

**THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD**

In the Matter of:)		
)		
Daci Enterprises, LLC)	Case No.:	N/A
t/a Dacha Beer Garden)	License No.:	092773
)	Order No:	2015-376
Holder of a)		
Retailer's Class DT License)		
)		
at premises)		
1600 7th Street, N.W.)		
Washington, D.C. 20009)		

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Mike Silverstein, Member
Hector Rodriguez, Member
James Short, Member

ALSO PRESENT: Daci Enterprises, LLC, t/a Dacha Beer Garden, Applicant

Andrew Kline, Counsel, of the Veritas Law Firm, on behalf of the Applicant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

**ORDER FINDING SUBSTANTIAL CHANGE AND SUMMARILY DENYING THE
APPLICATION FOR A CHANGE OF HOURS**

INTRODUCTION

Daci Enterprises, LLC, t/a Dacha Beer Garden (hereinafter, "Dacha" or "Applicant") has requested that the Alcoholic Beverage Control Board (Board) approve a change in the occupancy of the premises to 600 persons, but in the interim allow Dacha to automatically change its

occupancy from 126 persons to 190 persons.¹ *Letter from Andrew J. Kline, Counsel to the Alcoholic Beverage Control Board*, 1-2 (Mar. 9, 2015) [*Mar. 9 Letter*]; *Letter from Andrew J. Kline, Counsel to the Alcoholic Beverage Control Board*, 1 (Jun. 29, 2015) [*June 29 Letter*]. Dacha also requests that the Board placard its request to extend its hours to 2:00 a.m. and 3:00 a.m. *Mar. 9 Letter*, 1. The Applicant requested reconsideration and clarification of the Board's decision to deny the request, which was announced before the issuance of this Order. *Jun. 29 Letter*, 1.

The Board issues the following Order affirming and clarifying its vote to deny the request. First, the Board deems Dacha's request to expand the occupancy of the premises a substantial change and consolidates the request to automatically change its occupancy from 126 to 190 persons with its preexisting request for an occupancy of 600 persons. Second, the Board summarily denies Dacha's request to expand its hours, because the request conflicts with § 1 of its Settlement Agreement.

FINDINGS OF FACT

The Board makes the following findings of fact:

I. Facts Related to Dacha's Occupancy.

1. The Board takes administrative notice of the following documents in ABRA Licensing File No. 92773:
 - a. The Applicant filed an initial Application for a New Retailer's Class DT License (Application) on June 21, 2013. *ABRA Application*, ABRA License No. 192773 (Submitted Jun. 21, 2013) [*June 2013 ABRA Application*]. Dacha indicated that it was applying for license approval before the issuance of a Certificate of Occupancy under § 405. *Id.* (Question 5); 23 DCMR § 405 *et. seq.* (West Supp. 2015). Dacha indicated in the Application that the "Total Occupancy Load" would be "190." *June 2013 ABRA Application* (Question 7a).
 - b. The Applicant filed a revised Application on July 10, 2013. The new "Total Occupancy Load" was "184" and initialed by Illya Alter, one of the managing members. *ABRA Application*, ABRA License No. 192773 (Submitted Jul. 10, 2013) (Question 7a).
 - c. Illya Alter, one of Dacha's owners, sent an email to ABRA's Licensing Division on July 10, 2013, which stated "[p]lease find attached . . . the ABRA Application form with Total Capacity field filled in." *Email from Illya Alter to Betty Harper*,

¹ For the purposes of this Order, the 190 figure does not include the 30 seat sidewalk café, which together would give Dacha an overall total capacity of 220.

Alcoholic Beverage Regulation Administration (Jul. 10, 2013). “Our total capacity will be 184.” *Id.*

- d. The Notice of Public Hearing posted on July 26, 2013 indicated a total occupancy load of 190. *Notice of Public Hearing*, ABRA License No. 092773 (Jul. 26, 2013).²
- e. The Certificate of Occupancy issued on August 23, 2013, and submitted by Dacha on August 23, 2013, as part of its Application, indicates that the premises have an “Occupant Load” of “126” people. *Department of Consumer and Regulatory Affairs, Certificate of Occupancy*, Permit No. CO1303075 (Aug. 23, 2013).
- f. The Board issued a stipulated license to Dacha for a Retailer’s Class DT License with a “Capacity” of “126,” which was issued on September 10, 2013. *Dacha Beer Garden—Stipulated License*, ABRA License No. 092773 (Sept. 10, 2013) (No. 013208) (copy of stipulated license).
- g. The Board issued a full Retailer’s Class DT License to Dacha on October 9, 2013. *Dacha Beer Garden*, ABRA License No. 092773 (Oct. 9, 2013) (copy of license). The license indicated that Dacha had a capacity of “126.” *Id.*
- h. The Board issued a second license to Dacha on May 22, 2014, with a capacity of “126.” *Dacha Beer Garden*, ABRA License No. 092773 (May 22, 2014) (copy of license).
- i. The Board issued a third license to Dacha on March 16, 2015, with a capacity of “126.” *Dacha Beer Garden*, ABRA License No. 092773 (Mar. 16, 2015) (copy of license).

II. Dacha’s Settlement Agreement

2. The Board approved an amendment to the Applicant’s Settlement Agreement on May 21, 2014. *In re Daci Enterprises, LLC, t/a Dacha Beer Garden*, Board Order No. 2014-226 (D.C.A.B.C.B. May 21, 2014). The new agreement provides the following restriction in § 1: “The establishment’s hours of operation shall not exceed the following: Monday-Thursday, 7:00 AM to 10:30 PM; Friday, 7:00 AM to 11:59 PM; Saturday, 7:00 AM to 11:59 PM; Sunday, 7:00 AM to 10:30 PM. On Holidays, hours shall not exceed 7:00 AM to 11:59 PM.” *Id.*, *Amendment to Agreement Between DACI Enterprises, LLC t/a Dacha Beer Garden and Advisory Neighborhood Commission 6E*, § 1 [*Amended Settlement Agreement*].

² The file does not indicate whether Dacha amended the 184 figure before placarding.

CONCLUSIONS OF LAW

3. The Board deems the request to expand the occupancy of the premises a substantial change based on the initial Certificate of Occupancy submitted as part of Dacha's initial application. The Board further summarily denies the request to extend the establishment's hours, because the request conflicts with § 1 of Dacha's Settlement Agreement.

I. DACHA'S REQUEST FOR INCREASED OCCUPANCY CONSTITUTES A SUBSTANTIAL CHANGE BASED ON THE CERTIFICATE OF OCCUPANCY SUBMITTED AS PART OF ITS INITIAL APPLICATION.

4. The Board deems Dacha's request to expand the occupancy of the premises to 190 persons a substantial change in accordance with § 25-762, because the request represents an increase in the occupancy figure provided in the Certificate of Occupancy provided by Dacha as part of its initial application.

a. Dacha's initial application "set forth" an occupancy of 126 people.

5. Section 25-762(a) 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."

D.C. Official Code § 25-762(a) (emphasis added). Under § 25-762(a), in order to determine whether a change is substantial, the Board must examine whether the request represents a significant departure from the initial application. *Id.* In examining the initial application, the Board looks at the application itself and any supporting documentation submitted as part of the application, which includes the Certificate of Occupancy.

6. In this case, Dacha included a Certificate of Occupancy with its initial application for licensure that indicated the premises had an occupancy load of 126 persons. *Supra*, at ¶ 1(a), (e). Subsequently, the Board issued Dacha various licenses between 2013 and 2015 that indicated the establishment had an occupancy of 126. *Supra*, at ¶ 1(f)-(i).³ Consequently, the Board's records indicate that Dacha "set forth" an initial occupancy of 126 people based on the Certificate of Occupancy submitted as part of its initial application.

³ The length of time that Dacha has operated with a capacity of 126 also raises a question as to whether Dacha forfeited any claims related to its initial application and the initial grant of licensure. *See e.g., Bliss v. Bliss*, 81 F.2d 411, 414 (D.C. Cir. 1935); ("courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them."); *Mercer v. United States*, 724 A.2d 1176, 1182 (D.C. 1999) ("To be considered timely, an objection must permit the court to take appropriate and effective corrective action.") (quotation marks removed).

b. The Board's interpretation of § 25-762 is supported by the clear language of § 25-762

7. The Board determination that Dacha “set forth” an initial occupancy of 126 people based on the Certificate of Occupancy submitted on August 23, 2013, is supported by the clear language of § 25-726. *Supra*, at ¶ 1(e).

8. An agency's interpretation of a statute is governed by the two-part *Chevron* test. *Pannell-Pringle v. D.C. Dep't of Employment Servs.*, 806 A.2d 209, 211 (D.C. 2002) *citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The threshold question under *Chevron* is whether the statute is clear. *Id. citing Columbia Realty Venture v. District of Columbia Rental Housing Comm'n*, 590 A.2d 1043, 1046 (D.C.1991). If so, then the plain language of the statute governs its interpretation. *Id.* If not, the agency must simply provide a “reasonable” interpretation of the ambiguous statute to have its interpretation upheld. *Id. citing Chevron*, 467 U.S. at 842-43.

9. It has been said that in interpreting a statute, the words used by the statute should be given their ordinary and common meaning. *District of Columbia v. Cato Institute*, 829 A.2d 237, 240 (D.C. 2003). Black's Law Dictionary indicates that the term “set forth” means “set out,” which means “[t]o recite . . . or incorporate (facts or circumstances).” *Black's Law Dictionary* (10th ed. 2014) (see the definitions for “set forth” and “set out”). Because the phrase “set forth” may mean “incorporate,” the Board finds it reasonable to incorporate or make any supporting documentation and licenses submitted with the application part of the “initial application” under § 25-762.⁴ Therefore, when an applicant, such as Dacha, submits a Certificate of Occupancy with its application, the Certificate of Occupancy is part of the “initial application” described in § 25-762(a), and may be relied upon to determine if a request qualifies as a substantial change.

c. Dacha's request to increase the occupancy to 190 persons from 126 persons constitutes a substantial change.

10. The Board further determines that Dacha's request qualifies as a substantial change under § 25-762(b)(1).

11. Under D.C. Official Code §§ 25-762(b) and 25-762(b)(1), “[i]n 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 . . . [i]ncrease the occupancy of the licensed establishment or the use of interior space not previously used” D.C. Official Code § 25-762(b), (b)(1).

⁴ This interpretation is also supported under a holistic reading of Title 25, which makes the Certificate of Occupancy an important part of determining whether the applicant complies with the law, qualifies for approval or issuance of the license, or otherwise qualifies for certain privileges. D.C. Official Code §§ 25-101(43)(A)(x), 25-113(b)(B)(i)(I), 25-113(b)(B)(ii)(I); 25-113(e)(5)(B)(i)(I), 25-113(e)(5)(B)(ii)(I), 25-303(c)(4), 25-311(c), 25-314(b)(1), 25-331(d)(4), 25-332(c)(4); 23 DCMR §§ 208.10-208.11, 404.1-404.2, 405.1, 405.3(a), 1002.4 (West Supp. 2015).

12. In this case, at the time of issuance, the maximum capacity of the premises as determined by the Certificate of Occupancy was 126. *Supra*, at ¶ 1(e)-(i). Dacha now requests a capacity of 190 persons. *Mar. 9 Letter*; *Jun. 29 Letter*. An increase in occupancy is specifically listed in § 25-762(b)(1) as an issue of concern; therefore, the Board determines that the request constitutes a substantial change under § 25-762.

d. The Board is not persuaded by Dacha's position that it is entitled to an occupancy of 190 persons as a matter of right.

13. Dacha argues that it is entitled to a capacity of 190, because the Board previously approved the request an occupancy for 190 in 2013. *June 29 Letter*, 1.⁵ This is incorrect. As noted above, the determination that Dacha is seeking a substantial change is based on the Certificate of Occupancy submitted with its initial application, not its initial estimate of capacity provided by the licensee in the Application or the public notice published by ABRA advertising the application. *Supra*, at ¶¶ 1(a)-(b), (d), 4-6. While the Board may consider the presence of these figures in the application and public notice as part of its determination that a change represents a potential concern, the fact that Dacha operated for two years under the 126 figure persuades the Board that Dacha's current request for increased occupancy is a significant change in the nature of the operations that merits public notice and comment.

14. Therefore, the Board denies Dacha's request to increase its occupancy without placarding the substantial change.

II. THE BOARD SUMMARILY DENIES DACHA'S REQUEST FOR INCREASED HOURS BECAUSE IT VIOLATES THE SETTLEMENT AGREEMENT.

15. The Board also summarily denies Dacha's request to extend its hours because the request violates § 1 of the Settlement Agreement. The Board further rejects Dacha's contention that § 25-446.02(E) prevents the enforcement of § 1, because such an interpretation contradicts preexisting precedent at the time of enactment that influenced the drafting of § 25-446.02(E); nullifies § 25-446.01(7); and creates a conflict between §§ 25-446.01(7) and 25-446.02(E).

a. The plain language of the agreement prevents Dacha from extending its hours beyond the hours stipulated in the agreement.

16. Section 1 of the Settlement Agreement states that "[t]he establishment's hours of operation shall not exceed the following: Monday-Thursday, 7:00 AM to 10:30 PM; Friday, 7:00

⁵ The Board's decision related to Dacha's capacity did not rest on the Settlement Agreement; therefore, Dacha's argument on this ground is moot. *Letter from Andrew J. Kline, Counsel to the Alcoholic Beverage Control Board*, 1 (Jun. 29, 2015). The settlement agreement provision that limits Dacha to seated capacity of 100 does not prevent the establishment increasing its general occupant load, which is a separate from the establishment's seating capacity. *Amendment to Agreement Between DACI Enterprises, LLC t/a Dacha Beer Garden and Advisory Neighborhood Commission 6E*, § 12.

AM to 11:59 PM; Saturday, 7:00 AM to 11:59 PM; Sunday, 7:00 AM to 10:30 PM. On Holidays, hours shall not exceed 7:00 AM to 11:59 PM.” *Supra*, at ¶ 2.

17. The Board is obligated to enforce Dacha’s Settlement Agreement. D.C. Official Code § 25-446(c), (e). Dacha’s Settlement Agreement is akin to a contract; therefore, the Board relies on principles of contract law to interpret it. *North Lincoln Park Neighborhood Ass’n v. District of Columbia Alcoholic Beverage Control Bd.*, 727 A.2d 872, 875 (D.C. 1999); *see also Letter from Peter J. Nickles, Attorney General, Office of the Attorney General of the District of Columbia, to Fred Moosally, General Counsel, Alcoholic Beverage Regulation Administration*, 3-4 (Dec. 18, 2008). Accordingly, the Board generally construes a settlement agreement “within its four corners and generally . . . enforce[s] it as written.” *Prince Const. Co., Inc. v. District of Columbia Contract Appeals Bd.*, 892 A.2d 380, 385 (D.C. 2006). The court has further instructed that “[i]f the document is facially unambiguous, its language should be relied upon as providing the best objective manifestation of the parties’ intent.” *1010 Potomac Associates v. Grocery Manufacturers of Am., Inc.*, 485 A.2d 199, 205 (D.C. 1984).

18. In this case, the language of § 1 is “facially unambiguous”; Dacha’s hours cannot exceed the hours stated in the Settlement Agreement. Dacha argues that the Board should consider the fact that the establishment is expanding into a new space that did not exist at the time the agreement was executed.⁶ Nevertheless, the Board disagrees with this one-sided and self-serving interpretation that seeks to add exceptions to the agreement that were not agreed upon by the parties. *N. Lincoln Park Neighborhood Ass’n, v. D.C. Alcoholic Beverage Control Bd.*, 727 A.2d 872, 875 (D.C. 1999) (“Once entered, the agreement between the parties becomes the law of the case, and its terms may not be enlarged or diminished by the court, for to do so would be to create a new stipulation to which the parties have not agreed.”)⁷ Instead, it is clear from the language of § 1 that the parties agreed to limit the hours of the establishment, regardless of any unilateral changes Dacha makes to the establishment.

19. As a result, pursuant to § 1 of the agreement, Dacha may not obtain hours that exceed the hours listed in the agreement; therefore, Dacha’s request is summarily denied.

⁶ Even if the Board were inclined to credit Dacha’s argument, it is questionable whether the Board could even adopt Dacha’s proposed interpretation without violating the due process rights of the other party to the agreement or triggering a contested case. 23 DCMR § 1903.1 (West Supp. 2015) (“Any request filed with the Board that involves an existing voluntary agreement shall be considered a contested case by the Board . . .”).

⁷ Similar to our decision in *Madam’s Organ*, Dacha also “. . . does not highlight any plain language in the text that support its position; does not point to any ambiguities, conflicts, or other provisions that alter the common understanding of the words used in § [1]; does not demonstrate a need to resort to extrinsic evidence; or otherwise present credible evidence that both parties agreed to the interpretation advanced by [Dacha].” *In re 2461 Corporation, LLC, t/a Madam’s Organ*, Case No. 14-CMP-00325, Board Order No. 2015-360, ¶ 4 (D.C.A.B.C.B. Jul. 29, 2015).

b. Section 25-446.02(E) does not prohibit the parties from capping Dacha's hours.

20. The Board further disagrees with Dacha's argument that D.C. Official Code § 25-446.02(E) prevents the enforcement of § 1 of the agreement.

21. In this case, in determining whether § 1 of Dacha's Settlement Agreement is enforceable, the Board must consider D.C. Official Code §§ 25-446.01(7) and 25-446.02(E). First, § 25-446.01(7) states that "[a] settlement agreement enforceable by the Board under this subchapter may include: . . . [r]estrictions on hours of operation and sales and service for a new or existing licensee's facilities." D.C. Official Code § 25-446.01(7). In contrast, § 25-446.02(E) states that unenforceable provisions include "[r]equirements that prohibit the licensee from applying for changes to licensed operation procedures, including . . . changes of hours." D.C. Official Code § 25-446.02(E).

22. Since these statutes were enacted, the Board has interpreted these potentially conflicting provisions as prohibiting a settlement agreement from barring the submission of an application, but not preventing the agreement from otherwise barring the licensee from ultimately obtaining or utilizing the applied for privilege, such as later hours or entertainment. The Board affirms this narrow reading of 25-446.02(E), because it is reasonable to presume that the Council merely intended to codify the Board's prior interpretation of § 25-446 in *Café Eagle*; it avoids rendering parts of Title 25 superfluous; and it prevents the creation of a conflict between §§ 25-446.01(7) and 25-446.02(E).

i. Section 25-446.02(E) merely adopts the Board's holding in Café Eagle.

23. First and foremost, the enactment of §§ 25-446.01 and 25-446.02 must be understood in light of the Board's interpretation of § 25-446 at the time of their enactment.

24. Under commonly accepted rules of statutory construction,

[i]n ascertaining the legislative intent in the enactment of a statute, the state of the law prior to its adoption is given consideration. Thus, in the interpretation of a statute, it is proper to look to the origin of the act or of the section being construed, or to the sources from which it was derived. It is also a general rule of interpretation to assume that the legislature in the enactment of a statute was aware of established rules of law applicable to the subject matter of the statute. Upon enactment, the statute becomes a part of, and is to be read in connection with, the whole body of the law. Interpretation of a word or phrase in a statute requires consulting any precedents or authorities that inform the analysis.

73 Am. Jur. 2d Statutes § 91 (footnotes removed).

25. In this case, at that time of enactment, the Board, in *Café Eagle*, had previously rejected a settlement agreement provision that would have barred the licensee from "seek[ing] an entertainment endorsement" *In re Café Eagle, LLC, t/a Café Eagle*, Case No. 10-PRO-00181, Board Order No. 2012-347, ¶¶ 10, 25 (D.C.A.B.C.B. Sept. 12, 2012). The Board rejected

the provision because the agreement required the Board to punish the licensee any time it “. . . tries to obtain an entertainment endorsement; which [includes] negotiating [an amendment;] applying for an entertainment endorsement, and . . . applying to terminate or amend the Agreement under § 25-446(d)(2).” *Id.* at ¶ 27. The Board was also concerned that punishing the licensee for seeking a change to its license risked running afoul of the First Amendment on overbreadth grounds and violating the Petition Clause of the First Amendment. *Id.* at ¶ 27 n. 3; *see* U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . . and to petition the Government for a redress of grievances.”); *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 525 (2002) (“the right to petition extends to all departments of the Government”). The Board then advised the parties that while they could not bar the applicant from seeking entertainment, they could agree to prohibit entertainment at the establishment. *Id.* at ¶ 28.

26. There is no indication that the legislature intended to overrule the Board in *Café Eagle*. Therefore, §§ 25-446.01(7) and 25-446.02(E) should be read as merely codifying the Board’s earlier decision in that case. Therefore, as written, § 25-446.02(E) merely prevents a settlement agreement from prohibiting a licensee from engaging in the act of *applying* for a privilege, but does not prevent the agreement from barring the licensee from ultimately *obtaining* the privilege.⁸

- i. *The adoption of Dacha’s interpretation would render § 25-446.01(7) superfluous.*

27. Second, “[a] basic principle [of statutory interpretation] is that each provision of the statute should be construed so as to give effect to all of the statute’s provisions, not rendering any provision superfluous.” *Grayson v. AT & T Corp.*, 15 A.3d 219, 238 (D.C. 2011); *Baghini v. D.C. Dep’t of Employment Servs.*, 525 A.2d 1027, 1029 (D.C. 1987). If the Board allowed Dacha to unilaterally nullify § 1 by applying for and obtaining increased hours, then § 25-446.01(7) affirmative approval of hours restrictions would be rendered meaningless. Consequently, Dacha’s proposed interpretation is unreasonable.

- ii. *The adoption of Dacha’s interpretation would create a conflict between §§ 25-446.01(7) and 25-446.02(E).*

28. Third, when two statutes potentially conflict, it is critical that courts and administrative agencies attempt to “. . . reconcile them if possible.” *George Washington Univ. v. D.C. Bd. of Adjustment*, 831 A.2d 921, 943 (D.C. 2003) (quotation marks removed). Indeed, the court has stated that “. . . where one statute is not irreconcilable with another statute but both statutes can have coincident operation, the court should interpret them so that they are both effective. *George v. Dade*, 769 A.2d 760, 770 (D.C. 2001) (quotation marks removed). In this case,

⁸ This has been the Board’s interpretation since the enactment of these statutes. *Mallof v. D.C. Alcoholic Beverage Control Bd.*, 43 A.3d 916, 925 (D.C. 2012) (“We have repeatedly held that [t]he deference which courts owe to agency interpretation of statutes which they administer is, of course, at its zenith where the administrative construction has been consistent and of long standing, *and plummets substantially when those attributes are lacking.*”) (quotation marks removed). To switch interpretations now, as proposed by Dacha, would simply raise doubts regarding the validity of numerous settlement agreements that have been approved by the Board since the enactment of §§ 25-446.01 and 25-446.02, and potentially lead to the reopening of hundreds of protest cases due to parties being misled about the terms of their settlement agreement.

reading § 25-446.01(7) in isolation permits settlement agreement to restrict the hours of a licensed establishment, while § 25-446.02(E) read in isolation prohibits such restrictions. The reasonable means of reconciling these two competing statutes is to read § 25-446.02(E) narrowly so that the two provisions can have “coincident operation,” as the Board has done in this case. As a result, § 1 of the Settlement Agreement remains operational and enforceable.

ORDER

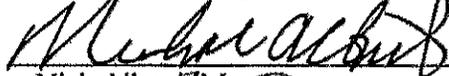
Therefore, on this 5th day of August 2015, the Board hereby **DENIES** the motion for reconsideration filed by Daci Enterprises, LLC, t/a Dacha Beer Garden.

IT IS FURTHER ORDERED that Dacha’s request to extend its hours is **SUMMARILY DENIED**.

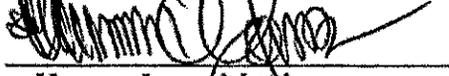
IT IS FURTHER ORDERED that the request to expand Dacha’s capacity shall be deemed a **SUBSTANTIAL CHANGE** and treated accordingly. The request shall be **CONSOLIDATED** with Dacha’s current request to expand the occupancy of the premises to 600 persons. *Mar. 9 Letter*, 1.

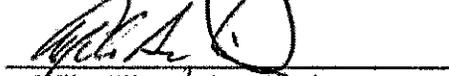
ABRA shall deliver a copy of this Order to Dacha’s counsel.

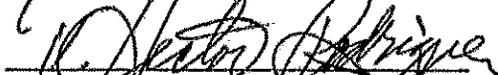
District of Columbia
Alcoholic Beverage Control Board

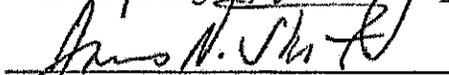

Nick Alberti, Member


Donald Brooks, Member


Herman Jones, Member


Mike Silverstein, Member


Hector Rodriguez, Member


James Short, Member

I concur with the majority decision with respect to the Licensee's request for increased occupancy. However, I respectfully dissent with respect to the Licensee's request for a change of hours.

Sections 25-446.01(7) and 25-446.02(E) appear contradictory on their face. Section 25-446.01(7) states as follows:

A settlement agreement enforceable by the Board may include:

(7) Restrictions on hours of operation and sales and service for a new or existing licensee's facilities;

§ 25-446.02(E) states as follows:

The Board shall not enforce the following provisions if included in a settlement agreement covered by this subchapter:

(E) Requirements that prohibit the licensee from applying for changes to licensed operation procedures, including applications for summer gardens, sidewalk cafes, rooftop decks, entertainment endorsements, and change of hours.

I concur with the majority that these two provisions should be construed to give effect to both. However, I construe them differently. In my view, the majority's construction of the provisions as allowing a licensee to apply to the Board for a change of hours, but automatically dismissing that change without a hearing renders § 25-446.02(E) meaningless.

Instead, I interpret § 25-446.01(7) as allowing the parties to set hours for the sale and operation of a licensed establishment, but § 25-446.02(E) as allowing for the licensee to apply to the Board for a change of hours and have its request considered as a substantial change pursuant to § 25-762. Section 25-446.02(E) applies to "licensed operation procedures." These enumerated operation procedures are all contained in § 25-762, including hours. Accordingly, it appears to me that change of hours falls in the category of those operation procedures for which the legislature intended to preserve the Board's authority to regulate, and not leave exclusive authority to the parties to a settlement agreement.

Further, § 25-446.01(7) is written with the term "may." Section 25-446.02(E) uses the term "shall." Accordingly, § 25-446.02(E) may not be subverted by § 25-446.01(7).

Finally, § 25-446.01(7) is not rendered meaningless by this interpretation. The two provisions can be read so that they both have meaning. Restrictions on hours may be negotiated and included in settlement agreements. These hours will be enforced by the Board. All the other provisions listed in § 25-446.02 may not be included in a settlement agreement and will not be enforced by the Board. At the same time, the Board retains authority to consider changes to hours pursuant to the substantial change provisions.



Ruthanne Miller, Chairperson

Pursuant to 23 DCMR § 1719.1, any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, Reeves Center, 2000 14th Street, NW, 400S, Washington, D.C. 20009.

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, 430 E Street, N.W., Washington, D.C. 20001; (202/879-1010). However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 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) (2004).