

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

In the Matter of:)		
)		
Sula, LLC)	Order No.	2010-376
t/a Masa 14)	Case No.:	10-PRO-00007
)	License No.	081469
Application for a Substantial Change)		
Retailer's Class CR License)		
)		
at premises)		
1825 14th Street, N.W.)		
Washington, D.C. 20009)		
)		

BEFORE: Charles Brodsky, Chairperson
Mital Gandhi, Member
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Calvin Nophlin, Member

ALSO PRESENT: Sula, LLC, t/a Masa 14, Applicant

Mr. Andrew Kline, on behalf of the Applicant

Commissioner Peter Raia, on behalf of Advisory Neighborhood
Commission 1B

Ms. Kuk-Ja Kim, on behalf of a Group of Seventy Five or More
Individuals

Mr. Ramon Estrada, on behalf of a Group of Five or More Individuals

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

Jonathan Berman, Assistant Attorney General
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Sula, LLC, t/a Masa 14 (Applicant) filed an Application for a Substantial Change for its Retailer's Class CR License at premises 1825 14th Street, N.W. The Applicant seeks to open a summer garden and expand its premises. The Application initially came before the Alcoholic Beverage Regulation Administration (ABRA) for a Roll Call Hearing on March 1, 2010.

Protests against the Application were timely filed by Advisory Neighborhood Commission (ANC) 1B by letter dated February 16, 2010. The Group of Five or More Individuals represented by ANC Commissioner Ramon Estrada timely filed its protest on February 16, 2010. Furthermore, the Group of Seventy Five or More Individuals represented by Ms. Kuk-Ja Kim timely filed its protest on January 29, 2010.

No Voluntary Agreement was reached between the Applicant and the Protestants before the Protest Hearing. The Application was heard at a Protest Hearing on May 12, 2010.

Pursuant to D.C. Official Code § 25-602(a) (2009), the protest issues are whether the request for a substantial change to the licensee's operations in order to allow for a summer garden on the establishment's roof would adversely impact the peace, order, and quiet of the neighborhood.

FINDINGS OF FACT

1. The Applicant is requesting a Substantial Change to its Retailer's Class CR License. *ABRA Licensing File No. 081469.*

2. The Applicant's establishment is located at 1825 14th Street, N.W. *ABRA Licensing File No. 083559.* The establishment is located in a C-3-A zone. *ABRA Exhibit No. 6.* There are 40 ABC licensed establishments located within 1200 feet of the Applicant and 13 of those establishments have sidewalk cafés or summer gardens. *ABRA Exhibit No. 7.* Investigator Parker noted that two of the 13 establishments, Polly's and Indulj, may not be utilizing their outdoor seating. *Transcript May 12, 2010 (hereinafter Tr. 5/12/10)* at 38. Further, Investigator Parker testified that the list of 40 establishments does not include licenses that have been approved but have not opened yet. *Tr., 5/12/10* at 42. There are no schools within 400 feet of the Applicant. *ABRA Exhibit No. 8.* The establishment is located in the middle of the 1800 Block of 14th Street, N.W., Washington, D.C. *ABRA Exhibit No. 10.* Currently, the proposed second floor has not been built. *ABRA Exhibit No. 16.*

3. The Applicant's current hours of sale and service of alcohol are Sunday, 10:00 a.m. to 2:00 a.m., Monday through Thursday, 8:00 a.m. to 2:00 a.m., and Friday and Saturday, 8:00 a.m. to 3:00 a.m. *ABRA Licensing File No. 08169.*

4. The Applicant proposes to have the summer garden operate from 8:00 a.m. to 2:00 a.m., Sunday through Thursday, and 8:00 a.m. to 3:00 a.m., Friday and Saturday. *ABRA Protest File 076250-09/075P, Protest Report, 7*. The establishment has requested hours for the sale of alcoholic beverages in the summer garden that correspond to their hours of operation request, except that on Sundays the establishment wants to be able to sell and serve alcohol only from 10:00 a.m. to 2:00 a.m. *ABRA Protest File 076250-09/075P, Protest Report, 8*.
5. ABRA Investigator Vincent Parker observed the Applicant's establishment "on 11 separate occasions from April 15, 2010, to April 28, 2010." *ABRA Protest File 076250-09/075P, Protest Report, 9*. Investigator Parker stated that he found no ABRA violations during his investigation. *Tr., 5/12/10 at 38*.
6. Investigator Parker learned that the Applicant shares trash removal services and grease and oil removal services contracts with the neighboring establishments. *Tr., 5/12/10 at 27*. During one visit to the establishment, Investigator Parker noticed trash near the dumpsters located at the rear of the establishment but observed that the establishment's staff was cleaning the area without prompting from the Investigator. *Tr., 5/12/10 at 27, 45-46*.
7. Investigator Parker stated that he entered the establishment during monitoring visits. During his investigation, he never witnessed a rowdy crowd. He noted that the establishment was approved for 239 seats under its Certificate of Occupancy. *Tr., 5/12/10 at 27*.
8. Investigator Parker did not hear sound emanating across 14th Street, N.W., when he observed the establishment utilize entertainment on two separate occasions. *Tr., 5/12/10 at 27*.
9. Investigator Parker noted that parking around the restaurant was an issue. *Tr., 5/12/10 at 28*. The restaurant is located near 14th Street, N.W., and U Street, N.W., an area with many attractions. *Tr., 5/12/10 at 28*. According to Investigator Parker, it takes a long time to find street parking. *Tr., 5/12/10 at 29*. However, Investigator Parker noted that the Applicant offered valet parking on Thursday, Friday, Saturday, and other busy nights. *Tr., 5/12/10 at 28-29*. Based on his observations, Investigator Parker determined that the area lacked ample street parking. *Tr., 5/12/10 at 32*. Nevertheless, Investigator Parker testified that A&P Parking Lot operates a private parking lot near the Applicant, which is the same company that operates the Applicant's valet service. *Tr., 5/12/10 at 32*. Lastly, Investigator Parker testified that the Reeves Center, located one block away from the Applicant, has over three hundred parking spots available and believes it allows public parking until 3:00 a.m. or 4:00 a.m. *Tr., 5/12/10 at 33-34, 39-40*.
10. Investigator Parker obtained crime analysis data for 1825 14th Street, N.W., from the Metropolitan Police Department (MPD). According to MPD, there were seven calls for service in 2009. *Tr., 5/12/10 at 29*.

11. Investigator Parker testified that he knew one establishment within 1200 feet of the Applicant that utilized a rooftop deck. *Tr.*, 5/12/10 at 41.

12. The Applicant called Felipe Lozano to testify in support of the Application. *Tr.*, 5/12/10 at 48-49. Mr. Lozano has lived in an apartment at 1420 N Street, N.W., Washington, D.C., for the past two and a half years. *Tr.*, 5/12/10 at 48. He testified that his apartment is located approximately six blocks from the Applicant's establishment. *Tr.*, 5/12/10 at 48. Mr. Lozano supported the Application because it offered late night dining options and thought the Applicant's rooftop plans would add to the "atmosphere" of the neighborhood. *Tr.*, 5/12/10 at 49, 61. Mr. Lozano stated that he has never previously advocated for more outdoor dining establishments in his neighborhood. *Tr.*, 5/12/10 at 54. Mr. Lozano stated that he believed the Applicant's plans would increase the value of the neighborhood. *Tr.*, 5/12/10 at 57.

13. Mr. Lozano testified that he regularly patronizes the Applicant and frequents the establishment at least twice per week. *Tr.*, 5/12/10 at 58. He testified that he has never stayed at the establishment past 1:30 a.m. *Tr.*, 5/12/10 at 60. According to Mr. Lozano, in his opinion, the establishment was usually at 50 percent occupancy on Monday nights and approximately 80 to 100 percent capacity during the weekends. *Tr.*, 5/12/10 at 59. Mr. Lozano stated that he believed that the rooftop deck should be allowed to stay open until 3:00 a.m. *Tr.*, 5/12/10 at 66.

14. The Applicant called Ms. Shonika Proctor to testify in support of the Application. *Tr.*, 5/12/10 at 67-69. Ms. Proctor lives at 1434 Swann Street, N.W., which is located approximately half a block away from the Applicant. *Tr.*, 5/12/10 at 68. She stated she supports the Application because she supports local businesses and expanding the service industry. *Tr.*, 5/12/10 at 69-70.

15. Ms. Proctor stated that she was not concerned about the Applicant's proposed hours for the rooftop deck. *Tr.*, 5/12/10 at 70. She stated that the 14th Street, N.W., area is very active and vibrant, which attracted her to the area. *Tr.*, 5/12/10 at 70. Furthermore, she believes that the Applicant's patrons are the "sophisticated type" and are upscale and professional. *Tr.*, 5/12/10 at 70. As a result, Ms. Proctor stated that she believed that the establishment would not attract an "obnoxious" crowd. *Tr.*, 5/12/10 at 71. Finally, Ms. Proctor admitted that she had never patronized the Applicant's establishment between 2:00 a.m. and 3:00 a.m. *Tr.*, 5/12/10 at 73.

16. Ms. Proctor stated that she does not believe the establishment causes any noise disturbances. *Tr.*, 5/12/10 at 77. Ms. Proctor stated she has been able to hold a conversation over the music played by the Applicant. *Tr.*, 5/12/10 at 77. Furthermore, she testified that after patronizing the Applicant's establishment on one occasion she did not hear any sounds emanating from the establishment after she walked across the street. *Tr.*, 5/12/10 at 77.

17. Ms. Proctor testified that she did not believe the establishment had a trash problem. *Tr.*, 5/12/10 at 78.

18. Ms. Proctor testified that the neighborhood becomes active between 7:30 a.m. and 8:00 a.m. *Tr.*, 5/12/10 at 81. She testified that stores in the neighborhood generally open between 9:00 a.m. and 10:00 a.m. *Tr.*, 5/12/10 at 81.

19. The Applicant called Ivan Iricanin to testify in support of the Application. *Tr.*, 5/12/10 at 85. Mr. Iricanin stated that he was the General Manager of the establishment and did not have an ownership interest in the Applicant. *Tr.*, 5/12/10 at 117.

20. Mr. Iricanin described the Applicant's proposed addition to the establishment. *Tr.*, 5/12/10 at 86. Mr. Iricanin stated that the establishment planned to build an addition to the second floor. *Tr.*, 5/12/10 at 86. The second floor has stairs leading to the first floor of the establishment. *Tr.*, 5/12/10 at 86. The rooftop deck will have a bar with 34 seats and allow some room for standing patrons. *Tr.*, 5/12/10 at 86. He stated that a small kitchen will be added, which will allow the Applicant to make food for those sitting upstairs. *Tr.*, 5/12/10 at 87. Mr. Iricanin stated that the rooftop deck's seating ends 18 feet before the front of the building. *Tr.*, 5/12/10 at 87. He further testified that only one patio will be showing. *Tr.*, 5/12/10 at 87. The Applicant submitted reproductions of the establishment's expansion plans in accordance with Mr. Iricanin's testimony. *ABRA Protest File 076250-09/075P, Applicant Exhibit #1; Tr.*, 5/12/10 at 90-91.

21. Mr. Iricanin stated that the rooftop deck's seating was designed to end 18 feet before the front of the building in order to minimize the noise experienced by the surrounding community. *Tr.*, 5/12/10 at 88. Mr. Iricanin stated that the occupancy of the second floor would be limited to 68 people in the outside portion of the second floor and 60 people on the inside. *Tr.*, 5/12/10 at 93, 96.

22. Mr. Iricanin stated the establishment sought to increase its bar space because he believed patrons enjoyed eating at the bar. *Tr.*, 5/12/10 at 98. He stated that building a bar upstairs would give customers the option of enjoying their meal or drink outside on pleasant days. *Tr.*, 5/12/10 at 99.

23. Mr. Iricanin stated that the establishment planned to install sliding doors in the second floor enclosed area. *Tr.*, 5/12/10 at 100. He stated the establishment planned to close the doors at 12:00 a.m. *Tr.*, 5/12/10 at 100. Furthermore, Mr. Iricanin stated that the establishment would not play music on the second floor and when there is music being played inside the establishment the sliding doors will remain closed. *Tr.*, 5/12/10 at 100-01.

24. Mr. Iricanin further added that the establishment intended to keep tables and chairs set up on the second floor at all times. *Tr.*, 5/12/10 at 101. He also stated that the menu on the second floor would be different from the menu on the first floor and have different food. *Tr.*, 5/12/10 at 102. He stated that the second floor would essentially be a second restaurant. *Tr.*, 5/12/10 at 102. Mr. Iricanin testified that there were no plans to provide heating to the second floor and that it would be open whenever conditions permitted it to be open. *Tr.*, 5/12/10 at 106.

25. Mr. Iricanin testified that the establishment would not restrict individuals standing at the outdoor bar. *Tr.*, 5/12/10 at 110. He stated that the establishment would not violate its occupancy limitation on the second floor. *Tr.*, 5/12/10 at 111. Mr. Iricanin testified that patrons would only use the stairs leading from the first floor, even though there are stairs leading to the second floor from the back. *Tr.*, 5/12/10 at 112. Mr. Iricanin stated that a manager would be located where patrons enter the second floor to ensure that the establishment did not violate its occupancy limit. *Tr.*, 5/12/10 at 113-14.

26. Mr. Iricanin testified that the Applicant also operates a sidewalk café, which operates until 12:00 a.m. *Tr.*, 5/12/10 at 134-35. The sidewalk café currently has an approved occupancy of 14 people. *Tr.*, 5/12/10 at 134. Mr. Iricanin testified that the Applicant has never received any noise complaints that refer to the sidewalk café as the source of the problem. *Tr.*, 5/12/10 at 134-35.

27. The Applicant called Geoff Turner to the stand to testify in support of the Application. *Tr.*, 5/12/10 at 135. Mr. Turner stated that he was an audio engineer and provides noise consulting services to restaurants and nightclubs in Washington, D.C., through his business, Acoustasonics. *Tr.*, 5/12/10 at 136-37. Mr. Turner also noted that he had previously worked as a consultant for the Black Cat, which holds a Retailer's Class CN License at premises 1811 14th Street, N.W. *Tr.*, 5/12/10 at 141; (*See ABRA Licensing File No. 60476*).

28. The Board affirmed that Mr. Turner qualified as an expert and could give a professional opinion concerning his investigation and findings. *Tr.*, 5/12/10 at 138. Mr. Turner testified that none of his clients have ever had their applications denied by the Board for noise issues. *Tr.*, 5/12/10 at 213. Mr. Turner testified that he previously has done work for ANC 6C and Policy, which holds a Retailer's Class CR License at premises 1904 14th Street, N.W. *Tr.*, 5/12/10 at 214; (*See ABRA Licensing File No. 76804*). He stated that he was briefly enrolled in American University's Physics School but left to pursue a career in recording. *Tr.*, 5/12/10 at 216. Mr. Turner stated that he has studied the science of sound and received instruction from other professionals in the field. *Tr.*, 5/12/10 at 217. He stated that he has been engaged in the noise consulting business for the past 15 to 20 years. *Tr.*, 5/12/10 at 217-18.

29. Mr. Turner stated that the Applicant hired him to determine if a summer garden on the Applicant's roof would cause noise issues for the establishment's neighbors. *Tr.*, 5/12/10 at 139. In that vein, Mr. Turner designed a test to determine if the neighbors would face any noise issues from the Applicant. *Tr.*, 5/12/10 at 142. Mr. Turner devised an experiment where he would reproduce sounds generated by an outdoor dining area on the proposed addition to the second floor and then measure whether the sound could be heard by the Applicant's neighbors. *Tr.*, 5/12/10 at 143. The results of Mr. Turner's experiments were submitted as evidence. *ABRA Protest File 076250-09/075P, Applicant Exhibit #2; Tr.*, 5/12/10 at 148-49.

30. Mr. Turner made a recording of the sound at The Reef in Adams Morgan, which features a rooftop bar similar to the one proposed at the Applicant's establishment. *Tr.*, 5/12/10 at 143. Mr. Turner chose The Reef because the noise produced was from people talking, eating, and

drinking without music. *Tr.*, 5/12/10 at 145-46. In order to make a recording, Mr. Turner also measured the sound pressure level using an sound pressure level meter. *Tr.*, 5/12/10 at 144. Mr. Turner stood six feet away from the crowd at The Reef while making the recording. *Tr.*, 5/12/10 at 144. He found that The Reef's rooftop bar, which had 75 people on the roof, measured at 83.1 decibels. *Tr.*, 5/12/10 at 144. Mr. Turner stated that he made the recording at 8:33 p.m. on May 5, 2010, during the Cinco de Mayo holiday. *Tr.*, 5/12/10 at 167. According to Mr. Turner, he brought a microphone to the roof of The Reef and made a recording six feet away from the crowd. *Tr.*, 5/12/10 at 221.

31. Mr. Turner stated that the unit of measurement of sound is the decibel. *Tr.*, 5/12/10 at 218. According to Mr. Turner, a decibel measures sound power. *Tr.*, 5/12/10 at 219. Furthermore, he noted that sound is not cumulative and sound coming from various sources will not add up to create a larger decibel reading. *Tr.*, 5/12/10 at 234. Mr. Turner stated that the benchmark for a sound reading done in the interior of a house was 30 decibels. *Tr.*, 5/12/10 at 245.

32. Mr. Turner stated that The Reef's rooftop deck was designed similarly to the Applicant's proposed plans. *Tr.*, 5/12/10 at 178. Mr. Turner added that The Reef had a canopy, unlike the Applicant's proposed roof deck, but believed that the canopy had no effect on the transmission of sound at The Reef and, therefore, the difference was irrelevant. *Tr.*, 5/12/10 at 178. Mr. Turner testified that when he made his recording The Reef had about 25 people in the bar area. *Tr.*, 5/12/10 at 202. He asserted that The Reef had similar conditions to the Applicant's proposed plans and was appropriate to use in his test because The Reef was an exposed, open air bar with the right number of people. *Tr.*, 5/12/10 at 179. Lastly, Mr. Turner admitted that this experiment was merely an estimate of the effect of the Applicant's proposed expansion and not an exact model. *Tr.*, 5/12/10 at 225-27. Nevertheless, Mr. Turner emphasized that an exact reproduction was unnecessary. *Tr.*, 5/12/10 at 225-27.

33. Mr. Turner also admitted that he attempted to make a recording at Lauriol Plaza but found that the restaurant was too loud. *Tr.*, 5/12/10 at 167. He stated that Lauriol Plaza had between 100 to 300 people on their rooftop deck. *Tr.*, 5/12/10 at 175. According to Mr. Turner, Lauriol Plaza's rooftop deck was not appropriate for the test because it had at least three times the number of people that could possibly be found on the Applicant's rooftop deck. *Tr.*, 5/12/10 at 176-77. Finally, Mr. Turner noted that Lauriol Plaza's rooftop deck was bigger and more enclosed than the Applicant's proposed expansion. *Tr.*, 5/12/10 at 239.

34. On the Applicant's roof, between 6:30 p.m. and 8:00 p.m., Mr. Turner played the recording of the sound produced by The Reef and put it on loop. *Tr.*, 5/12/10 at 145. According to Mr. Turner, he used two speakers that he normally uses for public address systems at outdoor events. *Tr.*, 5/12/10 at 168. He stated that he placed the speakers next to the establishment's wall that faces Swann Street, N.W. *Tr.*, 5/12/10 at 203. Mr. Turner ensured that the sound produced was at the same level produced at The Reef. *Tr.*, 5/12/10 at 145. He then measured the sound at nine different points surrounding the establishment. *Tr.*, 5/12/10 at 146. Mr. Turner

measured the noise levels in front of the Applicant's building; just before the alley on Swann Street, N.W.; behind the Applicant's building; at the entrance of 1340 T Street, N.W.; at the back of several residences, which face the Applicant; and inside 1434 Swann Street, N.W. *Tr.*, 5/12/10 at 147-48.

35. According to Mr. Turner, he could not measure or perceive any sound at seven of the nine designated locations in his experiment. *Tr.*, 5/12/10 at 149. According to Mr. Turner, at the two locations where the sound could be perceived, the sound was lightly perceptible to the human ear but could not be measured. *Tr.*, 5/12/10 at 151.

36. The first point where sound could be perceived was indicated as point G in the report Mr. Turner submitted to the Board. *Tr.*, 5/12/10 at 152. Point G was located in the alley behind Masa 14 and is where Masa 14 stores its trash cans. *Tr.*, 5/12/10 at 152. Mr. Turner walked up and down the alley, which runs parallel to 14th Street, N.W. *Tr.*, 5/12/10 at 152. He noted that the sound could no longer be heard once he was past the building adjacent to the Applicant's establishment. *Tr.*, 5/12/10 at 152. He noted that the closest residence, located at 1833 14th Street, N.W., was three buildings away from Masa 14, which he estimated was between 50 to 60 feet away from the Applicant. *Tr.*, 5/12/10 at 152. Furthermore, he was able to conduct a noise reading on an outdoor balcony on the third floor of the residence. *Tr.*, 5/12/10 at 153-54. Mr. Turner testified that from where he was positioned on the balcony he could not hear the sound emanating from Point G. *Tr.*, 5/12/10 at 154. Mr. Turner further added that the sound was imperceptible 10 to 15 feet away from Point G. *Tr.*, 5/12/10 at 154.

37. Mr. Turner stated that he established a baseline ambient sound level reading at point G of 58 decibels. *Tr.*, 5/12/10 at 206. After turning on the speakers, Mr. Turner obtained a reading of 55.6 decibels. *Tr.*, 5/12/10 at 206. Mr. Turner explained that the lower reading after turning on the speakers was normal because the environment had probably changed and that a reading with a divergence of 3 decibels is accepted in his field. *Tr.*, 5/12/10 at 206-207.

38. Mr. Turner also testified that he took measurements of the sound being generated on the roof from the front of the Applicant's building. *Tr.*, 5/12/10 at 155-56. He testified that he could hear the sound in front of the building but it was very difficult to hear the sound when there was traffic or other street noise. *Tr.*, 5/12/10 at 156. Furthermore, the sound dissipated once he reached the residences nearest the northwest corner of 14th Street, N.W., and Swann Street, N.W. *Tr.*, 5/12/10 at 156.

39. Mr. Turner stated that he could have tested the sound during a louder period of time; for example, Friday or Saturday night. *Tr.*, 5/12/10 at 157. Mr. Turner speculated that if he performed his test during those times the sound would be "completely covered over" and have no effect on "peace, order, and quiet." *Tr.*, 5/12/10 at 157.

40. Mr. Turner further opined that his test represented a "worse case scenario" because the proposed structure had not been built and there were no absorptive materials, like buildings or bodies, in place to block the transmission of sound waves. *Tr.*, 5/12/10 at 158-59. Mr. Turner

believed that noise control measures should focus on the residences facing the front side of the establishment's roof because they are the closest in proximity and there are few obstructions between the residences and the Applicant. *Tr.*, 5/12/10 at 159.

41. Mr. Turner commented that the building located next to the Applicant would block sound traveling north from the Applicant. *Tr.*, 5/12/10 at 160. Furthermore, Mr. Turner opined that no one would be bothered by sound being transmitted to the south because there was nothing but rooftops up until the Black Cat's building. *Tr.*, 5/12/10 at 160. Finally, the neighbors located to the southeastern side of S Street, N.W., and 14th Street, N.W., could not hear the sound because the residences were not in Masa 14's direct line of sight and were located too far away to hear the sound. *Tr.*, 5/12/10 at 160.

42. Mr. Turner stated that he devised a number of recommendations for the Applicant in order to minimize noise generated by the Applicant's proposed expansion. *Tr.*, 5/12/10 at 161. Mr. Turner recommended that the Applicant build an acoustic barrier facing Swann Street, N.W., that would not interfere with the historic nature and aesthetics of the property. *Tr.*, 5/12/10 at 161-162, 196. In that vein, Mr. Turner described designing a living wall for the Applicant. *Tr.*, 5/12/10 at 163. The wall would consist of adding willow trees around a currently existing wall facing Swann Street, N.W., on the Applicant's rooftop. *Tr.*, 5/12/10 at 162, 182. According to Mr. Turner, such a wall has sufficient surface density to block sound. *Tr.*, 5/12/10 at 163. Indeed, he stated that the wall would even block the sound created by people who are standing and talking in the direction of the wall and Swann Street, N.W. *Tr.*, 5/12/10 at 196. Mr. Turner stated that he had seen estimates that a living wall could reduce sound by 31 decibels; however, he believed that estimate was too high. *Tr.*, 5/12/10 at 230.

43. Furthermore, Mr. Turner recommended that the owner pledge to invest further resources into noise abatement should any problems with noise control arise. *Tr.*, 5/12/10 at 164. Finally, he stated that the Applicant was receptive to receiving noise control training. *Tr.*, 5/12/10 at 164-65.

44. Mr. Turner believed that music being played on the first floor would not be perceptible beyond the Applicant's property line if the doors on the second floor were left open. *Tr.*, 5/12/10 at 169. He also admitted that the glass doors that the Applicant proposed installing would act as a reflective surface and increase the transmission of sound. *Tr.*, 5/12/10 at 182-183. Nevertheless, Mr. Turner asserted that the living wall would mitigate the effects of the glass doors. *Tr.*, 5/12/10 at 183. Mr. Turner stated that the wall was not necessary but he recommended it because building it would be cheaper before the establishment started construction on the second floor. *Tr.*, 5/12/10 at 190.

45. Mr. Turner noted that the Applicant's HVAC system was not running while he performed his test; however, HVAC systems for the Applicant's neighbors were running. *Tr.*, 5/12/10 at 174.

46. The Applicant called Mr. Latif Guler to testify in support of the Application. *Tr.*, 5/12/10 at 250. Mr. Guler is the Director of Operations and is responsible for running the Applicant's business on a day-to-day basis. *Tr.*, 5/12/10 at 250. He stated that the Applicant began operating on October 12, 2009. *Tr.*, 5/12/10 at 250. During that time, Mr. Guler stated the establishment has never received a noise complaint. *Tr.*, 5/12/10 at 251.

47. Mr. Guler stated that the Applicant is a restaurant and a dining destination. *Tr.*, 5/12/10 at 251, 258. He testified that the Applicant receives approximately 55 percent of its revenue from food sales and 45 percent of its revenue from the sale of alcoholic beverages. *Tr.*, 5/12/10 at 251. Mr. Guler added that the establishment offers a DJ as entertainment but does not offer dancing. *Tr.*, 5/12/10 at 252.

48. Mr. Guler testified that the proposed expansion on the second floor would be utilized as a restaurant. *Tr.*, 5/12/10 at 252. He stated that there would be a bar on the second floor but it would be in the enclosed area. *Tr.*, 5/12/10 at 254. Furthermore, he stated that amplified music would not be played in the unenclosed area. *Tr.*, 5/12/10 at 254. The Applicant wants to build on the second floor in order to give people more opportunities to dine outside. *Tr.*, 5/12/10 at 256. Originally, the Applicant wanted to utilize the whole space; however, in consideration of the neighborhood, he stated that the Applicant reduced the size of its plans. *Tr.*, 5/12/10 at 260-61.

49. Mr. Guler stated that operating the second floor at late hours was important to the business because there was demand for late dining. *Tr.*, 5/12/10 at 258. He stated that many of the establishment's regular customers are from the neighborhood. *Tr.*, 5/12/10 at 258. Mr. Guler stated that the Applicant planned to offer alcoholic beverages on the proposed rooftop deck. *Tr.*, 5/12/10 at 275. Mr. Guler believed that rooftop deck would accommodate patrons who wanted to smoke. *Tr.*, 5/12/10 at 276.

50. Mr. Guler testified that the Applicant has hired a valet company to deal with parking near the restaurant. *Tr.*, 5/12/10 at 261-62. He stated that the Applicant makes valet parking available Wednesday through Sunday. *Tr.*, 5/12/10 at 261. Mr. Guler mentioned that demand for the valet service was low. *Tr.*, 5/12/10 at 262.

51. Mr. Guler testified that a number of establishments near the Applicant had rooftop dining. *Tr.*, 5/12/10 at 264. Mr. Guler mentioned that Marvin's rooftop was open until 2:00 a.m. during the week and 3:00 a.m. on weekends and played amplified music. *Tr.*, 5/12/10 at 264. He also mentioned that the Black Cat got approval for a rooftop patio, along with establishments located at 2001 14th Street, N.W., and 2005 14th Street, N.W. *Tr.*, 5/12/10 at 265.

52. Mr. Guler testified that the alley behind the establishment is a public alley. *Tr.*, 5/12/10 at 266. He stated that the establishment's management ensures the alley is clean and assigns people to clean the alley. *Tr.*, 5/12/10 at 266. Mr. Guler speculated that the employee observed by Investigator Parker cleaning the alley was most likely a dishwasher working for the Applicant sent by a manager to clean the alley. *Tr.*, 5/12/10 at 267.

53. Mr. Guler stated that the Applicant intends to keep the rooftop deck open year-round. *Tr.*, 5/12/10 at 278.

54. Mr. Guler stated that before the Applicant opened in October 2009 he discussed his establishment's original plans with various ANCs. *Tr.*, 5/12/10 at 279-280. According to Mr. Guler, he did not discuss the rooftop deck with the ANCs because he had not thought about opening the rooftop at that time. *Tr.*, 5/12/10 at 280. According to Mr. Guler, he originally planned to use the space for storage and office space. *Tr.*, 5/12/10 at 298.

55. Mr. Guler stated that the Applicant would not violate its occupancy requirements. *Tr.*, 5/12/10 at 282. He stated that in order to get to the rooftop deck patrons must access it from the inside of the establishment. *Tr.*, 5/12/10 at 283. As a result, he stated that the establishment would station a manager by the doors to the second floor that would be responsible for ensuring the establishment did not violate its occupancy requirements. *Tr.*, 5/12/10 at 284. Specifically, the manager would count all the people in the establishment and maintain a counter to keep track of the people. *Tr.*, 5/12/10 at 286. Furthermore, Mr. Guler stated that if the manager in charge of keeping the occupancy count had to leave, the second manager on duty would take over their duties. *Tr.*, 5/12/10 at 288.

56. Mr. Guler testified that on Saturday nights the Applicant only allows 200 people into the establishment even though the establishment's occupancy is 239 people. *Tr.*, 5/12/10 at 290.

57. Mr. Guler testified that the second floor rooftop deck will have two sliding glass doors. *Tr.*, 5/12/10 at 291. He stated that the establishment plans to keep one door closed at all times and use the other for ingress and egress. *Tr.*, 5/12/10 at 291-92.

58. Mr. Guler estimated that, as planned, the Applicant would generate \$2,000 per night from the rooftop deck once it becomes operational. *Tr.*, 5/12/10 at 294. Mr. Guler also estimated that if the establishment was forced to close the rooftop deck at midnight the establishment would lose 50 percent of the revenue it could generate from the new addition. *Tr.*, 5/12/10 at 295. Finally, Mr. Guler mentioned that Applicant intends to hire 24 additional people if the rooftop deck is built. *Tr.*, 5/12/10 at 311.

59. Mr. Guler stated that his establishment was committed to ensuring that the alley behind Masa 14 was kept clean. *Tr.*, 5/12/10 at 301. He stated that his establishment could not move the dumpster because it was not within the Applicant's control. *Tr.*, 5/12/10 at 302.

60. Mr. Guler stated that the Applicant was going to receive a building permit from the Department of Consumer and Regulatory Affairs (DCRA) in the week following the Protest Hearing. *Tr.*, 5/12/10 at 306. He testified that the Applicant had to inform DCRA of the rooftop deck's maximum capacity. *Tr.*, 5/12/10 at 306. He stated that the maximum capacity of both the enclosed and unenclosed areas of the rooftop deck is 118 people. *Tr.*, 5/12/10 at 307.

Nevertheless, because DCRA has not yet approved the Applicant's Application, the Applicant could not give ABRA a firm figure. *Tr.*, 5/12/10 at 308.

61. Mr. Guler testified that that Applicant was taking additional measures to control noise generated by the rooftop deck. *Tr.*, 5/12/10 at 310. He stated that the Applicant is going to install acoustic panels under the tables, benches, and on the ceiling of the enclosed area. *Tr.*, 5/12/10 at 310.

62. The Protestants called Mr. Ramon Estrada to testify against the Application. *Tr.*, 5/12/10 at 322. He stated that Policy and Local 14, both licensed establishments, have Voluntary Agreements that mandate they close their summer gardens between 11:00 p.m. and 12:00 a.m. *Tr.*, 5/12/10 at 322. Mr. Estrada testified that the Applicant was a "good addition to the neighborhood" but was concerned that the establishment was trying to increase its capacity so soon after opening. *Tr.*, 5/12/10 at 323. Mr. Estrada believed that, in combination with other licensees, several thousand people were being attracted to the neighborhood. *Tr.*, 5/12/10 at 323-24. In turn, he stated that the increase in patrons visiting the neighborhood has increased the ambient noise of the community. *Tr.*, 5/12/10 at 324. Mr. Estrada believed that the rooftop deck should have the same limitations as the Applicant's sidewalk café, which the Applicant's Voluntary Agreement stated must be closed at midnight. Mr. Estrada also asked the Board to consider the new condominiums being built on 14th Street, N.W., and Swann Street, N.W., and on 14th Street, N.W., and U Street, N.W. *Tr.*, 5/12/10 at 324.

63. Mr. Estrada also testified that he has seen oyster shells and mussel shells in the alley behind Masa 14. *Tr.*, 5/12/10 at 325.

64. Mr. Estrada testified that he knew that the purpose of the ARTS Overlay District, a zoning regulation that applies to the Applicant, is to encourage 18 hour activity. *Tr.*, 5/12/10 at 327. He also admitted that the Applicant had to notify the ANC before it could apply for the rooftop deck because it was a substantial change to the Applicant's license. *Tr.*, 5/12/10 at 328.

65. Mr. Estrada testified that he opposed the Application because, if approved, the use of the rooftop could potentially cause late night noise. *Tr.*, 5/12/10 at 341. He stated that he did not oppose the Applicant receiving additional outdoor seating space but he did not want to see it open past 11:00 p.m. *Tr.*, 5/12/10 at 341-43. Mr. Estrada stated that he wanted the Applicant to follow the District of Columbia's current noise regulations and not produce sounds that could be heard in a residence near the establishment. *Tr.*, 5/12/10 at 343-44.

66. Commissioner Peter Raia testified on behalf of ANC 1B, which opposed the Applicant's Application. *Tr.*, 5/12/10 at 346. Commissioner Raia testified that the Applicant was not dealing with its trash in an appropriate manner. *Tr.*, 5/12/10 at 347. Commissioner Raia admitted that multiple businesses were the cause of the problem. *Tr.*, 5/12/10 at 347. Nevertheless, he stated that the dumpster in the back was never covered and the Applicant did not keep a lid on their grease barrel. *Tr.*, 5/12/10 at 347. He accused the Applicant of only dealing with the trash appropriately when they needed something from the community. *Tr.*,

5/12/10 at 348. He also stated that Mr. Guler was not very responsive to community complaints and he takes a long time to respond to emails. *Tr.*, 5/12/10 at 355. Commissioner Raia complained that it took the Applicant 60 days to deal with the grease barrel problem and 30 days to deal with objects it placed in the public space. *Tr.*, 5/12/10 at 356.

67. Commissioner Raia admitted that he had communicated with Mr. Guler or his representatives in the past. *Tr.*, 5/12/10 at 361-364. Commissioner Raia stated that he emailed Mr. Guler on March 24, 2010, and stated that the Applicant had cleaned up the alley and stated that it “shows good faith.” *Tr.*, 5/12/10 at 362. Commissioner Raia also admitted he received an email from Mr. Kline, the Applicant’s attorney, on January 18, 2010, which attempted to set up a meeting between the Applicant and Commissioner Raia. *Tr.*, 5/12/10 at 364. Commissioner Raia also admitted receiving other emails regarding the rooftop deck. *Tr.*, 5/12/10 at 365. Finally, Commissioner Raia admitted that he had received Mr. Guler’s cell phone number during mediation process and had not made any complaints since the mediation occurred. *Tr.*, 5/12/10 at 398.

68. Commissioner Raia acknowledged that the Applicant participated in a cooperative arrangement with three other businesses regarding trash removal. *Tr.*, 5/12/10 at 367. He admitted that the agreement provides a common compactor for all the participating businesses, including the Applicant. *Tr.*, 5/12/10 at 368. Commissioner Raia further noted that the Applicant had the potential to cause trash problems because it held up to 150 percent more people than the other establishments participating in the trash removal agreement. *Tr.*, 5/12/10 at 381-82.

69. Commissioner Raia acknowledged that his ANC voted to support the recommendations of the 2F ARTS Overlay Committee report. *Tr.*, 5/12/10 at 372. He acknowledged that the report recommended increasing the linear street footage of eating and drinking establishments up to 50 percent. *Tr.*, 5/12/10 at 372. Mr. Raia believed that stores in his neighborhood opened for business between 8:00 a.m. and 10:00 a.m. *Tr.*, 5/12/10 at 375.

70. Commissioner Raia admitted that the ANC could not empirically prove that the Applicant’s plans would cause greater noise. *Tr.*, 5/12/10 at 387. However, Commissioner Raia asserted that common sense dictates that the addition of 68 people will create more noise. *Tr.*, 5/12/10 at 387. Commissioner Raia also stated that his ANC opposed having noise emanating from the establishment being heard on the street. *Tr.*, 5/12/10 at 392.

71. Commissioner Raia acknowledged that he had not received many complaints from the community about breaches of the peace or noise coming from the Applicant. *Tr.*, 5/12/10 at 378, 396. He stated that people in his community had only complained about the trash problem and had not complained about noise coming from the Applicant. *Tr.*, 5/12/10 at 396-97. Nevertheless, Commissioner Raia stated that he has received complaints about noise emanating from Marvin’s rooftop deck. *Tr.*, 5/12/10 at 397. Finally, Commissioner Raia was concerned that the noise regulations did not cover the human voice and that no one was enforcing the noise laws regarding music. *Tr.*, 5/12/10 at 397.

72. The Protestants called Mr. Clay Batchelor to testify against the Application. *Tr.*, 5/12/10 at 399-400. Mr. Batchelor lives at 1308 T Street, N.W. *Tr.*, 5/12/10 at 400. According to Mr. Batchelor, the Board approved the Black Cat's rooftop deck but without allowing for a bar or additional occupancy. *Tr.*, 5/12/10 at 404. Mr. Batchelor stated that he did not support the Applicant's Application so long as the plans called for a bar on the rooftop deck. *Tr.*, 5/12/10 at 406-07.

73. Mr. Batchelor admitted that the Board did not forbid the Black Cat's customers from consuming alcoholic beverages while on the rooftop deck. *Tr.*, 5/12/10 at 405. Mr. Batchelor conceded that, unlike the Black Cat, the Applicant was seeking a bar in an enclosed area on the rooftop deck. *Tr.*, 5/12/10 at 405. Further, Mr. Batchelor conceded that the Black Cat is allowed to operate until 1:30 a.m., Sunday through Thursday, and until 2:30 a.m., Friday and Saturday. *Tr.*, 5/12/10 at 405. He also stated that the Black Cat is a nightclub that has no food service requirements and has an approved occupancy of 199 people. *Tr.*, 5/12/10 at 406.

74. The Protestants called Mr. Lincoln Leibner to testify against the Application. *Tr.*, 5/12/10 at 408. Mr. Leibner lives at 1332 T Street, N.W. *Tr.*, 5/12/10 at 408. Mr. Liebner testified that since the Applicant opened in October 2009 the neighborhood has changed. *Tr.*, 5/12/10 at 409. He stated that there are more pedestrians and vehicles in the neighborhood, which make the neighborhood livelier. *Tr.*, 5/12/10 at 409. If the Application was approved, Mr. Liebner feared the neighborhood would become even more vibrant. *Tr.*, 5/12/10 at 409. Mr. Liebner stated that he opposed the Application because he felt the rooftop deck should be closed by 12:00 p.m. *Tr.*, 5/12/10 at 416.

75. Mr. Liebner testified that he believes there is a noise problem in the neighborhood after midnight. *Tr.*, 5/12/10 at 409. He stated that on the weekends noise problems occur once the bars close for the night and patrons who are leaving become very loud. *Tr.*, 5/12/10 at 410. He stated that patrons from the bars kick over trash cans, slam car doors, cause car alarms to go off, and talk in the street, all of which produces noise. *Tr.*, 5/12/10 at 411. Mr. Liebner testified that there are generally no noise problems from 3:00 a.m. to 5:00 a.m. *Tr.*, 5/12/10 at 411.

76. Mr. Liebner also stated that that alley behind the Applicant has a trash problem. *Tr.*, 5/12/10 at 418. He stated that on occasion the dumpsters are placed in a manner that blocks ingress and egress from the alley. *Tr.*, 5/12/10 at 419. Furthermore, Mr. Liebner stated that the restaurants and individuals leave garbage in the alley. *Tr.*, 5/12/10 at 419. Mr. Liebner stated that he has filed complaints against other businesses regarding the trash problem in the alley. *Tr.*, 5/12/10 at 420. However, Mr. Liebner stated he has never filed a complaint against the Applicant for failing to deal appropriately with its waste. *Tr.*, 5/12/10 at 420.

CONCLUSIONS OF LAW

77. Pursuant to D.C. Official Code § 25-313(a) (2009), an Applicant must demonstrate to the Board's satisfaction that the establishment for which a substantial change to a liquor license is sought is appropriate for the neighborhood in which it is located. The Board concludes that the Applicant has demonstrated that the Application for a summer garden on its rooftop deck, is appropriate for the area in which the establishment is located.

78. The Board recognizes that pursuant to D.C. Official Code § 1-309.10(d) and D.C. Official Code § 25-609, an ANC's 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). Accordingly, the Board "must elaborate, with precision, its response to the ANC issues and concerns." Foggy Bottom Ass'n, 445 A.2d at 646.

79. Here, ANC 1B alleged in a letter dated February 10, 2010, that if the Board approved the Applicant's Application this would adversely impact the peace, order, and quiet of the neighborhood. Specifically, during the Protestants and ANC 1B's presentation to the Board they raised concerns that Applicant's plans would lead to parking issues, trash problems, and noise.

80. In regards to parking, the Board is not convinced by the ANC's contention that approving the Applicant's Application will lead to parking problems in the neighborhood. Although 14th Street, N.W., is a high-traffic area, testimony by both parties indicates that parking lots are available to the general public and the Applicant employs a valet service. As such, the Board believes that the potential traffic problems raised by the Protestants are speculative and unfounded.

81. In regards to litter and trash disposal, the Board does not believe that the trash problems behind the Applicant's business merit denying the Application. The evidence before the Board does suggest that there are trash issues in the alley. Nevertheless, the Board notes that the alley is shared by multiple businesses and the Applicant cannot be expected to have responsibility over the entire area. In addition, the Protestants in their submissions and testimony only referred to a general trash problem and failed to demonstrate that the Applicant was specifically responsible for the problems in the alley. As such, it appears that sometimes the alley is dirty and the Applicant's trash cans and the alley's dumpster are not stored properly. Yet, the Board also notes that based on the testimony and evidence provided by Investigator Parker, the Applicant does clean the alley from time to time. Based on the evidence received by the Board, it does not appear that the trash problem is directly caused by the Applicant. Therefore, the Board will not dismiss the Application based on the Protestants' concerns regarding trash.

82. It should be noted that the Board is discouraged that the Applicant took over a month to address complaints made the Protestants. Nevertheless, maintaining good relations with ones' neighbors is not a requirement under the law. Therefore, if the Applicant will not respond to complaints in a timely fashion, the Board suggests that the Protestants report their complaints to an appropriate government agency rather than wait for the Applicant to comply.

83. Finally, in regards to the noise issue, the Board is not convinced that the Applicant's proposed expansion will cause noise problems for the neighborhood. The Protestants lacked empirical evidence and could only offer the Board conjecture and speculation as to whether a rooftop deck would encourage disturbing late night noise. Based on the testimony and evidence presented, the Applicant has taken affirmative steps to deal with potential noise problems caused by its proposed expansion. The Applicant has agreed to build a living wall and place acoustic panels at various points atop the rooftop deck. Furthermore, the Applicant has told the Board that it will not play recorded music in the unenclosed portion of the rooftop deck. In addition, the Board is not convinced that the Applicant's patrons will cause noise problems in the community. Indeed, Investigator Parker never observed a rowdy crowd at the establishment. Lastly, the Board notes that the Applicant does not have any previous noise violations. Based on these facts and the steps the Applicant will take to control noise generated by the establishment, the Board will not deny the Application based on the Protestants' concerns regarding noise.

84. Nevertheless, the Board reserves the right to amend this order and take corrective action should the Applicant fail to live up to the presentation it made up to the Board. The Board expects that the Applicant will build the "living wall" proposed by Mr. Turner, install the acoustic panels, and not play recorded music in the unenclosed area of the rooftop deck. The Board intends to have an ABRA investigator inspect the Applicant's premises when construction of the premises is complete in order to ensure that the Applicant has been truthful with the Board.

85. Pursuant to D.C. Official Code § 25-313(b)(2) and 23 DCMR § 400.1(a) the Board must determine whether the Application for a Substantial Change of the Applicant's Retailer Class CR License will have an adverse effect on the peace, order, and quiet of the neighborhood. The Board finds based on the testimony and evidence received by the Board that the Applicant's proposed plans will not adversely affect the peace, order, and quiet of the neighborhood or be a detriment to the community. Specifically, Investigator Parker's investigation did not reveal any negative impact that approving the Application would have on noise, parking, or trash. As such, the Board approves the Application.

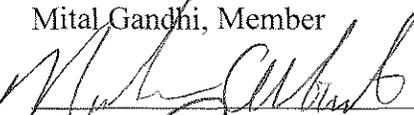
ORDER

Therefore, it is hereby ORDERED on this 30th day of June 2010, that the Application for a Substantial Change filed by Sula, LLC, t/a Masa 14 (Applicant), at premises 1825 14th Street, N.W., Washington, D.C., be and the same is hereby **GRANTED**;

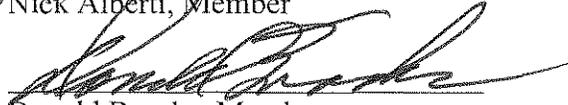
District of Columbia
Alcoholic Beverage Control Board

Charles Brodsky, Chairperson

Mital Gandhi, Member

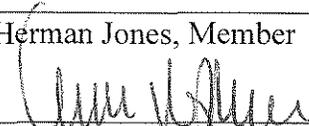


Nick Alberti, Member



Donald Brooks, Member

Herman Jones, Member



Calvin Nophlin, 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.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 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).