize for not
9 doing this earlier but it's something I want to
10 do -- what I will do, the case was scheduled for
11 9:30 -- I will recall this case at 10:00. If
12 they're not here at 10:00, then I'll dismiss it.
13 But I know that there are some _____ issues for
14 you so I apologize for doing that, so just take a
15 seat and I'll recall the case at 10:00. I
16 normally do this for, it's not because it's a
17 protest, if you weren't here and if the licensee
18 was here, I would do the -- recall the case at
19 10:00, but I give a grace period for everyone and
20 try to be a manager then, and if I call the case
21 at 10:00 and if they're not here, then the matter
22 is dismissed and the applicant is allowed to go.

1 Just have a seat for now and I will recall.

2 CHAIRPERSON ANDERSON: I'm going to recall
3 the protest hearing for case #16-PRO-00076,
4 Driftwood Kitchen, license #86210. Will the
5 parties please approach and identify themselves
6 for the record, please? You can pull up a chair,
7 please. Will the parties please identify
8 themselves for the record, please?

9 MR. CICCICO: Toby Cicco, general manager of
10 Driftwood Kitchen.

11 CHAIRPERSON ANDERSON: Who?

12 MR. CICCICO: Cicco. C-I-C-C-O.

13 CHAIRPERSON ANDERSON: And you are the
14 general manager?

15 MR. CICCICO: Yes.

16 CHAIRPERSON ANDERSON: Do you have a letter
17 from the organization -- from the establishment
18 stating that you're authorized to represent them
19 today in this matter?

20 MR. CICCICO: I do not have the letter. I
21 didn't realize it was required for presentation.
22 I've been here for all the hearings so far.

1 CHAIRPERSON ANDERSON: Do we have anything in
2 our record? If it's not in the record -- are you
3 a member of the LLC or are you just a general
4 manager?

5 MR. CICCICO: General manager.

6 CHAIRPERSON ANDERSON: Well, I need -- if we
7 don't have it in the record I need it by the
8 close of business today that you have, that you
9 provide the agency with a letter authorizing that
10 you represent them today.

11 MR. SHULMAN: Can I ask a point of order?
12 Does that mean the previous hearings are
13 invalidated?

14 CHAIRPERSON ANDERSON: All right, can you
15 state your name for the record please?

16 MR. SHULMAN: Andrew Shulman.

17 MS. MARKHAM: Kristin Markham.

18 MS. WILLIAMS: Kaley Williams.

19 CHAIRPERSON ANDERSON: And you're
20 protestants? What is it that you're trying to
21 clarify?

22 MR. SHULMAN: I'm just asking about the

1 legality of the previous meetings, just for my
2 own edification.

3 CHAIRPERSON ANDERSON: So, what are you
4 saying, sir?

5 MR. SHULMAN: I'll withdraw the question.

6 CHAIRPERSON ANDERSON: No, you didn't say
7 anything wrong. I'm just saying tell me -- it's
8 our context that doesn't make sense, so tell me
9 what previous issues you're talking about.

10 MR. SHULMAN: Oh, the roll call hearings.

11 CHAIRPERSON ANDERSON: And who was at the
12 roll call hearing?

13 MR. SHULMAN: It was Toby and I and my ANC
14 chair.

15 CHAIRPERSON ANDERSON: So, this man was at
16 the roll call hearing?

17 MR. SHULMAN: Yes. Yeah.

18 CHAIRPERSON ANDERSON: Okay, so it's probably
19 okay because I guess he was at the roll call
20 hearing because the agency was giving him some
21 information stating that he could represent the
22 agency but the parties who are appearing in front

1 of me today I'm not familiar with them. And so,
2 when someone announces themselves, that's one of
3 the reasons why I always ask --

4 MR. SHULMAN: Sure.

5 CHAIRPERSON ANDERSON: -- when I asked you
6 earlier who are you -- so therefore, the next
7 question I can ask is okay, now that we know who
8 you are then I can look through the record that I
9 have in front of me that says that you're the
10 owner, or you're not the owner, if your name is
11 not in front of me, then I'm going to say, "well,
12 since you're not the owner, did someone from the
13 establishment inform us that you're going to be
14 here today to represent them.

15 MR. SHULMAN: Got it.

16 CHAIRPERSON ANDERSON: So, I guess what
17 you're saying is that he was a person who has
18 been in front of the agency, so my assumption is
19 that someone has provided information to the
20 agency that he is authorized to represent them.

21 MR. SHULMAN: Got it.

22 CHAIRPERSON ANDERSON: It is my understanding

1 that one of the preliminary matters in the case
2 is that at the roll call hearing that the
3 protestants, the group of five or more, the
4 protestants had to establish standing. In order
5 for the protestants to establish standing if it's
6 five or more we need to have a combination of
7 five people appear either at the roll call or at
8 this hearing today. Now, I see there are three
9 people here today from the group of five or more
10 and can I --who was at the roll call hearing?

11 MR. SHULMAN: There were two.

12 CHAIRPERSON ANDERSON: And what's the name of
13 the two people?

14 MR. SHULMAN: Chris Miller and Andrew
15 Shulman.

16 CHAIRPERSON ANDERSON: And who is here today?

17 MR. SHULMAN: Kaley Williams and Kristin
18 Markham.

19 CHAIRPERSON ANDERSON: And so, therefore,
20 five -- we didn't have five representatives from
21 -- between the protest and the roll call today.

22 MR. SHULMAN: It was my understanding that we

1 only needed to have three people here today to
2 add up to the total five.

3 CHAIRPERSON ANDERSON: But you don't have
4 three people here -- it has to be five separate
5 people, so you could have had two people at the
6 roll call and three today but it can't be -- the
7 three who are here today -- it couldn't be the
8 two people who were at the roll call hearing.
9 So, either all five -- it had to be a combination
10 of five different people. And pursuant to 1601.5
11 a protestant group of five or more representative
12 of property owners of the district, share common
13 ground or in a moratorium zone established by 25-
14 351, a group of no fewer than three residents or
15 property owners within -- and -- five or more
16 individuals of the group have appeared at either
17 the roll call hearing or at a previous status
18 hearing. This says pursuant to 1603.2, at least
19 five individuals of the group of five or more
20 individuals must be persons at either the roll
21 call hearing or the protest status hearing. So
22 that's the regulation. 1605.1 it says that five

1 or more -- so it has to be a combination of five
2 different people and that's one of the reasons
3 why I'm asking the names of who, so if you have
4 three people here today and two separate people
5 showed up at the roll call, then that's five.
6 But because you did not have -- you don't have
7 five people and you were granted standing, it has
8 to be five or more, and those five people have to
9 show up, and we do not have that. And with that
10 said, the recommendation -- do you have any
11 comments on that, sir?

12 MR. SHULMAN: Yeah, that was not clear to me
13 at the roll call hearing. I had letters of
14 delegation from all six -- excuse me -- for all
15 of the other individuals involved in the protest
16 delegating their authority to me that I turned in
17 at the roll call hearing and if you look in the
18 record it should have that. If we needed five
19 separate people, then I guess I did the math
20 wrong, I would still ask for a continuation or an
21 extension to demonstrate the standing as the
22 record shows we were here at 9:30 and the

1 business owner wasn't. We weren't given a chance
2 to talk about that, but that's fine. If the
3 licensee doesn't have standing, even attend the
4 hearing, and they're getting an extension, we
5 would ask that we be received -- given the same
6 opportunity to demonstrate standing. My other
7 protestants are out of town this week. I can
8 check with them and see when they get back to
9 demonstrate standing. Would the board agree to
10 that since we're --

11 CHAIRPERSON ANDERSON: The regulations are
12 clear, sir. You have two chances for the five
13 people to show up. So, the regulations are
14 saying at the roll call, you know, all five
15 people either show up at roll call or a
16 combination of five needs to be at the status
17 hearing. So, you have two chances for the five
18 people, so, therefore, all you had -- you had
19 three people here today, which is fine. If you
20 had two separate people -- if you had two
21 different people at the roll call hearing you'd
22 be fine. But you have not had five -- you have

1 had two hearings and you have not had five
2 separate people, so --

3 MR. SHULMAN: Can we reschedule the status --
4 this status hearing at a date where the business
5 can provide the appropriate documentation to show
6 their authority and we can have another person
7 physically here?

8 CHAIRPERSON ANDERSON: I don't think that --
9 I don't believe that I have -- that the board can
10 do that.

11 MR. SHULMAN: The board can't reschedule the
12 status hearing? It was rescheduled once. It was
13 originally in September but then we were going to
14 run a test of the proposal as part of a voluntary
15 settlement agreement, part of the mediation, part
16 of the negotiations, we were going to run a test.
17 So, we had a status hearing that got pushed out
18 to today, so the status hearing was -- it's been
19 rescheduled -- can we not --

20 CHAIRPERSON ANDERSON: Who requested that the
21 status hearing be rescheduled?

22 MR. SHULMAN: The both of us. It was the

1 protestants and it was the business. We both
2 agreed to be rescheduled for the status.

3 CHAIRPERSON ANDERSON: So, are both parties
4 asking that this matter be rescheduled?

5 MR. SHULMAN: Toby?

6 MR. CICCICO: No.

7 MR. SHULMAN: So.

8 MR. SHORT: What is the answer? Can you
9 speak up for the record?

10 CHAIRPERSON ANDERSON: He said no, I heard
11 it. He said no.

12 MR. PERRY: Mr. Chairman, I see there are two
13 new board members. Would it be possible for us
14 to move to the back of the room to look through
15 all the information?

16 CHAIRPERSON ANDERSON: As chairperson of the
17 Alcoholic Beverage Control Board for the District
18 of Columbia and in accordance with Section 405 of
19 the Open Meetings Amendment Act of 2010, I move
20 that the ABC Board hold a closed meeting for the
21 purpose of seeking legal advice from our counsel
22 on case #16-PRO-PRO00076, Driftwood Kitchen, per

1 section 405-B of the Open Meetings Amendment Act
2 of 2010. Is there a second?

3 MR. SHORT: Second.

4 CHAIRPERSON ANDERSON: Mr. Short has seconded
5 the motion. I will now take a roll call vote on
6 the motion before us now that it has been
7 seconded.

8 CHAIRPERSON ANDERSON: Mr. Perry?

9 MR. PERRY: I agree.

10 CHAIRPERSON ANDERSON: Mr. Alberti?

11 MR. ALBERTI: I agree.

12 CHAIRPERSON ANDERSON: Mr. Short?

13 MR. SHORT: I agree.

14 CHAIRPERSON ANDERSON: Mr. Silverstein?

15 MR. SILVERSTEIN: I agree.

16 CHAIRPERSON ANDERSON: Ms. Hobson?

17 MS. HOBSON: I agree.

18 CHAIRPERSON ANDERSON: Mr. Anderson? I
19 agree. As it appears that the motion has passed,
20 I hereby give notice that the ABC Board will hold
21 this closed meeting in the ABC conference room
22 pursuant to the Open Meetings Amendment Act where

1 we will discuss this matter and we will be back.

2 Thank you.

3 [Off the record.]

4 [On the record]

5 CHAIRPERSON ANDERSON: We are back on the
6 record. The first issue -- the group of five or
7 more has requested a continuance of the status
8 hearing, and the licensee does not agree to grant
9 them an extension -- I'm sorry, a continuance.
10 So, I, then make a motion to the board that we
11 deny this request. Is there a second?

12 MR. SHULMAN: Can I make a comment before
13 that decision is rendered?

14 CHAIRPERSON ANDERSON: Go ahead.

15 MR. SHULMAN: So, I have here an e-mail from
16 Imani Morland on July 21, 2016. I will forward
17 the e-mail to whoever I need to. In there it
18 says "failure of an applicant or a protestant to
19 appear at the status hearing or the protestant
20 hearing will subject the application -- the
21 application or protest -- to dismissal at
22 discretion of the board. So, you all have the

1 ability to decide. Further, in the e-mail it
2 says, talking about the status hearing, "if the
3 requisite number of individuals is not present
4 the board may dismiss the protest, or may --"

5 CHAIRPERSON ANDERSON: That's not the vote
6 I'm making sir. The first thing that you have
7 asked me to continue the matter, and so we're
8 voting on whether or not we're going to continue
9 the matter. I'm going to address that issue
10 also.

11 MR. SHULMAN: Okay.

12 CHAIRPERSON ANDERSON: So, the first vote
13 that was seconded, all in favor say aye. (Chorus
14 of ayes.) Those opposed? (No audible response.)
15 The matter passed 6-zero-zero. So, therefore,
16 we're not going to do a continuance. The second
17 issue, that's a separate issue. The second issue
18 is whether or not you have had the
19 representatives of five or more. I'm reading
20 from the transcript of the roll call hearing and
21 this is what you were specifically told at the
22 roll call vote.

1 At the point of the status hearing the boards
2 need to have seen at least five faces. So, you
3 are here today, so for the status hearing bring
4 three people from your group that were not here
5 today. That was the information -- I'm reading
6 the transcript from the status hearing that you
7 were specifically informed at the status hearing
8 that you had to bring three people today in the
9 group who were not there to comply with the law.
10 The law says -- this is not -- this is not the
11 discretion -- the law says that the regulations I
12 quoted earlier 1605.1, says that between a
13 combination of the status hearing and the roll
14 call hearing five people must show up, and you
15 were also advised that you have to bring three
16 people from your group that did not show up at
17 the status hearing. So, therefore it is not a
18 matter of it's being the board discretionary.
19 This is what our rules say that we operate by.
20 And so, with that said, do you have any other
21 comments to make?

22 MR. SHULMAN: Yes. The e-mail from my

1 position -- the e-mail that I received from Imani
2 Morland --

3 CHAIRPERSON ANDERSON: -- all right --

4 MR. SHULMAN: -- speaks differently because
5 it says that you all have discretion.

6 CHAIRPERSON ANDERSON: To do what, sir?

7 MR. SHULMAN: To dismiss or to not dismiss
8 the protest or the applicant.

9 CHAIRPERSON ANDERSON: Well, but --

10 MR. SHULMAN: From what I'm hearing, you're
11 going to dismiss the protest, right?

12 CHAIRPERSON ANDERSON: This is the issue,
13 sir. In order to go to court you have to prove
14 that you have standing. And so -- we're not
15 talking about whether or not your case has merit.
16 It's whether or not you have standing. And so,
17 therefore, the basic threshold to go to court;
18 for example, there are some courts that if you
19 sue someone you have to sue them for \$25,000. If
20 you sue them for \$24,599, the court will dismiss
21 the matter because it says that the threshold to
22 get into court is that the matter has to be

1 \$25,000. And where you are today the law says
2 that in order for us to move forward with this
3 matter is that you have to have five people,
4 because you got standing because you came to the
5 board and said that there's at least five of us
6 in the community who have a problem with this
7 matter. And so, what we're saying to you, I
8 don't want you to tell me that there are five
9 people out there. I want you to show me who the
10 five people are and I'm giving you two
11 opportunities to show up with five people.

12 That's all we're -- and so, therefore, if you
13 had brought five people at the roll call we
14 wouldn't have this issue today. If you had
15 brought -- pursuant to what you were told -- if
16 you had brought three people today who were not
17 part of your group, we wouldn't have this
18 conversation. So, the board -- there are rules -
19 - I'm not being unfair to you, and I know you
20 said before that you were here at 9:30. This is
21 my matter, the matter starts at 9:30 but we give
22 it the common courtesy, so what I've done, is you

1 weren't here at 9:30, I would have waited until -
2 - I would recall the case because this is a
3 serious matter, so I'm not going to say -- you
4 could be stuck in traffic or anything could
5 happen, so, therefore, as a courtesy I gave for
6 all parties, if the case is to start at 9:30 I
7 try to be here at 9:30 and if you're not here at
8 9:30, number one, I give you half an hour, go on
9 with my calendar, I call the case, and if you're
10 not here, then it's dismissed.

11 So, I was not being unfair to you by giving
12 him the common courtesy, because I think that it
13 was scheduled for 9:30 and I think he probably
14 showed up about 9:45 or 9:46. I don't why he's
15 late, but that was within -- and if he was not
16 here I still would have dismissed -- I still
17 would have dismissed your protest because you did
18 not -- you were told at the roll call hearing
19 that you were given conditional standing. Do you
20 know what that means?

21 MR. SHULMAN: So, yes we understand that the
22 requisite number of people were not shown. We

1 understand that. But, for the record, the e-mail
2 says you all have discretion. Also --

3 CHAIRPERSON ANDERSON: Discretion in what?

4 MR. SHULMAN: To dismiss -- it says to
5 dismiss the license application or to dismiss the
6 protest. It says you have discretion, and what I
7 am sensing is that you are using your discretion
8 to dismiss the protest and I would ask that you
9 use your discretion to not dismiss the protest,
10 to make a decision as a board, which at least
11 this e-mail says you can, and I think that's
12 fair. If we even go back to the roll call --
13 let's get legal here -- if we even go back to the
14 roll call hearing, where I -- where the
15 protestants presented conditional standing.

16 There were the two people who were here and
17 all of the delegation letters that I submitted
18 that granted me authority to appear on their
19 behalf. This gentleman was at that roll call
20 hearing. You, at the start of this hearing,
21 asked him for a document saying that he has
22 approval to justify the standing as the

1 applicant. That was not submitted at the roll
2 call hearing. There was no legal documentation
3 justifying that. So if we go back then this
4 should have been dismissed at the roll call
5 hearing, because there was a protest, we
6 demonstrated conditional standing, the applicant
7 didn't demonstrate conditional standing through
8 that letter of authority, so I --

9 CHAIRPERSON ANDERSON: But I don't know that,
10 sir. I just --

11 MR. SHULMAN: You have the record, though.

12 CHAIRPERSON ANDERSON: Sir. I --

13 MR. SHULMAN: Can I ask Mr. Alberti's opinion
14 on the matter?

15 CHAIRPERSON ANDERSON: Sir -- sir -- sir.
16 I'm the chairman of the board.

17 MR. SHULMAN: I am --

18 CHAIRPERSON ANDERSON: I'm sorry.

19 MR. SHULMAN: Okay.

20 CHAIRPERSON ANDERSON: I'm the chairman of
21 the board and so, therefore, I'll call and ask
22 people who I need to speak. Although we're all

1 equals, and I'm sorry, you're not going to say to
2 ask any board what their opinion is.

3 MR. SHULMAN: Okay.

4 CHAIRPERSON ANDERSON: So, we're going to
5 move on. The motion is -- this is the motion.
6 The motion is we're not going to grant you
7 standing and dismiss your -- dismiss the
8 protestant because they have failed to establish
9 standing at these proceedings. Is there a
10 second?

11 MR. SHORT: Second.

12 CHAIRPERSON ANDERSON: Mr. Short has seconded
13 the motion. Those in favor say aye. (Chorus of
14 ayes.) Those opposed? (No audible response.)
15 The matter passed 6-zero-zero. We will issue a
16 decision today. You have ten days to appeal this
17 matter, to tell us why it is that you believe
18 that the decision the board made today is in
19 error. Thank you.

20 MR. ALBERTI: May I make a comment?

21 CHAIRPERSON ANDERSON: Yes, Mr. Alberti.

22 MR. ALBERTI: So, first of all, since you

1 asked for my opinion I fully support the decision
2 of the board on this matter. But aside from
3 that, what I wanted to say to you is I understand
4 that one of your issues is that you believe the
5 licensee is not abiding by the current settlement
6 agreement.

7 MR. SHULMAN: That's not the issue at hand,
8 if I may.

9 MR. ALBERTI: Okay, well that's the key issue
10 I think we've heard in some of your letters and
11 communications to us. If that's not the issue,
12 then I won't make my offer which is to make sure
13 that our enforcement staff looks into this
14 matter, so if that's not an issue for you then I
15 won't make that offer.

16 MR. SHULMAN: Can you -- can you -- can you --
17 - can I ask --

18 CHAIRPERSON ANDERSON: I'm sorry, sir, the
19 matter is over. Thank you very much. We're
20 moving on with our calendar.

21

22 (Whereupon, the above-entitled matter was
23 concluded.)

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