

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

In the Matter of:	)	
	)	
NHV Corporation, Inc.	)	License Number: 024663
t/a Haydee's Restaurant	)	Case Number: 10-PRO-00012
	)	Order Number: 2010-467
Petition to	)	
Terminate a Voluntary Agreement	)	
for a Retailer's Class CR License	)	
	)	
at premises	)	
3102 Mount Pleasant Street, N.W.	)	
Washington, D.C. 20010	)	

NHV Corporation, Inc., t/a Haydee's Restaurant, represented by Robert P. Waldeck, Esq.,  
Applicant

Sam Broeksmit, on behalf of the Mount Pleasant Neighborhood Alliance (MPNA),  
Protestant

BEFORE:                   Nick Alberti, Acting Chairperson  
                              Mital Gandhi, Member  
                              Donald Brooks, Member  
                              Herman Jones, Member  
                              Calvin Nophlin, Member  
                              Mike Silverstein, Member

**ORDER DENYING MOTIONS TO DISMISS AND MOTION TO STRIKE**

The Petition to Terminate a Voluntary Agreement for a Retailer's Class CR License filed by NHV Corporation, Inc., t/a Haydee's Restaurant, (Applicant), which has been protested by the MPNA (Protestant) came before the Alcoholic Beverage Regulation Administration (ABRA) for a Roll Call Hearing on August 16, 2010, in accordance with D.C. Official Code § 25-601 (2001). The Status Hearing is scheduled for September 22, 2010, and the Protest Hearing is scheduled for November 17, 2010.

The Protestant submitted two Motions to Dismiss, dated August 16, 2010, which ask the Board to dismiss the Petition filed by the Applicant. The Protestant argues that the Applicant is not entitled to file a Petition to Terminate a Voluntary Agreement until 2012 because the Voluntary Agreement, originally approved in 1997, was amended and approved in 2008. As a result, the Protestant argues that the Applicant has not satisfied the four year waiting period created by Title 25 of the District of Columbia Official Code. Furthermore, the Protestant argues that the Applicant has not negotiated with the Applicant

in good faith as required by statute because no meetings between the parties have occurred, been requested, or are scheduled for the future.

In a Motion to Strike MPNA's Motions to Dismiss and a Reply Brief submitted on August 23, 2010, and September 5, 2010, respectively, the Applicant asks the Board to reject the Protestant's Motions. The Applicant argues that the Board must strike the Applicant's Motion to Dismiss because the protest hearing process does not envision a summary disposition process under 23 DCMR § 1606.1 and that the Applicant is entitled to a full hearing under D.C. Code § 25-431(f) and D.C. Code § 25-431(h). Further, the Applicant argues that its Voluntary Agreement is 13 years old because it was initially approved on March 14, 1997, not 2008 as claimed by the Protestant. The Protestant also argues that it has satisfied the good faith requirement because the parties met on March 6, 2010, to negotiate the termination of the Voluntary Agreement. According to the Applicant, the Protestant refused to negotiate unless the Applicant dropped its request for a Class CN License. Finally, the Applicant also requested on August 20, 2010, that the Board grant the Applicant further time to reply to the Protestant's Motions, which the Board granted.

After reviewing the parties' arguments, the Board denies the Applicant's Motion to Strike MPNA's Motions to Dismiss because there is no legal authority that supports the Applicant's position. The Board also denies the Protestant's Motions because the Voluntary Agreement signed by the parties was initially approved in 1997, and not 2008. In addition, the Board finds that there is a question of material fact as to whether the parties engaged in good faith negotiations as required by statute.

As a preliminary matter, the Board rejects the Applicant's contention that it must strike the Protestant's Motions to Dismiss. The legal authority cited by the Applicant to support its position does not apply to the present matter. A motion to dismiss argues that the application should be dismissed as a matter of law. Here, the Protestant argues that, as a matter of law, the Applicant has not satisfied D.C. Code § 25-446 (2004). If there is no genuine issue of material fact, the Board is entitled to dismiss the Application if it does not comply with the standards outlined in § 25-446. As such, if the Board had granted the Protestant's Motions, it would mean that there was no evidence or facts that the Applicant could have submitted in order obtain approval by the Board. The Board also notes that 23 DCMR 1716 (2008) *passim*, which governs motions submitted to the Board, contemplates that motions will be submitted by the parties and does not limit the types of motions that can be submitted during a protest hearing. Therefore, the Board denies the Applicant's Motion to Strike MPNA's Motions to Dismiss.

Nevertheless, the Board agrees with the Applicant's arguments on the merits of the Protestant's Motions. The Applicant's Petition to Terminate a Voluntary Agreement for a Retailer's Class CR License is timely. As stated in D.C. Code § 25-446, the Board may accept a Petition early if it is received "[a]fter 4 years from the date of the Board's decision *initially approving* the voluntary agreement." D.C. Code § 25-446(d)(2) (emphasis added). Here, the Voluntary Agreement was approved on March 14, 1997, and amended in 2008. An amendment to a voluntary agreement does not constitute initial approval. As such, the Protestant's Motion to Dismiss on this ground is incorrect.

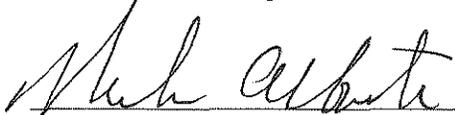
Further, there is a genuine issue of material fact as to whether the Applicant negotiated with the Protestant in good faith. As indicated in D.C. Code § 25-446, in order to terminate its Voluntary Agreement early, the Applicant must make “a good-faith attempt to negotiate a mutually acceptable amendment,” which is evidenced by “[a] meeting between the parties that did not result in agreement” or “the non-applicant parties refused to meet with the [A]pplicant.” D.C. Code § 25-446(d)(4)(A)(ii), § 25-446 (5)(A)-(B). Here, the parties engaged in mediation facilitated by ABRA on September 8, 2010. As such, this fact satisfies the good-faith requirement found in D.C. Code § 25-446. Therefore, the Board denies the Protestant’s Motions to Dismiss.

As such, the Board denies the Protestant’s Motions to Dismiss and the Applicant’s Motion to Strike MPNA’s Motions to Dismiss.

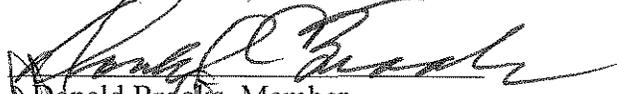
### **ORDER**

The Board does hereby, this 15th day of September 2010, **DENY** the Motions to Dismiss filed by Sam Broeksmit on behalf of the MPNA. The Board also **DENIES** the Applicant’s Motion to Strike MPNA’s Motions to Dismiss. Copies of this Order shall be sent to the Applicant and to the Protestant.

District of Columbia  
Alcoholic Beverage Control Board

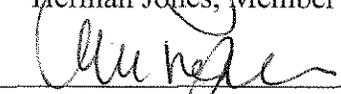
  
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Nick Alberti, Acting Chairperson

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Mital M. Gandhi, Member

  
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Donald Brooks, Member

  
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Mike Silverstein, Member

Pursuant to 23 DCMR § 1719.1 (April 2004), 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, 1250 U Street, N.W., Third Floor, Washington, DC 20009.