

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

In the Matter of:)		
)		
Leeds the Way, LLC)	License No.:	071913
t/a Hank's Oyster Bar)	Case No.:	10-PRO-00094
)	Order No.:	2012-319
Petition to Terminate a)		
Voluntary Agreement)		
)		
at premises)		
1624 Q Street, N.W.)		
Washington, D.C. 20009)		

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Calvin Nophlin, Member
Mike Silverstein, Member

ALSO PRESENT: Leeds the Way, LLC, t/a Hank's Oyster Bar, Applicant

Andrew Kline, on behalf of the Applicant

David Mallof and Alexis Rieffel, on behalf of A Group of Three or More
Individuals, Protestants

Michael K. Hibey, Esq., on behalf of the Protestants

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

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

INTRODUCTION

This matter comes before the Alcoholic Beverage Control Board (Board) on the order of the District of Columbia Court of Appeals in David Mallof v. District of Columbia Alcoholic Beverage Control Board, which reverses and remands our decision In the Matter of Leeds the Way, LLC, t/a Hank's Oyster Bar. David Mallof v. District of Columbia Alcoholic Bev. Control Bd., 43 A.3d 916, 923 (D.C. 2012); see also In the Matter of Leeds the Way, LLC, t/a Hank's Oyster Bar, Case No. 10-PRO-00094, Board Order No. 2010-533 (D.C.A.B.C.B. Nov. 3, 2010).

In Hank's Oyster Bar, we received the Petition to Terminate a Voluntary Agreement (Petition) from Leeds the Way, LLC, t/a Hank's Oyster Bar (Applicant), requesting that we terminate its Voluntary Agreement under District of Columbia Official Code § 25-446(d). Hank's Oyster Bar, Board Order No. 2010-533 at 1.¹ On June 28, 2010, a valid protest against the Petition was timely filed by the Group of Three or More (Protestants), represented by David Mallof and Alexis Rieffel. Id. at 2. In addition, the Dupont Circle Citizens Association (DCCA) also filed a timely protest against the Applicant, but we later dismissed the association from the proceedings. Id.; Mallof, 43 A.3d at 917 n.1. The remaining parties attended a Roll Call Hearing on July 12, 2010, a mediation session on August 10, 2010, and a Protest Status Hearing on August 18, 2010.

The case proceeded to a Protest Hearing on October 13, 2010, where the Applicant argued that a licensee does not have to satisfy § 25-446(4)(A)(i) and (ii) or 25-446(d)(4)(B) when requesting the termination of its voluntary agreement under § 25-446(d)(4). Id. at ¶ 49; *Transcript (Tr.)*, October 13, 2010 at 20, 49-51.

In pertinent part, § 25-446 states,

- (d)(4) The Board may approve a request by fewer than all parties to amend or terminate a voluntary 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 voluntary 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 voluntary 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

¹ Chairperson Miller did not participate in the original proceeding; however, she has read the record of that proceeding. During the original Protest Hearing, we note that Chairperson Brodsky served as the chair of the Board. Accordingly, the reader should note that the use of the term "we" when referring to the original proceeding does not include Chairperson Miller.

- (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)(5) To fulfill the good faith attempt criteria of paragraph (4)(A)(ii) of this subsection, a sworn affidavit from the applicant shall be filed with the Board at the time that an application to amend a voluntary agreement by fewer than all parties is filed stating that either:
- (A) A meeting occurred between the parties which did not result in agreement; or
 - (B) The non-applicant parties refused to meet with the applicant.

D.C. Code § 25-446(d)(4)-(5) (West Supp. 2012).

Specifically, the Applicant argued that, because parts (A) and (B) referenced only petitions to amend voluntary agreements but part (C) referenced both petitions to amend and terminate voluntary agreements, the Council did not intend (A) and (B) to apply to petitions to terminate voluntary agreements. *Id.*; *Tr.*, 10/13/10 at 20, 49-51; *see also* § 25-446(d)(4). Over the objection of the Protestants, we agreed with this interpretation. *Tr.*, 10/13/10 at 94-95. We then found that terminating the agreement would not have an adverse impact on the neighborhood under § 25-446(d)(4)(C). *Id.* at ¶¶ 51-53. Accordingly, we terminated the Applicant's Voluntary Agreement based on our determination of (C), without examining whether the Applicant satisfied (A) or (B). *Id.* at 10.

On appeal, the court disagreed with the reasoning adopted by the Board. In its order, the court found that the Board did not give sufficient weight to the word "each" in § 25-446(d)(4). *Mallof*, 43 A.3d at 920. Therefore, the court held that the Board could not terminate the Voluntary Agreement unless the Applicant satisfies parts (A), (B), and (C) of § 25-446(d)(4). *Id.* at 923.

In compliance with the order issued by the court, we held a Remand Hearing on June 13, 2012, to address parts (A) and (B) of § 25-446(d)(4). The parties were instructed by ABRA's Office of General Counsel that the Remand Hearing would address the issues raised in *Mallof*. Finally, consistent with our past practice, we did not request that the parties submit new Protest Information Forms (PIF) before the hearing.

In light of the holding of the District of Columbia Court of Appeals and the presentations of the parties on June 13, 2012, we must now address the following questions:

- (1) Were the parties required to submit new Protest Information Forms (PIF) before the Remand Hearing?

- (2) Does the Applicant's failure to initially file a sworn affidavit with her Petition require the Board to dismiss her Petition under § 25-446(d)(5), or may we accept the affidavit submitted at the Remand Hearing?
- (3) If dismissal is not required, does the Petition satisfy parts (A) and (B) of § 25-446(d)(4), and show that the Applicant's Voluntary Agreement merits termination under § 25-446(d)(4)?

We answer each question in turn. First, the parties were not required to submit new PIFs after the Remand Hearing, which is in accordance with the Board's past practice. Second, § 25-446(d)(5) does not require us to dismiss the Applicant's Petition; instead, we may accept the sworn affidavit submitted by the Applicant as an amendment to its initial application. Consequently, we may address the arguments of the parties on their merits, rather than dismiss the case out of hand based on a technicality. Third, we find that the Applicant has demonstrated that it has satisfied parts (A) and (B) of § 25-446(d)(4); therefore, in light of our conclusions in our prior Order, we grant the Petition.

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:

A. Voluntary Agreement

1. The Board approved the Voluntary Agreement executed by the Applicant, the DCCA, and A Group of Five or More Individuals, represented by David Mallof and Alexis Rieffel on May 11, 2005. In the Matter of Leeds the Way, LLC, t/a Hank's Oyster Bar, Case No. 11003-05/030P, Board Order No. 2005-75, 1-6 (D.C.A.B.C.B. May 11, 2005).

B. Adverse Impact and Timing of Application

2. The Board's finding regarding the permissibility of the Petition and § 25-446(d)(4)(C) was settled by our decision in Hank's Oyster Bar, and not overruled by the court in Mallof. Therefore, under the law of the case doctrine, we affirm our prior holding that the Petition was filed during the Applicant's renewal period after four years from the date the Voluntary Agreement was approved. Lenkin Co. Management v. District of Columbia Rental Housing Com'n, 677 A.2d 46, 48 (D.C. 1996); §§ 25-446(d)(1)-(2); Hank's Oyster Bar, Board Order No. 2010-533 at ¶ 50. Furthermore, we also affirm our prior findings that the termination of the Voluntary Agreement "will not have an adverse impact on the neighborhood where the establishment is located . . ." §§ 25-446(d)(4)(C); Hank's Oyster Bar, Board Order No. 2010-533 at ¶¶ 51-53.

C. Diligent Efforts and Good Faith Negotiations

3. The Applicant has filed two affidavits, the first unsworn and the second sworn, demonstrating its efforts to locate the other parties and attempts to engage in good faith negotiations over the termination of its Voluntary Agreement.

4. The first unsworn affidavit is dated March 29, 2010. *ABRA Protest File No. 10-PRO-00094*, Petition to Amend or Terminate Voluntary Agreement, 1-2 (Mar. 29, 2010). This affidavit was undersigned by counsel, but does not contain language that it was sworn under penalty of perjury or indicate that the affidavit was notarized. Id.

5. During the Remand Hearing, the Applicant submitted a second notarized affidavit signed by Jamie Leeds, the Applicant's owner, which was dated June 13, 2012. *ABRA Protest File No. 10-PRO-00094*, Affidavit in Support of Petition to Terminate Voluntary Agreement (Jun. 13, 2012); *Tr.*, 6/13/12 at 10-11. The affidavit contained the following statements:

1. I am over the age of 18, and otherwise competent to give testimony.
2. I am the sole member of Leeds the Way, LLC, t/a Hank's Oyster Bar ("Licensee").
3. I directed Andrew J. Kline to prepare and send the letter dated January 26, 2010, attached hereto as Exhibit A to to [sic] Robin Diener, President, Dupont Circle Citizens Association, and David Mallof and Alexis Rieffel, the designated representatives for the group of 5 or more individuals.
4. As Mr. Kline heard nothing in response to the January 26, 2010 letter, which was sent via e-mail and first class mail, he, on, my behalf and with my knowledge, contacted the Protestants via e-mail on February 23, 2010. He proposed a meeting date of March 4, 2010 at 10:00 a.m., in his office, which is located within the boundaries of the Dupont Circle ANC, as the date, time and place for the meeting. I was copied on the email, a copy of which is attached hereto as Exhibit B.
5. Mr. Kline advised that Protestant David Mallof was the only person who responded to that e-mail and I have no knowledge that anyone else responded. Mr. Mallof suggested a telephone call. A copy of his email, on which I was copied, is attached as Exhibit C.
6. Mr. Kline advised that he did, in response to the email, speak to Mr. Mallof by phone. Mr. Mallof indicated that he did not believe a meeting would be productive as he did not believe it was time to revisit the Voluntary Agreement. That understanding was confirmed by an e-mail dated February 24, 2010 10:00 a.m. from Mr. Kline to Mr. Mallof. The email further indicated that March 10, 2010, 10:00 a.m. would be kept available for a meeting and that Protestants should advise whether they would be attending. I was copied on the email and a copy is attached as Exhibit D.

6. [sic] To my knowledge, none of the Protestant signatories to the Voluntary Agreement expressed any willingness to meet, indicated that the scheduled meeting time on March 4 or march [sic] 10, 2010 was inconvenient, appeared in the [sic] Mr. Kline's office on either date, or proposed another date, time or place for a meeting.
7. I did, in 2010, subsequent to the filing of the Petition to Terminate, meet at Hank's Oyster Bar with Lex Rieffel, Robin Diener, on behalf of the DCCA, and representatives of ANC 2B, to discuss the voluntary agreement and possible amendments, but no agreement was reached.
8. Immediately after the recent Court of Appeals decision in this matter, I had Mr. Kline again contact counsel for the representatives of the protestants to see if this matter could be resolved by way of an amended or substitute agreement. Although negotiations continued over several days, no agreement could be reached.

Id.

6. Jamie Leeds serves as the chef and owner of Hank's Oyster Bar. *Transcript (Tr.)*, June 13, 2012, at 71-72. Ms. Leeds signed a lease to rent the establishment's current location in October 2004. *Tr.*, 6/13/12 at 73. Under her lease, she began paying rent in May of 2005. *Tr.*, 6/13/12 at 73. Ms. Leeds also applied for a transfer of a liquor license to her current address after she signed the lease. *Tr.*, 6/13/12 at 74. When her application was protested, she wanted to have a hearing before the Board. *Tr.*, 6/13/12 at 75-76. Nevertheless, the previous Board did not provide her with a hearing date within a time frame that would meet her business needs. *Tr.*, 6/13/12 at 78-80. Consequently, in order to expedite the licensing process, she agreed to execute a Voluntary Agreement with the Protestants. *Tr.*, 6/13/12 at 79.

7. Currently, Ms. Leeds's Voluntary Agreement restricts her ability to expand the occupancy of her restaurant. *Tr.*, 6/13/12 at 80. The spaces next to her restaurant were occupied by another restaurant and a residential unit at the time the Board approved her Voluntary Agreement. *Tr.*, 6/13/12 at 82. Therefore, the occupancy provision in her Voluntary Agreement was immaterial at the time she signed the agreement. *Tr.*, 6/13/12 at 82. Furthermore, even if space was available, she would not have been able to expand her restaurant, because of the liquor license moratorium in effect at the time she signed the agreement. *Tr.*, 6/13/12 at 82. Ms. Leeds noted that the Voluntary Agreement's provision restricting her occupancy became a material impediment to her business once (1) the moratorium was relaxed to allow for additional lateral expansions; (2) the landlord of the neighboring residential property changed the designation of the property to commercial zoning, which made the space available for business purposes; and (3) her business started to thrive. *Tr.*, 6/13/12 at 83-84.

8. In order to remove this impediment, Ms. Leeds, through her attorney, sent a letter to Robin Diener, the President of the Dupont Circle Citizens Association (DCCA), David Mallof,

and Alexis Rieffel on January 26, 2010. Applicant's Exhibit A, 1; *Tr.*, 6/13/12 at 86.² In the letter, Ms. Leeds's attorney notified the recipients that the letter discussed "the Voluntary Agreement" that was "entered into with the [DCCA], Mr. Mallof, Mr. Rieffel, and others." *Id.* The letter then stated,

Hank's Oyster Bar desires to expand its premises to include seating in the adjacent space, along with adding additional outside seating abutting the adjacent space Because of limitations in the Voluntary Agreement adopted by the Board, the Licensee may not apply for the desired substantial change unless the Voluntary Agreement is either amended or terminated We would like to meet with you in an effort to negotiate a mutually acceptable amendment to the Voluntary Agreement. Please advise as to whether you are amenable to such a meeting and provide some dates and times when you might be available.

Id. at 1-2.

9. Ms. Leeds did not receive a response to her letter from any of the recipients. *Tr.*, 6/13/12 at 87. On February 23, 2010, Ms. Leeds's attorney sent the recipients of the letter an email stating,

We have heard nothing from you in response to our request for a meeting concerning the possible expansion of Hank's Oyster Bar. We propose March 4, 10 a.m. in my office as a date, time and place for such a meeting. If I receive no response, we shall presume that you have no intention of meeting with us concerning this matter.

Applicant's Exhibit B; *Tr.*, 6/13/12 at 87-88.

10. On February 24, 2010, at 4:35 p.m., Mr. Mallof responded by writing, "Would be delighted to speak with you or Jamie by phone first. Please call anytime" Applicant Exhibit No. 3. Then, on February 24, 2010, at 6:18 p.m., Ms. Leeds attorney sent the following email after a telephone conversation with Mr. Mallof:

When we spoke today, you indicated you do not believe it is time to revisit the voluntary agreement for Hank's Oyster Bar. Accordingly, although you indicated you do not speak for the others, you see no point in meeting to discuss the matter. You indicated that you would, however, speak with the other signatories to the VA to see if they feel differently.

You mentioned that I had omitted Susan Meehan from the letter I sent. Indeed, as the Board Order approving the voluntary agreement explicitly referenced you and Lex Reiffel as the representatives of the group of 5 protestants, I wrote only to the two of you.. [sic] I presume you have, and will, keep Susan, as well as Michael Fasano and

² We refer to the letters and emails supplied by the Applicant using the identifications stamped on the documents for the purposes of citation.

Patricia Steele, the other members of your protest group, apprised of these discussions. If that is not the case, please let me know, and provide their e-mail addresses, and I will communicate with them directly.

I am keeping March 10, at 10 a.m. available, in case you are willing to meet. Please let me know whether you will be coming.

Applicant's Exhibit C, 1.

11. Ms. Leeds noted that none of the recipients of the letter appeared at the meeting offered by Ms. Leeds's attorney. *Tr.*, 6/13/12 at 96. Furthermore, Ms. Leeds never received an offer from Mr. Mallof to reschedule the meeting or hold the meeting in a different location. *Tr.*, 6/13/12 at 97.

12. David Mallof is one of the signatories to the Voluntary Agreement. *Tr.*, 6/13/12 at 112. Mr. Mallof admits that he received the letter sent by the Applicant's attorney on January 26, 2010. *Tr.*, 6/13/12 at 113, 120, 151. Mr. Mallof admits that he did not respond to the letter. *Tr.*, 6/13/12 at 113, 118. Mr. Mallof conceded that he was in communication with the other five signatories regarding the Applicant's letter, and likely forwarded it to them. *Tr.*, 6/13/12 at 113-14, 134-35.

13. Mr. Mallof further admitted that he received the email sent by Ms. Leeds's attorney on February 24, 2010. *Tr.*, 6/13/12 at 121. Mr. Mallof also admits that he spoke to Ms. Leeds's attorney on the phone. *Tr.*, 6/13/12 at 125. He recalls that during the conversation he asked the attorney to send a proposal for him to review. *Tr.*, 6/13/12 at 126, 1399. Mr. Mallof also cannot recall whether he sent additional emails to the Applicant's attorney regarding Hank's Oyster Bar's request for negotiations outside of those that appear in the record. *Tr.*, 6/13/12 at 129, 139 ("*I don't know for a fact, but there may be other emails where I suggested send us something over.*") (emphasis added).

14. Mr. Mallof stated that, in his view, a precondition to meeting or setting up a meeting was receiving a proposal with "meat on the bone" from the Applicant or her representative. *Tr.*, 6/13/12 at 127, 148-49, 157, 248.

15. Mr. Mallof also admitted that, in the past, he has spoken to Ms. Leeds about having her expand her restaurant into Trio's space, rather than the neighboring residence. *Tr.*, 6/13/12 at 154.

16. Ralph Johansson is a signatory to the Voluntary Agreement, as well. *Tr.*, 6/13/12 at 166. Mr. Johansson was not involved in discussions to amend or terminate the Applicant's Voluntary Agreement in 2010. *Tr.*, 6/13/12 at 166. Mr. Johansson claims that he did not refuse to meet with the Applicant to discuss renegotiating the Voluntary Agreement, but he did not deny that he was aware of the Applicant's letter, dated January 26, 2010. *Tr.*, 6/13/12 at 166, 169, 177, 184; see also *Tr.*, 6/13/12 at 113-14, 134-35.

17. Mr. Johansson further agreed that he “allowed Mr. Mallof to handle communications with the licensee and their representative.” *Tr.*, 6/13/12 at 179, 196-97. Like Mr. Mallof, Mr. Johansson believed the information in the letter was insufficient, and believed that the Applicant had to provide additional information as a precondition for a meeting. *Tr.*, 6/13/12 at 184-85.

D. Change in Circumstance

18. Commissioner Jacobson serves as the Advisory Neighborhood Commissioner for Single-Member District 2B-04. *Tr.*, 6/13/12 at 35. His constituents are located across the street from the establishment. *Tr.*, 6/13/12 at 35.

19. Commissioner Jacobson discussed the Dupont Circle moratorium zone. *Tr.*, 6/13/12 at 36. In 2009, Commissioner Jacobson led his Advisory Neighborhood Commission’s (ANC) Dupont East Moratorium review committee. *Tr.*, 6/13/12 at 36; Government of the District of Columbia, Dupont Circle Advisory Neighborhood Commission 2B ad hoc Committee on the Dupont East Liquor Moratorium Committee Report, 1 (Mar. 11, 2009) [2B Report].

20. The East Dupont Circle Moratorium Zone was in effect before the Applicant entered into a Voluntary Agreement with the DCCA and the Protestants on May 11, 2005.³ Title 25, D.C. Code Enactment and Related Amendment Act of 2001, § 203(b) (D.C. Law 13-298, effective May 3, 2001; 23 DCMR § 306.11 (2001)); 47 D.C. Reg. 282 (Jan. 21, 2000) (Notice of Final Rulemaking); *supra*, at ¶ 1. During the moratorium on the issuance of liquor licenses, the moratorium zone also prohibited establishments from expanding their premises. D.C. Law 13-298, § 203(b); 51 D.C. Reg. 4309 (Apr. 30, 2004) (§ 306.10); 12 D.C. Reg. 2191 (Mar. 24, 2006) (saying that, in 2006, the Board sought to clarify the “the existing prohibition on lateral expansion . . .” but determined “that removing the lateral expansion prohibition would result in a much greater adverse impact to the neighborhood . . .”) (Notice of Final Rulemaking); *see also* 23 DCMR §§ 306.1, 306.2 (West Supp. 2012).

21. In 2009, and made permanent in 2010, the Board modified the East Dupont Circle Moratorium Zone lateral expansion prohibition to allow for four lateral expansions. 56 D.C. Reg. 7340 (Sept. 4, 2009) (Notice of Emergency and Proposed Rulemaking); 57 D.C. Reg. 8679 (Sept. 24, 2010) (Notice of Final Rulemaking). Specifically, the new regulation states,

306.9 No more than four (4) lateral expansion applications shall be approved by the Board in the East Dupont Circle Moratorium Zone. If four (4) lateral expansion applications are approved by the Board, current holders of a Retailer’s license Class A, B, C, or D within the East Dupont Moratorium Zone shall not be permitted to apply to the Board for expansion of service or sale of alcoholic beverages into any adjoining or adjacent space, property, or lot, unless either:

³ The Board takes administrative notice of the rulemakings and legislation related to the East Dupont Circle Moratorium Zone. *Tr.*, 6/13/12 at 279.

(a) the prior owner or occupant of the adjacent space, property, or lot held within the prior five (5) years a Retailer's license Class A, B, C, or D; or (b) the adjacent space, property, or lot had, for the prior five (5) years, a certificate of occupancy or building permit held in the name of the current holder of the Retailer's license Class A, B, C, or D seeking the lateral expansion. Nothing in this section shall prohibit holders of a Retailer's license Class C or D from applying for outdoor seating in public space.

23 DCMR §§ 306.9 (West Supp. 2012); 57 D.C. Reg. 8679 ABRA, Notice of Final Rulemaking, East Dupont Circle Moratorium Zone, 1-4 (Jul. 28, 2010).

22. At the conclusion of its review, Commissioner Jacobson's committee recommended that the Board extend the moratorium for five years, allow two additional lateral expansions, and two additional licenses. *Tr.*, 6/13/12 at 37. The report produced by the committee cited the need for a change in the moratorium based on the drastic economic downturn that occurred in 2009. *Tr.*, 6/13/12 at 41; 61; 2B Report, 4. Furthermore, the committee was concerned that the upcoming street renovation project would result in establishments going out of business, based on the neighborhood's experience with a similar renovation program for nearby P Street, N.W. *Tr.*, 6/13/12 at 41-42; 61; 2B Report, 10. The report also mentioned that since 2005, the number of vacant properties in the Dupont East Moratorium Zone grew from one property to four properties in 2009. *Tr.*, 6/13/12 at 70; 2B Report, 9. Commissioner Jacobson emphasizes that none of these factors were in the control of the Applicant. *Tr.*, 6/13/12 at 43.

23. Commissioner Victor Wexler serves as the Advisory Neighborhood Commissioner for ANC 2B-05. *Tr.*, 6/13/12 at 101. The Applicant's restaurant is located in Commissioner Wexler's Single-Member District. *Tr.*, 6/13/12 at 101. Commissioner Wexler noted that Advisory Neighborhood Commission 2B supported Ms. Leeds's efforts to expand her establishment. *Tr.*, 6/13/12 at 105.

24. Mr. Johansson has lived on the 1700 block of Q Street, N.W., for the past twenty years. *Tr.*, 6/13/12 at 166. Mr. Johansson noted that many retail establishments have moved into the neighborhood. *Tr.*, 6/13/12 at 167. He also has not observed a large increase in the number of alcohol serving establishments. *Tr.*, 6/13/12 at 168. Mr. Johansson further noted that the renovations to 17th Street, N.W., have been completed. *Tr.*, 6/13/12 at 168. He does not believe the neighborhood has changed significantly between 2005 and 2010. *Tr.*, 6/13/12 at 168.

25. Mr. Mallof noted that the economy of Washington, D.C., has been doing very well vis-à-vis the rest of the country. *Tr.*, 6/13/12 at 202. Furthermore, Mr. Mallof believes that the vacancy rates in the neighborhood are good, based on the many retail stores that have moved into the area. *Tr.*, 6/13/12 at 203. Mr. Mallof also noted that there are a wide variety of licensed establishments in the neighborhood, and that the number of licensed establishments has not changed significantly during the years the Voluntary Agreement was in effect. *Tr.*, 6/13/12 at 205-06, 208-12, 218.

CONCLUSIONS OF LAW

26. Under § 25-446(d)(4), the Board has the authority to terminate or amend a voluntary agreement without the agreement of all the parties. § 25-446(d)(4). The Board may take such an action if a petition is received during the licensee's "renewal period," and if the request is at least "4 years from the date of the Board's decision initially approving the voluntary agreement." § 25-446(d)(2)(A)-(B). The Applicant must also demonstrate (1) that the it has "made a diligent effort to locate all other parties to the voluntary agreement" or demonstrate that it "has made a good-faith attempt to negotiate a mutually acceptable amendment to the voluntary agreement," § 25-446(d)(4)(A)(i)-(ii); (2) that "[t]he need for an amendment [or termination] 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); and (3) 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). Finally, to fulfill the diligent effort and good faith negotiation criteria, the Applicant must file "a sworn affidavit from the applicant . . . at the time that an application to amend a voluntary agreement by fewer than all parties is filed stating that either: (A) A meeting occurred between the parties which did not result in agreement; or (B) The non-applicant parties refused to meet with the applicant." D.C. Code § 25-446(d)(5).

27. We find that the Applicant has met its burden under § 25-446(d) to terminate its Voluntary Agreement. First, our findings in our prior Order finding that the Petition was filed in a timely fashion and satisfies § 25-446(d)(C) remain binding under the law of the case doctrine. Second, the Applicant has satisfied § 25-446(d)(4)(A)(i) and (ii) by demonstrating (1) that it made diligent efforts to locate the other parties by sending a letter on January 26, 2010, requesting negotiations over the Voluntary Agreement to the DCCA and the other signatories' designated representatives named in the original Order approving the Voluntary Agreement; and (2) that the Applicant satisfied its obligations to attempt good faith negotiations over amending or terminating the Voluntary Agreement when the Protestants failed to respond to its January 26, 2010 letter, and confirmed by the Applicant's sworn affidavit submitted at the Remand Hearing, which we accept as an amendment to its initial filing. Third, the Applicant has satisfied § 25-446(d)(4)(B) by showing that the need for termination is caused by circumstances beyond its control, because the legal prohibition on lateral expansions created by the East Dupont Circle Moratorium Zone, in which the Applicant's restaurant is located, was altered to allow for four lateral expansions after we approved the Voluntary Agreement. In addition, § 25-446(d)(4)(B) is also satisfied by the fact that the zoning of the building adjacent to the Applicant's building was changed from residential to commercial. Consequently, because the Applicant has demonstrated that its Petition complies with parts (A), (B), and (C) of § 25-446(d)(4), we grant the Petition for Termination of the Voluntary Agreement.

Arguments of Parties

28. The Applicant argues that we should terminate its Voluntary Agreement, because it has met its burden under § 25-446(d)(4). *Tr.*, 6/13/12 at 279-80. While the Applicant admits that it

did not file a sworn affidavit with its initial pleadings, the Applicant argues that the Board is not required to dismiss the Petition under § 25-446(d)(5) based on the statute's legislative history and prior § 25-446(d)(4) cases decided in 2008. The Applicant further asserted that it has satisfied its duty to make efforts to diligently locate the parties or, if located, attempt good faith negotiations under part (A) of the statute, citing the letter, dated January 26, 2010, and the Protestants refusal to meet. *Tr.*, 6/13/12 at 267-69. The Applicant also argues that it satisfied part (B) of the statute, because the change in circumstance or change in the neighborhood portion of the statute is satisfied by the (1) economic downturn in 2009; (2) the Board's present penchant for providing licensees with speedy hearings; (3) the change in the law that altered the East Dupont Circle Moratorium Zone to allow for lateral expansions; and (4) the neighboring property's change from residential to commercial zoning. *Tr.*, 6/13/12 at 83-84, 276-79.

29. The Protestants counters that the Board could not take in the Applicant's new evidence, because it did not submit a new or amended PIF. *Tr.*, 6/13/12 at 32, 45-46. The Protestant further argues that we must dismiss the Petition under § 25-446(d)(5), because the failure to submit a sworn affidavit does not allow the Applicant to prove part (A) of the statute. *Tr.*, 6/13/12 at 281.

Discussion

A. PIF Requirement

30. As a preliminary matter, the Protestants object to the Applicant submitting evidence that was not indicated in the Applicant's original PIF filed before the Protest Hearing. *Tr.*, 6/13/12 at 32, 46. We reject this argument, because the Board has never required any parties to submit new PIFs before a remand hearing and the Board has the discretion to reopen the record and allow the parties to submit additional evidence.

31. We note that the PIF requirement is not mandated by the Board's statutes or regulations; rather it is an agency procedure enacted by the Board "to prepare the ABC Board for an upcoming Protest hearing" and to maintain good order and decorum. *ABRA Protest File No. 10-PRO-00094, Protestants' PIF*; see also *Hicks-Bey v. U.S.*, 649 A.2d 569, 575 (D.C. 1994) (saying that "... the trial court has inherent authority, unless otherwise specifically precluded, to control the conduct of the proceedings before it, in order to ensure that the proper decorum and appropriate atmosphere are established, that all parties are treated fairly, and that justice is done."); 23 DCMR § 1710.3 (authorizing the Board to maintain decorum and good order in its proceedings). Under our procedural rules and the District of Columbia's Administrative Procedure Act (DCAPA), no party has a *right* to advance notice of the other party's evidence before an administrative hearing. D.C. Code § 2-509(a)-(e) (West Supp. 2012); 23 DCMR § 1606.3 (West Supp. 2012) ("At the protest hearing, an applicant or licensee may give a brief opening statement summarizing the evidence and testimony he or she intends to produce regarding the appropriateness of the application or license at issue. Thereafter, the protestant may give a brief opening statement summarizing the evidence he or she intends to present to rebut or overcome the evidence and argument presented by the applicant or licensee.) Indeed, the

Board's statutes and regulations contain no references to pre-trial discovery mechanisms. See, e.g., D.C. Code § 25-442(a) (West Supp. 2012) (saying that parties may call witnesses to testify at a hearing); 23 DCMR § 1713.2 (West Supp. 2012) (“Any party who offers documentary evidence shall, at the hearing, provide copies to each opposing party.”)

32. Therefore, the parties did not have to submit new or amended PIFs prior to presenting new evidence and witnesses during the Remand Hearing.

B. Sworn Affidavit

33. We further decline to dismiss the Petition on the grounds that the Applicant failed to file a sworn affidavit under § 25-446(d)(5) with its initial filing. The Board does not find that § 25-446(d)(5) mandates dismissal, and we note that we are entitled to accept the Applicant's sworn affidavit submitted at the Remand Hearing as an amendment to the Applicant's initial filings.⁴

34. Contrary to the Protestants' arguments, the failure to file a sworn affidavit does not automatically translate into the dismissal of the Applicant's Petition. We decline this interpretation, because overly strict procedural requirements result in the dismissal of otherwise valid claims. See e.g., Tucios v. U.S. Services Industries, 680 A.2d 1023, 1026 (D.C. 1996) (saying that “rules shall be construed and administered to secure the just, speedy, and inexpensive determination of every action” and that “rules of civil procedure should be liberally construed.”) (citations and quotation marks omitted). We, therefore, reject interpreting our procedures in a way that emphasizes form over substance; and instead, we interpret the law broadly, in a manner that allows parties to argue their claims on the merits. See e.g., Cormier v. District of Columbia Water and Sewer Authority, 959 A.2d 658, 665 (D.C. 2008) (saying “[a]lthough conventional sworn affidavits would have been preferable, it would surely exalt form over substance to deny a hearing simply because the statements were not notarized”) citing Lanton v. United States, 779 A.2d 895, 903 (D.C. 2001).

35. Our interpretation is supported by general rules of statutory construction. Section 25-446(d)(5) states, “To fulfill the good faith attempt criteria of paragraph (4)(A)(ii) of this subsection, a sworn affidavit from the applicant shall be filed with the Board at the time that an application to amend a voluntary agreement by fewer than all parties is filed stating that either: (A) A meeting occurred between the parties which did not result in agreement; or (B) The non-applicant parties refused to meet with the applicant.” § 25-446(d)(5).

36. It is not always the case that the word ‘shall’ in a statute denotes a mandatory requirement. Adams v. Braxton, 656 A.2d 729, 731 (D.C. 1995). A statute using the word

⁴ We note that in its original petition to the District of Columbia Court of Appeals, the Protestants argued that the Board had to dismiss the Petition, because the Applicant did not submit a sworn affidavit in compliance with §§ 25-446(d)(4) and 25-446(d)(5). Brief for Petitioner, at 13. Yet, the court did not rule on the affidavit argument; and instead, the court left the matter to the Board's determination by ordering the Board to make findings on part (A) and part (B) of § 25-446(d)(4). Mallof, 43 A.3d at 923.

'shall' may be considered directory when a mandatory "construction is inconsistent with the manifest intent of the legislature or repugnant to the context of the statute." Williams v. U.S., 33 A.3d 358, 360 (D.C. 2011) citing Leonard v. District of Columbia, 801 A.2d 82, 84–85 (D.C. 2002); see also Miller v. Town of West Windsor, 704 A.2d 1170, 1173 (Vt. 1997) (defining "directory" as directing the manner of doing a thing and not the authority for doing it). "[I]t is a general rule that where strict compliance with the provision is essential to the preservation of the rights of parties affected and to the validity of the proceeding, the provision is mandatory, but where the provision fixes a mode of proceeding and a time within which an official act is to be done, and is intended to secure order, system and dispatch of the public business, the provision is directory." Pishny v. Board of County Com'rs of County of Johnson County, 277 P.3d 1170, 1181 (Kan. App. 2012) (internal quotations removed); see also, e.g., Chisholm v. Bewley Mills, 155 Tex. 400, 403 (Tex. 1956); Pereira v. State Bd. of Educ., 37 A.3d 625, 635 (Conn. 2012); Cobb County v. Robertson, 724 S.E.2d 478, 479–480 (Ga. App. 2012); Brennan v. Kolman, 781 N.E.2d 644, 646 (Ill. App. 1 Dist. 2002).⁵ Finally, "the presence of negative words requiring that an act shall be done in no other manner or at no other time than that designated, or . . . a provision for a penalty or other consequence of noncompliance" may indicate that a statute is mandatory. Pishny, 277 P.3d at 1181; see also e.g., Pereira, 37 A.3d at 635; KW Holdings, LLC v. Town of Windsor, 656 N.W.2d 752, 764 (Wis. App. 2002).

37. The statute's legislative history and construction supports the conclusion that § 25-446(d)(5)'s statement that the sworn affidavit shall be submitted at the time of filing is directory. The Council of the District of Columbia (Council) did not explain why it required a sworn affidavit to prove that the Applicant attempted good faith negotiations. But the Committee Report describing § 25-446's amendment process states,

The Board can then accept a change in the voluntary agreement, even if fewer than all the parties signing the agreement agree, if sworn upon evidence shows that the applicant has made an effort to find all the parties to the agreement, that there was a good faith effort made to change the voluntary agreement by including all the parties, that there is a need to change the agreement due to changes in the neighborhood, and that the amendment will not have an adverse effect on the neighborhood. Finally, this amendment specifies criteria for what it means to make a good faith effort.

Council of the District of Columbia, Report on Bill 15-516, the "Omnibus Alcoholic Beverage Amendment Act of 2004," Committee on Consumer and Regulatory Affairs, 36 (March 9, 2004).

38. In light of this language, the only thing the Council emphasized in its description of § 25-446(d) is that the licensee should make a showing based on sworn evidence that it satisfied § 25-

⁵ The Board has not found a specific case from the District of Columbia Court of Appeals that discusses in detail the difference between directory and mandatory statutory requirements. Nonetheless, we find the reasoning provided by other jurisdictions persuasive, and logically following the court's ruling in Gallothom, where the court held that "Statutory provisions concerning the performance of duties by public officers generally are considered directory so that the interests of private parties and the public might not suffer due to the official's failure to act promptly." Gallothom, Inc. v. District of Columbia Alcoholic Bev. Control Bd., 820 A.2d 530, 535 (D.C. 2003).

446(d)(4)(A). No language in the report states that the Applicant must make its evidentiary showing at the time of filing, or that we must rely on the affidavit exclusively. Consequently, it is inconsistent with the Council's emphasis on sworn evidence to dismiss the Petition merely because the Applicant failed to proffer a sworn affidavit at the time of filing; especially, when the Applicant has the burden to substantiate the facts alleged in the affidavit during the protest.

39. In light of the above, the manner in which § 25-446(d)(5) is written leads the Board to conclude that filing the sworn affidavit at the time the Petition is initially filed is a directory command. First, § 25-446(d)(5) merely sets a time for when filing is to occur, and it does not list a consequence for failing to meet this requirement. Second, the statute is not phrased in a negative fashion; for example, the statute does not say that the Board shall *not* terminate or amend a petition unless a sworn affidavit accompanies the Applicant's initial filing. Therefore, we conclude that § 25-446(d)(5)'s filing requirement is directory, based on its procedural nature, the failure of the statute to indicate penalties for late-filing, and the absence of negative phrasing.

40. We further find that allowing the amendment or late-filing of the sworn affidavit does not prejudice the Protestants, because in order to prove part (A), the Applicant must make an effort to locate the Protestants and attempt to engage in good faith negotiations. If the Applicant engaged in such actions, the Protestants should have direct knowledge and evidence of those events. Furthermore, hearing sworn evidence in the form of testimony at a hearing, and subjecting the parties to cross-examination is much more reliable than relying solely on a sworn affidavit. Consequently, the Applicant's failure to file a sworn affidavit with its initial pleadings does not place the Protestants at a disadvantage.

41. Because we find that the filing of the sworn affidavit is not mandatory, it is in our discretion to allow the Applicant to amend its Petition by filing a sworn affidavit. We, therefore, accept the sworn affidavit filed at the beginning of the Remand Hearing as satisfying § 25-446(d)(5).

42. The Board is entitled to accept amendments to petitions and applications as a matter of discretion when an amendment will not prejudice the opposing party or parties. Kingman Park Civic Association v. District of Columbia Alcoholic Bev. Control Bd., No. 11-AA-831, 7 (D.C. 2012). Notably, in Kingman Park Civic Association, we allowed the applicant to amend its application after a protest hearing so that the application correctly listed the establishment's ownership, hours of operation, and types of entertainment—all over the objection of the Kingman Park Civic Association (KPCA). Id. at 3-4. The court upheld the Board's decision, because there was "no authority prohibiting the Board from accepting an amended application." Id. at 7. Furthermore, the court also found that accepting the amended application did not prejudice the association, because the errors "were discussed during the hearing, and the [KPCA] had an opportunity to cross-examine the relevant witnesses about them." Id.

43. Here, we find that accepting the sworn affidavit at the beginning of the hearing is not prejudicial to the Protestants. Under part (A), the Applicant is obligated to make diligent efforts to locate the other signatories to the Voluntary Agreement or, if located, attempt good faith

negotiations with the other parties. As a result, if the Applicant failed to engage in the required activities, the Protestants would have direct knowledge of these events and the ability to prepare an adequate defense. Therefore, in accordance with Kingman Park, we accept the sworn affidavit, and we find that it satisfies the requirements of § 25-446(d)(5). Moreover, we note that the decision issued by the court gave the Protestants advanced notice of the issues that the Board would address at the Remand Hearing. Mallof, 43 A.3d at 923. Therefore, allowing the Applicant to amend its initial filing does not prejudice the Protestants.

44. Finally, on a separate note, the Board has previously allowed applicants to meet the requirement of § 25-446(d)(5) by means other than the filing of a sworn affidavit at the time of the petition to amend the voluntary agreement was submitted. In 2008, the previous Board found repeatedly that licensees submitting petitions to terminate their voluntary agreements in Mount Pleasant satisfied § 25-446(d)(4)(A) solely by attending a settlement conference with the opposing parties. In the Matter of Jaime T. Carillo, t/a Don Jaime's Restaurant, Case No. 10579-07/53P, Board Order No. 2008-190, ¶ 89 (D.C.A.B.C.B. Apr. 23, 2008); In the Matter of NHV Corporation, Inc., t/a Haydee's Restaurant, Case No. 10515-07/065P, Board Order No. 2008-189, ¶ 83 (D.C.A.B.C.B. Apr. 23, 2008); In the Matter of Don Juan Restaurant, Inc., t/a Don Juan Restaurant & Carryout, Case No. 21278-07/042P, Board Order No. 2008-233, ¶ 78 (D.C.A.B.C.B. Jul. 30 2008). None of the Mount Pleasant decisions discusses or show that the Board considered any sworn affidavits submitted with the filing of the petitions. Accordingly, it was reasonable for the Applicant in this case to rely on those decisions and conclude that a sworn affidavit at the time of the filing of the petition was not required.

45. For all these reasons, we, accept the sworn affidavit filed at the beginning of the Remand Hearing as satisfying § 25-446(d)(5). Supra, at ¶ 5.

C. Termination

46. Turning to the merits, we find that the Applicant has demonstrated its satisfaction of parts (A), (B), and (C) of §25-446(d)(4).

a. §§ 25-446(d)(1), 25-446(d)(2), 25-446(d)(4)(C)

47. Our conclusions in our prior Order that the Petition was filed at the proper time under §§ 25-446(d)(1), 25-446(d)(2), and 25-446(d)(4)(C) remain applicable under the law of the case doctrine. See generally, Hank's Oyster Bar, Board Order No. 2010-533. Under §§ 25-446(d)(1) and (d)(2), a licensee may file to terminate its Voluntary Agreement so long as the licensee makes the request during its renewal period and at least four years from the date the Voluntary Agreement was initially approved by the Board. § 25-446(d)(1), (d)(2). Furthermore, under part (d)(4)(C), the licensee must also show that "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.

48. Under the law of the case doctrine, “once the court has decided a point in a case, that point becomes and remains settled unless or until it is reversed or modified by a higher court.” Lenkin Co. Management, 677 A.2d at 48 citing Kritsidimas v. Sheskin, 411 A.2d 370, 371 (D.C.1980). Therefore, because the court did not overturn our decision finding that the Applicant has complied with §§ 25-446(d)(1), (d)(2), and (d)(4)(C), these conclusions remain applicable to this matter. Supra, at ¶ 2; Mallof, 43 A.3d at 92; see also Hank’s Oyster Bar, Board Order No. 2010-533, at ¶¶ 50-53.

b. § 25-446(d)(4)(A)

49. We further find that the Applicant has satisfied its burden to either make diligent efforts to locate the other parties, or, if located, attempt negotiations in good faith.

i. Diligent Effort

50. First, we find that the Applicant made diligent efforts to locate the other parties by sending the letter, dated January 26, 2010, requesting an opportunity to renegotiate the Voluntary Agreement to the DCCA, Mr. Mallof, and Mr. Rieffel.

51. A licensee seeking to terminate its Voluntary Agreement must make “a good-faith attempt to negotiate a mutually acceptable amendment to the voluntary agreement” unless she cannot, through “diligent effort[s],” locate the other parties. § 25-446(d)(4)(A)(i)-(ii). The term “diligent effort” is not defined in Title 25. Nevertheless, we would find that the Applicant satisfies the diligent effort standard when the Applicant’s actions are “reasonably calculated, under all the circumstances, to apprise” the other signatories that the Applicant wishes to renegotiate its Voluntary Agreement. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

52. Our final order approving the Voluntary Agreement listed the signatories to the agreement as the DCCA and A Group of Five or More Individuals, with Mr. Mallof and Mr. Rieffel listed as the group’s designated representatives. Supra, at ¶¶ 1, 8. In light of Mr. Mallof and Mr. Rieffel’s designation as designated representatives in our Order approving the Voluntary Agreement, the Applicant reasonably calculated that sending a letter to the DCCA and the named designated representatives would result in all the signatories being informed about their desires. Supra, at ¶ 8. Indeed, Mr. Mallof admitted that the other signatories had actual notice of the letter, because he, at the very least, told the other signatories about it. Supra, at ¶ 12. Under these circumstances, the January 26, 2010 letter sent to the DCCA, Mr. Mallof, and Mr. Rieffel satisfies the “diligent effort” requirement.

ii. Good Faith Negotiations

53. Second, we find that the Applicant has satisfied the good-faith negotiation requirements, because the Protestants inexplicably failed to respond to the Applicant’s letter, dated January 26, 2010, requesting negotiations, which demonstrates their refusal to meet with the Applicant.

54. In order to terminate its Voluntary Agreement, the Applicant must make “a good-faith attempt to negotiate a mutually acceptable amendment to the voluntary agreement” unless she cannot, through “diligent effort[s],” locate the other parties. § 25-446(d)(4)(A)(i)-(ii). Good faith is a term of art that requires “honesty in fact in the conduct or transaction concerned.” Big Builders, Inc. v. Israel, 709 A.2d 74, 77 (D.C. 1998) citing D.C. Code § 28:1-201 (West Supp. 2012); Beckett v. Tyler, 3 MacArth. 319, 1877 WL 18405, 3 (D.C. Sup. 1877); see also BLACK’S LAW DICTIONARY (9th ed. 2009) (defining good faith as “(1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.”) Furthermore, § 25-446(d)(5) tells us that the Applicant fulfills the good-faith requirement without an agreement, if “A meeting occurred between the parties that did not result in an agreement . . . or “[t]he non-applicant parties refuse[] to meet with the Applicant. § 25-446(d)(5)

55. Here, nothing in the Applicant’s conduct suggests fraud, deceit, or dishonesty on the part of the Applicant. Instead, the Applicant made efforts to meet with the Protestants by sending them the letter, dated January 26, 2010. Supra, at ¶ 8. The letter apprised the Protestants that (1) the Applicant desired to expand its premises and use additional outdoor space; (2) the Voluntary Agreement prevented the Applicant from doing so; and (3) asked them to contact the Applicant and provide acceptable times for a meeting. Id. The Protestants admitted they received this letter, but only responded after the Applicant’s attorney sent a follow up email on February 23, 2010. Supra, at ¶ 9. Mr. Mallof gave no reason for failing to respond to the Applicant’s January 26, 2010 letter. Supra, at ¶ 12. The Board finds that, once the Protestants received the January 26, 2010 letter, the burden shifted to the Protestants to respond to the letter and attempt to set up a meeting—not ignore the Applicant without explanation. Under these circumstances, we find that the Applicant has demonstrated that the Protestants refused to meet with them.

56. While unnecessary to our conclusion above, we further add that once the Applicant finally obtained a response from the Protestants, the Protestants did not have a right to set preconditions for meeting with the Applicant. In his testimony, Mr. Mallof emphasized that he did not feel he had an obligation to meet with the Applicant until they sent him a proposal that met his own personal expectations. Supra, at ¶ 14. Nevertheless, the law does not support this view of the good faith requirement. For these reasons, we find that the Applicant has satisfied its obligations under § 25-446(d)(4)(A).

c. § 25-446(d)(4)(B)

57. We also find that the change in the East Dupont Circle Moratorium Zone and the alteration of neighboring property’s zoning from residential to commercial satisfies the change in circumstances requirement under § 25-446(d)(4)(B).

58. Under § 25-446(d)(4)(B), a licensee seeking to terminate a voluntary agreement 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).

59. Previously, we have interpreted the test created by (B) broadly. For example, in dicta in Haydee's Restaurant, we wrote that the licensee could make the necessary showing in (B) by, for example, pointing to the new shopping center in the neighborhood; highlighting demographic and income changes; presenting evidence that the voluntary agreement no longer provided any benefit to the community; or showing that the neighborhood was undergoing severe economic distress. In the Matter of NHV Corporation, Inc., t/a Haydee's Restaurant, Case No. 10-PRO-00113, Board Order No. 2011-151, 5-6 n. 1 (D.C.A.B.C.B. Mar. 9, 2011). Likewise, in Madam's Organ, we said that the addition of a new D.C. Circulator route through the neighborhood qualified as a change to the neighborhood. In the Matter of 2461 Corporation, t/a Madam's Organ, Case No. 11-PRO-00016, Board Order No. 2012-250, 3 (D.C.A.B.C.B. Jun 6, 2012).

60. Consistent with our reasoning in Haydee's Restaurant and Madam's Organ, we likewise view a change in the liquor laws governing a neighborhood as a change in circumstances beyond the Applicant's control when the Applicant's ability to respond to that change is controlled by the Applicant's Voluntary Agreement. These types of changes in the law are the type of circumstance contemplated by the Council, because they can have a major impact on the value and cost of each party's concessions, which may or may not have been intended at the time each party manifested their assent to the agreement. See Simon v. Circle Associates, Inc., 753 A.2d 1006, 1012 (“A valid and enforceable contract requires both (1) agreement as to all material terms, and (2) intention of the parties to be bound There must thus be an honest and fair meeting of the minds as to all issues in a contract.”) (citations and quotation marks omitted).

61. Here, at the time Ms. Leeds negotiated her Voluntary Agreement with the Protestants in 2005, there was a long-standing prohibition on the lateral expansions of on-premise licenses. Supra, at ¶ 20. This changed in 2009, in an emergency rulemaking and was made permanent in 2010, when the Board allowed for four lateral expansions. Supra, at ¶ 21. It is uncontroverted that that the Voluntary Agreement prevents her from taking advantage of this change in the law, as the agreement prevents her from expanding her restaurant. Supra, at ¶ 7. Moreover, it is undisputed that Ms. Leeds has no control over the law. Under these circumstances, we find that the Applicant has demonstrated a change in circumstance beyond its control under § 25-446(d)(4)(B) that merits consideration of its Petition.

62. This is a just interpretation of part (B), because the parties cannot predict, or be expected to predict, what the future state of the law will be at the time they negotiate their agreement. Furthermore, under our interpretation, the change in the law must have a nexus to the agreement; thus, our reading of the statute avoids other license holders from asking for a termination or amendment to their agreements merely because the Council or the Board made a change to laws unrelated to a licensee's operations or their voluntary agreement.

63. Independent of our reasoning above, we also find that the change of the neighboring property's zoning designation from residential to commercial satisfies § 25-446(d)(4)(B). First, we note that as a residential zone the property was unavailable for business purposes at the time Ms. Leeds signed the Voluntary Agreement. Supra, at ¶ 7. Yet, once the neighboring property was zoned commercial this altered the character of the neighborhood and the value of the agreement entered into by the parties. Second, we also note that Ms. Leeds had no ability to control the zoning of the neighboring building. Therefore, we find that the change of the neighboring property's zoning designation from residential to commercial satisfies § 25-446(d)(4)(B) as well.

D. Conclusion

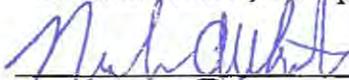
64. For the foregoing reasons, we find that the Applicant has satisfied parts (A), (B), and (C) of § 25-446(d)(4).

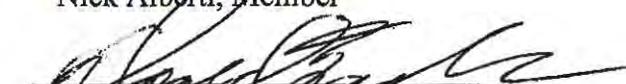
ORDER

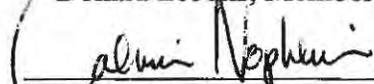
Therefore, on this 12th day of September 2012, it is hereby **ORDERED** that the Petition to Terminate a Voluntary Agreement requested by Leeds the Way, LLC, t/a Hank's Oyster Bar, at premises 1624 Q Street, N.W., Washington, D.C., is hereby **GRANTED** under § 25-446(d). The ABRA shall deliver copies of this order to the Applicant and the Protestants.

District of Columbia
Alcoholic Beverage Control Board


Ruthanne Miller, Chairperson


Nick Alberti, Member


Donald Brooks, Member


Calvin Nophlin, Member

I recuse myself from this matter.


Mike Silverstein, Member

Pursuant to Section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code §2-510 (2001) and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of the service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (April 2004) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b).