

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

_____)	
Multi-Management, Inc.)	Case Number: 13-PRO-00094
t/a Habana Village)	License Number: 024197
)	Order Number: 2014-033
Petition to Terminate a)	
Settlement Agreement)	
)	
at premises)	
1834 Columbia Road, N.W.)	
Washington, D.C. 20001)	
_____)	

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Mike Silverstein, Member

ALSO PRESENT: Multi-Management, Inc., t/a Habana Village, Petitioner

Ted Guthrie, Secretary, and William Simpson, Commissioner, on behalf of Advisory Neighborhood Commission (ANC) 1C, Protestant

Denis James, Kalorama Citizens Association, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

INTRODUCTION

The Alcoholic Beverage Control Board (Board) finds good cause to amend the settlement agreements attached to the Retailer's Class CR License held by Multi-Management, Inc., t/a Habana Village, (hereinafter "Petitioner" or "Habana Village") as follows:

- (1) Habana Village is permitted to apply for and obtain extended hours on New Year's and during daylight savings; and

- (2) Habana Village is permitted to apply for and obtain greater occupancy and use of the third floor.

The Board finds that these minor amendments to the agreements will not have a negative impact on the Adams Morgan neighborhood.

Procedural Background

Habana Village filed a timely Petition to Terminate a Settlement Agreement (Petition) requesting that the Board terminate its two Settlement Agreements entered into with Advisory Neighborhood Commission (ANC) 1C and the Kalorama Citizens Association (KCA) (collectively, the “Protestants”).¹ The Board approved the first settlement agreement on February 14, 2001. In re Habana Village Art & Folklore, Inc., t/a Habana Village & Art Folklore, Inc., Case No. 11583-00103P, 2 (D.C.A.B.C.B. Feb. 14, 2001) [*2001 Settlement Agreement*]. The Board approved the second settlement agreement on December 4, 2002, and approved an amendment to the agreement on April 8, 2009. In re Habana Village Art & Folklore, Inc., t/a Habana Village, Case No. 11583-02/119P, Board Order No. 2002-272, 2 (D.C.A.B.C.B. Dec. 4, 2002) [*2002 Settlement Agreement*]; In re Multi-Management, Inc., t/a Habana Village, Board Order No. 2009-079, 2 (D.C.A.B.C.B. Apr. 8, 2009) [*2009 Amendment to 2002 Settlement Agreement*].

The Board found that the Petition satisfied D.C. Official Code § 25-446(d)(2), because it was filed during the Petitioner’s renewal period and after four years from the date the Board originally approved the Settlement Agreements at issue in this matter. The Petition also contained the affidavit required by § 25-446(d)(5). The Alcoholic Beverage Regulation Administration (ABRA) then provided notice to the parties to the settlement agreement and the public in accordance with District of Columbia (D.C.) Official Code § 25-446(d)(3).

Subsequently, protests against the Petition were filed by the Protestants in accordance with District of Columbia (D.C.) Official Code §§ 25-601(1) and 25-602. *ABRA Protest File No.* 13-PRO-00094.

The Board recognizes that an Advisory Neighborhood Commission’s (ANC) properly adopted written recommendations are entitled to great weight from the Board. See Foggy Bottom Ass’n v. District of Columbia ABC Bd., 445 A.2d 643 (D.C. 1982); D.C. Official Code §§ 1-309.10(d); 25-609. Accordingly, the Board “must elaborate, with precision, its response to the ANC[’s] issues and concerns.” Foggy Bottom Ass’n, 445 A.2d at 646. The Board notes that it received a resolution from ANC 1C, and will satisfy the great weight requirement in the Board’s Conclusions of Law.

¹ The Board instituted a new form and new procedures related to the settlement agreement amendment and termination process during the Fall 2013 renewal period. The Board notes that these new procedures do not apply retroactively to petitions filed during the Spring 2013 renewal period, which includes the Petition filed in this matter. The Board instituted these changes in order to simplify and standardize the petition process.

The parties came before the Board's Agent for a Roll Call Hearing on July 22, 2013, and the Protestants were granted standing to protest the Petition. The parties then came before the Board for a Protest Status Hearing on September 11, 2013. The Protest Hearing in this matter occurred on October 16, 2013. Finally, at the conclusion of the hearing, the Board received Proposed Findings of Fact and Conclusions of Law from ANC 1C, which the Board considered in resolving this protest.

Based on the Protestants' initial protest letters, the Board may only grant the Petition if the Board finds that the request will not have a negative impact on peace, order, and quiet in the area located within 1,200 feet of the establishment. D.C. Official Code §§ 25-446(d)(4), 25-602; Letter from Ted Guthrie, Secretary, ANC 1C, to Ruthanne Miller, Chairperson, Alcoholic Beverage Control (ABC) Board (June 14, 2013) [ANC 1C Protest Letter]; Letter from Dennis James, President, KCA, to Ruthanne Miller, ABC Board (July 1, 2013). In addition, ANC 1C challenges whether the Applicant has satisfied D.C. Official Code § 25-446(d)(4)(A). ANC 1C Protest Letter.

FINDINGS OF FACT

The Board, having considered the evidence, the testimony of the witnesses, the arguments of the parties, and all documents comprising the Board's official file, makes the following findings:

I. Background

1. Habana Village holds a Retailer's Class CR License and has two separate settlement agreements attached to its license. *ABRA Protest File No. 13-PRO-00094*, Notice of Public Hearing. The Board approved the first settlement agreement on February 14, 2001. *2001 Settlement Agreement, 2*. The Board approved the second settlement agreement on December 4, 2002, and approved an amendment to the agreement on April 8, 2009. *2002 Settlement Agreement, 2; Amendment to 2002 Settlement Agreement, 2*.

II. Testimony of ABRA Investigator Jason Peru

2. ABRA Investigator Jason Peru investigated the Petition and wrote the Protest Report submitted into the record. *Transcript (Tr.)*, October 16, 2013 at 22. The establishment is located in Adams Morgan. *Id.* at 25. Fifty-eight licensed establishments operate within 1,200 feet of Habana Village. *Id.* at 25. Thirty-eight of the 58 establishments have settlement agreements attached to their license. *Id.* No schools, public libraries, or daycare centers are located within 400 feet of the establishment. *Id.* at 25. A residential building also abuts Habana Village, and there are other residents nearby. *Id.* at 33, 40-41.

3. Habana Village is a Cuban-themed establishment that offers live entertainment, such as live bands that play Latin-style music and disc jockeys that play salsa, meringue, Washita, and timba music. *Id.* The establishment also offers a full menu of Cuban-influenced food. *Id.* at 26.

4. As part of the investigation, ABRA investigators monitored the establishment on thirteen separate occasions. Id.; *ABRA Protest File No. 13-PRO-00094*, Protest Report, at 8 [Protest Report]. During this monitoring period, investigators did not observe loitering, excessive noise, or other violations of Title 25 of the D.C. Official Code (Title 25). Id. at 26. Investigator Peru noted that he only observed noise when the establishment's front door opened to allow patrons to enter and exit the establishment. Id. at 26.

5. The Metropolitan Police Department (MPD) Crime Analysis Unit provided Investigator Peru with a record of calls for service at Habana Village's address. Id. The records show that MPD received three calls for service between July 27, 2012, and July 26, 2013. Id. Two of the calls related to lost property, and one related to a theft complaint. Id.

6. The Petitioner's Investigative History shows three violations since 2008. Protest Report, at 9. In 2008, the Petitioner violated its Settlement Agreement and paid a \$500 fine. Id. In 2009, the Petitioner violated the substantial change law and paid a \$2,000 fine. Id. Finally, in 2012, the Petitioner did not have a licensed manager on duty and paid a \$500 fine. Id.

7. Investigator Peru noted that some establishments in the neighborhood have a higher occupancy than Habana Village and some establishments in the neighborhood may apply for holiday hours. *Tr.*, 10/16/13 at 29, 34. Investigator Peru did not believe that the settlement agreements at issue had any impact on the Petitioner's operations. Id. at 32.

III. Testimony of Pedro Lujan, Jr.

8. Pedro Lujan, Jr., serves as one of the owners of Habana Village, which has been located at its present location since 1996. Id. at 43. Mr. Lujan's family has lived in Adams Morgan since 1970 and he went to school in the area. Id. He noted that his family has owned a number of businesses in the community. Id. at 44-45.

a. Good Faith Negotiations

9. Mr. Lujan discussed his efforts to negotiate an amendment to the settlement agreements with the other parties. Id. at 59-60. Specifically, Mr. Lujan has discussed amending the agreements with both ANC 1C and the KCA on a number of occasions since 2004. Id. at 59.

10. In 2013, Mr. Lujan recalled that the KCA protested the renewal of his license, but the organization never showed up to the scheduled mediation. Id. at 60-61. On July 10, 2013, after a status hearing before the Board, the parties further discussed amending the settlement agreements without coming to an agreement. Id. at 62. The renewal never went to a hearing, because the KCA later withdrew its protest against Habana Village's renewal. Id. at 63. Mr. Lujan also contacted ANC 1C on April 11, 2013, to request their support for his Petition, and he further discussed his proposal at a meeting with various ANC 1C Commissioners in October 2013. Id. at 65-66, 69; see also Petitioner's Exhibit No. 8, at 1-2.

b. Change in Circumstances

11. Mr. Lujan testified about the impact of the settlement agreements on his business. *Tr.*, 10/16/13 at 51. The recession, recent construction in the area, and competition from other neighborhoods has driven customers away from businesses in Adams Morgan. *Id.* at 51, 73; Protestant's Exhibit No. 5, at 4-7.

12. The settlement agreements also prevent Habana Village from increasing its occupancy. *Tr.*, 10/16/13 at 57. The agreements currently limit the establishment's seating capacity to 130. *Id.* at 57. In 2004, Habana Village made a capital investment in the building and, in turn, obtained a variance from the city's zoning authorities, which designated the third floor of the building as retail and commercial. Petitioner's Exhibit No. 6, at 1, *Id.* at 94. At this time, Mr. Lujan would like the establishment to have a capacity of 190. *Tr.*, 10/16/13 at 57.

13. Finally, Mr. Lujan noted that District law now allows establishments to have extended hours on holidays. *Id.* at 57. However, the settlement agreements attached to Habana Village's license currently prohibit such activity. *Id.* According to Mr. Lujan, he would like permission to have extended hours on New Year's Eve and the two daylight savings days. *Id.*

14. Mr. Lujan did not raise any other specific objections against the other portions of the settlement agreements. *Id.* at 58.

c. Adverse Impacts

15. Mr. Lujan testified that Habana Village does not interfere with peace, order, and quiet in the neighborhood. *Id.* at 46. He also submitted a petition signed by twenty-two nearby residents in support of the request. Petitioner's Exhibit No. 8.

16. A previous report on the establishment authored by ABRA Investigator Erin Mathieson indicated that the agency monitored the establishment on twenty-one separate occasions between August 31, 2010, and September 11, 2010. *Tr.*, 10/16/13 at 48; Petitioner's Exhibit No. 2, at 15. During this investigation period, no ABRA investigator observed loitering, excessive noise, or other violations of the law. *Id.*

17. Mr. Lujan also noted that the establishment has undergone lengthy renovations to abate noise. *Id.* at 47; see also Petitioner's Exhibit No. 3, at 4. The Work Log provided by the Petitioner shows that it installed double insulated glass windows, removed an air conditioner, and installed foam insulation on the establishment's first floor front bay windows. Petitioner's Exhibit No. 1, at 1. The Petitioner installed double insulated glass windows on its first floor back room windows on the western portion of the establishment. *Id.* at 2. Habana Village added a soundproof wall to the staircase leading from the first to the second floor. *Id.* at 3. On the second floor, Habana Village removed windows, installed sound barriers, installed a new window on the second floor with double insulated glass, and removed HVAC duct work on the ceiling. *Id.* at 4-9, 16. Habana Village then installed a soundproof wall on the staircase leading from the second floor to the third floor. *Id.* at 10. On the third floor, Habana Village installed a

new double insulated glass window, removed windows, and installed an acoustic curtain in front of the fire escape. Id. at 11-15. Habana Village also installed an upgraded air conditioner unit that eliminates noise transfer and redistributed the establishment's speakers based on the advice of a sound expert. Id. at 17. In total, the establishment has spent \$31,850 on noise abatement. Id. at 18.

IV. Testimony of Katie Davis

18. Katie Davis has lived in Adams Morgan since 1969. *Tr.*, 10/16/13 at 112. Ms. Davis is familiar with many of the businesses run by Mr. Lujan and his family, and she described them as "terrific businesses" that are part of "the fabric of the community." Id. at 113. She currently lives a block and a half away from the establishment. Id. at 117.

V. Testimony of Commissioner Ted Guthrie

19. Commissioner Ted Guthrie represents ANC-1C03 and sits on the ANC's Alcoholic Beverage Control Committee. Id. at 129. Commissioner Guthrie was not aware of the petition until his ANC received notice from ABRA. Id.

20. Commissioner Guthrie described the negotiations that occurred between his ANC and Habana Village. Id. at 130. Mr. Guthrie stated that Mr. Lujan asked to terminate the agreement. Id. Mr. Guthrie is aware that Mr. Lujan engaged in negotiations with Commissioner Hart, a member of ANC 1C, but has no personal knowledge of what occurred at that meeting. Id. at 131. During a later mediation session, Mr. Guthrie recalls that Mr. Lujan asked to have the KCA removed from the agreement. Id. at 132. Finally, Commissioner Guthrie noted that after the ANC and Habana Village negotiated a tentative agreement, Habana Village decided to seek a hearing rather than give the ANC an opportunity to vote on the proposal. Id. at 156-57.

21. Commissioner Guthrie stated that his ANC's objection to the Petition is based on "unilaterally allowing a licensee to declare that they will terminate their voluntary agreement with a citizens association." Id. at 147. Commissioner Guthrie had no objection to the specific changes requested by Habana Village. Id. at 148.

22. Commissioner Guthrie is concerned that if the establishment is sold, the new owner will have an adverse impact on the neighborhood without the restrictions of the settlement agreements. Id. at 163.

VI. Testimony of Hal Simmons

23. Hal Simmons lives on the 1800 block of Columbia Road, N.W. Id. at 173-74. Mr. Simmons can see the establishment from his residence. Id. at 175. Mr. Simmons occasionally hears patrons leaving the establishment in his home on the weekends; however, he does not hear noise from the establishment at other times. Id. at 177-79.

VII. Testimony of Michael Colonna

24. Michael Colonna lives on the 1800 block of Columbia Road, N.W. Id. at 182. He resides in an apartment building that is almost directly across the street from the establishment. Id. at 183. Mr. Colonna is concerned that lifting the noise restrictions in the settlement agreement will impact residents in his building. Id. at 184.

VIII. Testimony of Denis James

25. Denis James represented the KCA at the Protest Hearing. Id. at 191. The KCA is concerned that Habana Village's Petition is deficient, because Mr. Lujan did not begin negotiations with the KCA until the organization had a meeting regarding the establishment's renewal application. Id. at 193.

26. Denis James submitted a call for service log generated by the Metropolitan Police Department (MPD). KCA Exhibit No. 5, 1-2. The log shows calls for service recorded by the MPD at 1834 Columbia Road, N.W., from about 2004 to 2013. Id. Over a nine-year period, there have been fifty-nine calls for service at 1834 Columbia Road, N.W., during the period under review. Id. The calls for service log does not show whether MPD substantiated the calls or whether the establishment's patrons were responsible for the alleged incidents. Id.

27. Denis James also submitted a police report related to an assault at the establishment that occurred on March 4, 2012. KCA Exhibit No. 6, at 1. The report indicates that a patron punched another patron in the back of the head and that the victim threw a speaker. Id. at 2. There is no indication in the report that the establishment was responsible for the incident or responded inappropriately to the incident. Id. at 2.

CONCLUSIONS OF LAW

28. Under D.C. Official Code § 25-446(d)(1), "Unless a shorter term is agreed upon by the parties, a settlement agreement shall run for the term of a license, including renewal periods, unless it is terminated or amended in writing by the parties and the termination or amendment is approved by the Board. D.C. Official Code § 25-446(d)(1). Accordingly,

The Board may approve a request by fewer than all parties to amend or terminate a settlement agreement for good cause shown if it makes each of the following findings based upon sworn evidence:

- (A)(i) The applicant seeking the amendment has made a diligent effort to locate all other parties to the settlement agreement; or
 - (ii) If non-applicant parties are located, the applicant has made a good-faith attempt to negotiate a mutually acceptable amendment to the settlement agreement;
- (B) The need for an amendment is either caused by circumstances beyond the control of the applicant or is due to a change in the neighborhood where the applicant's establishment is located; and

- (C) The amendment or termination will not have an adverse impact on the neighborhood where the establishment is located as determined under § 25-313 or § 25-314, if applicable.

D.C. Official Code § 25-446(d)(4)(A)-(C).

29. The Board amends the settlement agreements as follows, based on the Board's determination that such amendments satisfy § 25-446:

- (1) Habana Village is permitted to apply for extended hours on New Year's and daylight savings; and
- (2) Habana Village is permitted to apply for greater occupancy.

The Board further notes that it did not find sufficient evidence in the record to merit additional amendments or the termination of both agreements.

I. HABANA VILLAGE SATISFIED § 25-446(D)(4)(A) BY ATTEMPTING TO NEGOTIATE AN AMENDED SETTLEMENT AGREEMENT IN GOOD FAITH WITH ANC 1C AND THE KCA SINCE 2004.

30. The Board finds that Habana Village satisfied §25-446(D)(4)(A) through its negotiation with the parties beginning in 2004. The Board further rejects the ANC and KCA's assertion that Habana Village engaged in bad faith through its negotiating position, or for its determination to seek a hearing.

31. Under § 25-446(d)(4)(A), in order to terminate or amend a settlement agreement when the other signatories have been located, it must be shown that "the applicant has made a good-faith attempt to negotiate a mutually acceptable amendment to the settlement agreement." § 25-446(d)(4)(A)(i)-(ii).

32. In Hank's Oyster Bar, the Board stated that a licensee satisfies its obligation to attempt to negotiate an amended settlement agreement in good faith by engaging in "honesty in fact in the conduct or transaction concerned." § 25-446(d)(4)(A)(ii); In re Leeds the Way, LLC t/a Hank's Oyster Bar, Case Number 10-PRO-00094, Board Order No. 2012-319, ¶ 54 (D.C.A.B.C.B. Sept. 12, 2012) citing Big Builders, Inc. v. Israel, 709 A.2d 74, 77 (D.C. 1998). Consequently, if the licensee engages in negotiations with the other signatories to its agreement, the Board will only deem such efforts unsatisfactory under § 25-446(d)(4)(A)(ii) if it is shown that the licensee engaged in "fraud, deceit, or dishonesty." In re Leeds the Way, LLC t/a Hank's Oyster Bar, Board Order No. 2012-319, at ¶ 55.

33. The Board credits Mr. Lujan's uncontroverted testimony that Habana Village located both the KCA and ANC 1C, and has attempted to negotiate an amended settlement agreement with the parties since 2004. Supra, at ¶ 9. The negotiations described by the parties that occurred in 2013 merely supplement these previously ongoing discussions. Supra, at ¶¶ 10, 20,

25; see also *ANC 1C's Proposed Findings of Fact and Conclusions of Law*, 1. Consequently, the Board finds that these efforts on the part of Habana Village are sufficient to satisfy the minimum requirements of § 25-446(d)(4)(A).

34. ANC 1C and the KCA argue that Habana Village engaged in bad faith negotiations based on Habana Village's negotiating position of requesting the termination of the agreement and removal of the KCA from the agreement, as well as Habana Village's decision to seek a hearing without giving ANC 1C an opportunity to vote on the proposal. *Supra*, at ¶ 20. The Board disagrees.

35. The definition of "good faith" provided by the KCA and ANC 1C goes far beyond the meaning provided by the Board in *Hank's Oyster Bar*. The Board does not interpret § 25-446(d)(4)(A) as mechanism to second guess a licensee's negotiating position—whether reasonable or unreasonable—or a licensee's decision to end negotiations and seek a hearing provided by law.² These matters are merely parts of the negotiation process, and do not qualify as "fraud, deceit, or dishonesty." *In re Leeds the Way, LLC t/a Hank's Oyster Bar*, Board Order No. 2012-319, at ¶ 55. Finally, based on the Board's decision in *Hank's Oyster Bar*, such an expansion would be based on "unarticulated and unannounced standards"—the essence of "arbitrary and capricious" action. *Haight v. District of Columbia Alcoholic Beverage Control Bd.*, 439 A.2d 487, 493 (D.C. 1981) citing *Miller v. District of Columbia Board of Appeals and Review*, D.C. App. 294 A.2d 365, 369 (1972). Consequently, the Board rejects the expansion of the definition of "good faith" in § 25-446(d)(4)(A) proposed by ANC 1C and the KCA, and finds no support in the record to make a finding of fraud, deceit, or dishonesty on the part of Habana Village.

36. Therefore, the Board finds that the Petition filed by Habana Village satisfies § 25-446(d)(4)(A).

II. HABANA VILLAGE DEMONSTRATED THAT SOME OF THE PROVISIONS OF THE SETTLEMENT AGREEMENTS MERIT AMENDMENT UNDER § 25-446(D)(4)(B) BASED ON A CHANGE IN THE NEIGHBORHOOD AND CIRCUMSTANCES BEYOND THE CONTROL OF THE PETITIONER.

37. Habana Village has provided sufficient evidence to demonstrate that amendments to the agreements' hours and occupancy provisions are warranted.

38. Under § 25-446(d)(4)(B), in order to terminate or amend the settlement agreements, Habana Village must show "[t]he need for an amendment is either caused by circumstances beyond the control of the applicant or is due to a change in the neighborhood where the applicant's establishment is located." § 25-446(d)(4)(B). The Board previously stated in *Hank's Oyster Bar* that a change to the liquor law or to a property's zoning designation, which has a nexus to the settlement agreement attached to a petitioner's license, satisfies § 25-446(d)(4)(B). *In re Leeds the Way, LLC t/a Hank's Oyster Bar*, Board Order No. 2012-319, at ¶¶ 57-63.

² Even if reasonableness was a factor, the Board notes that it is reasonable for a licensee to request the removal of a party based on its perceived belief that it cannot work productively with that party.

39. The Board finds two changes in the neighborhood that warrant amending the settlement agreement's hours and occupancy provisions. The Board approved the agreements in 2001 and 2002 and it is undisputed that the agreements restrict Habana Village's occupancy and hours. *2001 Settlement Agreement, § 1* (hours); *2002 Settlement Agreement, §§ 1-2* (section 1 restricts hours and § 2 restricts the establishment's occupancy). Yet, in 2004, Habana Village made improvements to the building and obtained a zoning variance designating the third floor as retail and commercial space, which the Board deems as a change to the neighborhood. *Supra*, at ¶ 12. The Board also notes that as of May 1, 2013, the Council of the District of Columbia amended D.C. Official Code § 25-723 in order to extend the legal hours of operation for all on-premise retail license holders on holidays. D.C. Official Code § 25-723; Council of the District of Columbia, Omnibus Alcoholic Beverage Regulation Amendment Act of 2012, § 2(z) (effective May 1, 2013, D.C. Law 19-3210). Therefore, similar to *Hank's Oyster Bar*, the Board finds a sufficient change in the neighborhood here to warrant amendments to the settlement agreements' provisions limiting Habana Village's hours and occupancy.

III. HABANA VILLAGE DEMONSTRATED THAT AMENDING THE SETTLEMENT AGREEMENTS WILL NOT RESULT IN AN ADVERSE IMPACT UNDER § 25-446(D)(4)(C).

40. The Board finds that amending the agreement to allow Habana Village operate during extended hours on New Year's and daylight savings, as well as removing the provision that limits the ability of Habana Village to expand its occupancy, will not have a negative impact on the neighborhood's peace, order, and quiet.

41. The burden is on the Petitioner to show that "[t]he amendment or termination will not have an adverse impact on the neighborhood where the establishment is located as determined under § 25-313 or § 25-314, if applicable." § 25-446(d)(4)(C). The only appropriateness standard raised by ANC 1C and the KCA is § 25-313(b)(2), which states, "[i]n determining the appropriateness of an establishment, the Board shall consider . . . [t]he effect of the establishment on peace, order, and quiet, including the noise and litter provisions set forth in §§ 25-725 and 25-726." D.C. Official Code § 25-313(b)(2).

A. Amending the settlement agreements will not encourage crime.

42. The Board finds that amending the hours and occupancy provisions of the settlement agreements will not subject the neighborhood to an increase in crime or other forms of disorder. Multiple investigations conducted by ABRA show that the establishment is not a source of crime and disorder in the community, and Habana Village's record shows that the establishment has only engaged in a few minor violations of the city's liquor laws. *Supra*, at ¶¶ 4, 6, 16. Indeed, the information provided by the KCA does not contradict this conclusion, because the calls for service log provided by the KCA does not show a significant amount of police activity at the establishment over a nine-year period, and the KCA has not tied any of the alleged incidents to establishment's operations. *Supra*, at ¶¶ 26-27.

B. Amending the settlement agreements will not encourage noise.

43. The Board further finds that amending the hour and occupancy provisions of the settlement agreements will not have a negative impact on noise in the neighborhood.

44. Section § 25-725 states, “The licensee under an on-premises retailer’s license shall not produce any sound, noise, or music of such intensity that it may be heard in any premises [located in a residential zone] other than the licensed establishment by the use of any: . . . Mechanical device . . .” D.C. Code § 25-725(a), (a)(1), (b), (b)(3) (West Supp. 2013). Further, § 25-313(b)(2) permits the Board to consider noise beyond the scope of § 25-725.³ Panutat, LLC, t/a District of Columbia Alcoholic Beverage Control Bd., 2013 WL 5271321, *4 n. 12 (D.C. 2013) (“However, in mandating consideration of the effect on peace, order, and quiet, § 25-313(b)(2) does not limit the Board’s consideration to the types of noises described in § 25-725.”)

45. We credit Mr. Lujan’s testimony that the establishment has gone to great lengths soundproofing the establishment, and note that the Board is leaving in place the noise abatement measures contained in the settlement agreements. Based on the new hours created by the Council of the District of Columbia, the Board finds that it is reasonable for residents to expect greater patron activity during holidays such as New Year’s or for an establishment to remain open in accordance with the daylight savings hours described in § 25-723. Furthermore, based on the soundproofing measures taken by Habana Village, the Board sees no reason to prevent the establishment from applying for an increase to its occupancy; especially, when residents only report occasional noise from patrons outside the establishment on weekends. Supra, at ¶¶ 17, 23.

C. Amending the settlement agreements will not encourage trash and litter.

46. The Board finds that amending the agreements’ hours and occupancy provisions will not subject the neighborhood to increased trash and litter. Under § 25-726, the licensee must comply with the Litter Control Amendment Act of 1987 and “. . . take reasonable measures to ensure that the immediate environs of the establishment, including adjacent alleys, sidewalks, or other public property immediately adjacent to the establishment, or other property used by the licensee to conduct its business, are kept free of litter.” D.C. Official Code § 25-726. The record does not show any evidence that the establishment has created a trash or litter problem in the neighborhood.

47. Therefore, the Board finds that amending the hours and occupancy provisions of the settlement agreement in accordance with this Order will not have an adverse impact on the neighborhood.

³ The Board also made the same point in Riverfront. In re Dos Ventures, LLC, t/a Riverfront at the Ballpark, Case No. 13-PRO-00088, Board Order No. 2013-512, ¶ 41 (D.C.A.B.C.B. Nov. 13, 2013).

IV. THE BOARD'S ORDER GIVES ANC 1C'S ISSUES AND CONCERNS GREAT WEIGHT.

48. The Board addressed ANC 1C's concerns regarding peace, order, and quiet, as well as concerns that the Petition did not comply with § 25-446 in Section II of this Order. The Board notes that it is only making minor amendments to the settlement agreements and leaving the remaining portions of the agreement in place.

V. HABANA VILLAGE WAS PERMITTED TO AMEND ITS APPLICATION AFTER FILING A TIMELY PETITION.

49. As part of this Order, the Board affirms that Habana Village was entitled to amend its timely filed Petition. KCA Exhibit No. 3. As noted in Kingman Park, the Board has the discretionary authority to permit a licensee to amend an application or petition submitted to the Board after the original filing of the relevant documents, so long as the action does not result in prejudice to the protestants. Kingman Park Civic Ass'n, Et Al., v. District of Columbia Alcoholic Beverage Control Bd., No. 11-AA-831, 7 (D.C. 2012). Similar to Kingman Park, the amendment of Habana Village's Petition occurred before the matter was placarded, "discussed during the hearing," and the licensee was subject to "cross-examination"; therefore, the amendment permitted by the Board resulted in no prejudice to the KCA and ANC 1C. Id. Based on this reasoning, the Board upholds its decision to permit Habana Village to amend its timely filed Petition.

VI. THE PETITIONER SATISFIED ALL REMAINING REQUIREMENTS REQUIRED TO AMEND THE SETTLEMENT AGREEMENTS.

50. Finally, the Board is only required to produce findings of fact and conclusions of law related to those matters raised by the Protestants in their initial protest. See Craig v. District of Columbia Alcoholic Beverage Control Bd., 721 A.2d 584, 590 (D.C. 1998) ("The Board's regulations require findings only on contested issues of fact."); 23 DCMR § 1718.2. Accordingly, based on the Board's review of the Petition and the record, Habana Village has satisfied all remaining requirements imposed by Title 25 and Title 23 to merit the amendment of its settlement agreements by the Board in accordance with this Order.

ORDER

Therefore, the Board, on this 5th day of February 2013, hereby **AMENDS** the Settlement Agreements entered into by the Petitioner, ANC 1C, and the KCA as follows:

- (1) The Petitioner is permitted to apply for, receive, and operate in accordance with the extended holiday hours offered by D.C. Official Code § 25-723(c) on New Year's Eve, as well as any extended hours associated with daylight savings time. The Board notes that the settlement agreements are still effective for all remaining holidays not mentioned in this Order;

- (2) The Settlement Agreements shall not limit the occupancy of the establishment to 130 persons. As such, the Applicant is no longer prevented from applying for an increase in occupancy or using the third floor. The Board notes that the establishment must file a substantial change request with the Board before taking advantage of an increase in occupancy or using the third floor.⁴

IT IS FURTHER ORDERED that all other provisions of the settlement agreements shall remain in full force and effect.

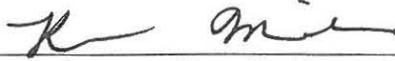
IT IS FURTHER ORDERED that the following clarification shall guide the interpretation of the existing settlement agreements:

- (1) The Board **ADVISES** Habana Village that under its existing settlement agreements merely providing a van to transport patrons or offering specials, without more, does not constitute a pub crawl under § 712.1 of Title 23 or a “tour” under § 7 of the 2002 Settlement Agreement. See Tr., 10/16/13 at 58; *2002 Settlement Agreement*, § 7; see also 2001 Settlement Agreement, § 7. The Board notes that a pub crawl under the law is defined “as an organized group of establishments within walking distance which offer discounted alcoholic drinks during a specified time period.” 23 DCMR § 712.1 (West Supp. 2013). Therefore, so long as the establishment does not offer discounts in coordination with other establishments or voluntarily participate in a coordinated event where individuals visit multiple establishments, the Board will not find that Habana Village engaged in a “pub crawl” or “tour.” See Webster’s II New College Dictionary (2001) (defining “tour” as a “. . . comprehensive trip including visits to points of interest”).

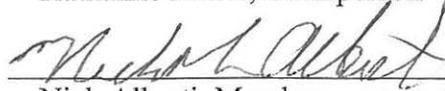
ABRA shall provide copies of this Order to the Petitioner, ANC 1C, and the KCA.

⁴ See Tr., 10/16/13 at 206-07; KCA Exhibit No. 4.

District of Columbia
Alcoholic Beverage Control Board



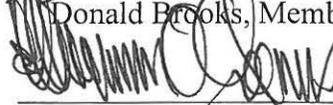
Ruthanne Miller, Chairperson



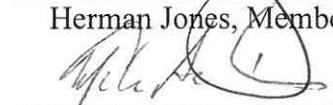
Nick Alberti, Member



Donald Brooks, Member



Herman Jones, Member



Mike Silverstein, Member

Under 23 DCMR § 1719.1 (2008), 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, under 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 under 23 DCMR § 1719.1 (2008) 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).