

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

In the Matter of:	)		
	)		
Colin Unlimited, LLC	)	License No.:	81909
t/a Saki	)	Case No.:	10-PRO-00180
	)	Order No.:	2012-029
Application for Substantial Change	)		
(Expansion) to a	)		
Retailer's Class CT License	)		
	)		
at premises	)		
2477 18th Street, N.W.	)		
Washington, D.C. 20009	)		

BEFORE:            Nick Alberti, Member  
                      Donald Brooks, Member  
                      Herman Jones, Member  
                      Calvin Nophlin, Member  
                      Mike Silverstein, Member

ALSO PRESENT:    Colin Unlimited, LLC, t/a Saki, Applicant

                          Matthew Cronin, Partner, on behalf of the Applicant

                          Benjamin Dalley, Partner, on behalf of the Applicant

                          Andrew Kline, Non-Lawyer Representative, on behalf of the Applicant

                          Olivier Kamanda, Commissioner, Advisory Neighborhood Commission  
                          (ANC) 1C

                          Denis James, President, Kalorama Citizens Association (KCA)

                          Martha Jenkins, General Counsel  
                          Alcoholic Beverage Regulation Administration

**ORDER GRANTING IN PART AND DENYING IN PART THE APPLICANT'S  
MOTION FOR RECONSIDERATION**

### **Procedural Background**

Colin Unlimited, LLC, t/a Saki, (Applicant) filed an Application for a Substantial Change to its Retailer's Class CT License (Application) at premises 2477 18th Street, N.W. The Applicant seeks to expand its establishment into the premises currently occupied by the District Lounge and Grille (District). In a letter, dated September 27, 2010, the Applicant acknowledged that the request was substantial. ANC 1C, in a letter, dated December 10, 2010, timely protested the Application.

We also note that the Kalorama Citizens Association (KCA) asserted that the Alcoholic Beverage Control Board (Board) did not provide proper notice of the Application to the public and requested that the Board re-placard the establishment. We denied this request, because we determined that the Application was properly noticed under District of Columbia Official Code § 25-423. Colin Unlimited, LLC, t/a Saki, Board Order No. 2011-087, 1-2 (D.C.A.B.C.B. Jan. 26, 2011).

The Roll Call Hearing in this matter was held on January 3, 2011, and the Status Hearing was held on February 23, 2011. We note that the Applicant and ANC 1C have submitted a Voluntary Agreement, dated May 4, 2011, for review by the Board under District of Columbia Official Code § 25-446. Based on concerns regarding the appropriateness of the proposed substantial change, the Board requested a Fact Finding Hearing, which occurred on July 27, 2011.

On October 19, 2011, the Board denied the Application because we found that it would have an adverse impact on Adams Morgan's peace, order, and quiet, residential parking needs, and vehicular and pedestrian safety. Colin Unlimited, LLC, t/a Saki, Board Order No. 2011-447, 6-9 (D.C.A.B.C.B. Oct. 19, 2011).

### **Applicant's Motion for Reconsideration**

Subsequently, on October 31, 2011, the Applicant filed a Motion for Reconsideration (Motion) with the Board, which argued that the Board erred when it denied the Application. Specifically, the Applicant argued that (1) under District of Columbia Official Code § 25-446, the Board may not deny an Application for a Substantial Change if a valid Voluntary Agreement is submitted by the parties; (2) the Board cannot rely on the findings and legislative history generated by the imposition of the Adams Morgan Moratorium Zone; (3) the Board cannot consider overconcentration when it determines the appropriateness of a substantial change; and (4) the hearing held on July 27, 2011, did not satisfy the District of Columbia Administrative Procedure Act (District of Columbia Official Code §§ 2-501 through 2-562). *Motion for Reconsideration*, 1-6. Based on this reasoning, the Applicant requests that the Board approve the Voluntary Agreement and the Application.

The Applicant's Motion persuades the Board that its prior Order did not comply with the contested case procedures contained in the District of Columbia Administrative Procedure Act.

Nevertheless, we disagree that the denial of the Application violated § 25-446 or that the Board could not consider appropriateness under § 25-313. We also disagree that the Board cannot consider the Adams Morgan Moratorium Zone or overconcentration as it pertains to peace, order, and quiet, residential parking needs, and vehicular and pedestrian safety in its determination of appropriateness. As such, instead of granting the Applicant the requested relief, we find that the appropriate remedy is to hold an additional hearing addressing the issues raised by the Applicant in accordance with the District of Columbia Administrative Procedure Act. We explain our reasoning further below.

**I. THE PARTIES SUBMISSION OF A VOLUNTARY AGREEMENT DOES NOT FORGO THE APPROPRIATENESS REQUIREMENT.**

The question raised by the Applicant in its Motion is whether § 25-446(c) mandates that the Board grant the Application for a Substantial Change when the Applicant and the only Protestant reached a Voluntary Agreement. We disagree, because ensuring that the Voluntary Agreement complies with “all applicable laws” includes appropriateness and § 25-446 was not meant to forgo the required appropriateness review for all substantial change applications under District of Columbia Official Code § 25-313. D.C. Code § 25-446(c) (West Supp. 2011)

**A. A Voluntary Agreement cannot comply with all applicable laws unless the Application is appropriate, because it is a part of the license when approved.**

In order to “qualify for . . . the approval of a substantial change in operation . . . an applicant shall demonstrate . . . that the establishment is appropriate for the locality, section, or portion of the District where it is to be located.” D.C. Code § 25-313 (West Supp. 2011). Under § 25-446(c), the Board shall approve a substantial change request if the parties submit a voluntary agreement that “complies with all applicable laws and regulations and the applicant otherwise qualifies for licensure.” D.C. Code § 25-446(c). Once approved, a voluntary agreement becomes “a part of the license.” North Lincoln Park Neighborhood Ass’n v. Alcoholic Beverage Control Bd., 666 A.2d 63, 67 (D.C. 1995).

Here, § 25-313 does not allow the Board to approve the Application for a Substantial Change unless the Application is appropriate. § 25-313. Because the Voluntary Agreement becomes a part of the Applicant’s license, § 25-313 is an “applicable law[]” under 25-446(c) that we must consider before approving the agreement and the Application. § 25-446(c). Therefore, we cannot determine whether the Voluntary Agreement complies with all “applicable laws” unless we determine that the establishment, operating within the confines of the Voluntary Agreement, is appropriate. § 25-446(c).

**B. Section 25-446(c) does not override the appropriateness requirement contained in § 25-313, because this would create a conflict between § 25-313 and 25-446(c).**

The Applicant asserts that § 25-446(c) precludes the Board from considering the Applicant's appropriateness. We cannot accept the Applicant's interpretation, because such an interpretation would create a conflict between §§ 25-313(a) and 25-446(c). Under the Applicant's interpretation, § 25-446(c) requires the Board to approve the Voluntary Agreement if it complies with "all applicable laws," excluding the appropriateness requirement. § 25-446(c). Nevertheless, this conflicts with § 25-313, which instructs the Board that no application qualifies for approval unless it is found to be appropriate. § 25-313(a).

Under general rules of statutory construction, we should deem both statutes as effective when they are "*capable* of co-existence . . . absent a clearly expressed [legislative] intention to the contrary. Richman Towers Tenants' Ass'n, Inc. v. Richman Towers, LLC, 17 A.3d 590, 617 (D.C. 2011) citing DeGroot v. DeGroot, 939 A.2d 664, 670 (D.C. 2008). As such, both §§ 25-313 or 25-446(c) should be read "in the light of the statute[s] taken as a whole" in accordance "with the policy of the legislation as a whole." Columbia Plaza Tenants' Ass'n v. Columbia Plaza Ltd. P'ship, 869 A.2d 329, 332 (D.C. 2005); Jeffrey v. United States, 892 A.2d 1122, 1128 (D.C. 2006).

As indicated by our analysis in section I(A), §§ 25-313 and 25-446 co-exist when we interpret the phrase "all applicable laws" in § 25-446 to include § 25-313. As such, we see no reason to adopt the Applicant's interpretation and create an unnecessary conflict between §§ 25-313 and 25-446.

Indeed, the Applicant's interpretation conflicts with the reasoning behind the creation of Title 25 of the District of Columbia Official Code. The purpose of the District of Columbia's alcoholic beverage control laws "is to strike a reasonable balance between the very legitimate concerns of residents, and . . . the legitimate needs of businesses." Council of the District of Columbia Committee on Consumer Regulatory Affairs, Report on Bill 13-449, the "Title 25, D.C. Code Enactment and Related Amendments Act of 2000," 4 (Nov. 20, 2000). Under the Applicant's interpretation, the Board must approve a substantial change request if the applicant and the protestant submit a voluntary agreement, without examining whether the application is appropriate. Consequently, under this interpretation, the law requires the Board to approve the Application for a Substantial Change even if it will have an adverse impact on peace, order, and quiet; residential parking needs; vehicular and pedestrian safety; and real property values. D.C. Code § 25-313(b)(1)-(3) (West Supp. 2011).

Furthermore, the Applicant's inflexible interpretation of § 25-446 means that if two or more protestants object to an application, the applicant would then have the ability to dismiss the other protests by entering into a voluntary agreement with only one of the protestants. If this interpretation became the law, it would be impossible to stop an applicant from encouraging sham protests so that the applicant could negotiate a favorable voluntary agreement with the strawman that forecloses legitimate protestants from obtaining relief from the Board. Thus, the Applicant's interpretation of § 25-446(c) would require the Board to introduce an unreasonable, unintended, and unfair practice into the protest process.

Under these circumstances, we fail to see how the Applicant's interpretation strikes a reasonable balance between the needs of residents and businesses. It is unfair to protestants to interpret our statutes in manner that allows licensees to adversely impact the neighborhood and engage in deceit to avoid legitimate protests. As a result, the only way to reconcile §§ 25-313(a) and 25-446(c), is to interpret § 25-446 as not excusing the Applicant from the appropriateness requirement.

**II. THE BOARD MAY RELY ON THE BOARD'S FINDINGS AND LEGISLATIVE HISTORY RELATED TO THE IMPOSITION OF THE ADAMS MORGAN MORATORIUM ZONE AS PERSUASIVE AUTHORITY AS TO WHAT IS APPROPRIATE FOR ADAMS MORGAN.**

The Board examines similar factors when examining whether a moratorium or application is appropriate. Under our rules, a moratorium may be imposed when it is shown that "the requested moratorium is appropriate under at least 2 of the appropriateness standards set forth in" in § 25-313. D.C. Code § 25-354 (West Supp. 2011). Notably, section 25-313 also applies when the Board determines whether a substantial change request is appropriate. § 25-313(a). Thus, when resolving a request for a moratorium or adjudicating a protest against a substantial change application, the Board will review the impact on peace, order, and quiet; residential parking; vehicular and pedestrian safety; and real property values. § 25-313(b)(1)-(3).

It is simply inconsistent and arbitrary for the Board in a rulemaking to say that Adams Morgan suffers from severe peace, order, quiet, traffic, and parking issues, and then allow the Applicant to create a large nightclub—as if the problems we recently recognized, under similar standards, do not exist. Although our appropriateness analysis focuses on an individual establishment's effect on the neighborhood, we cannot ignore the condition of the neighborhood where the establishment is located. Evidence of existing establishments' operations are relevant to determining whether expanding an establishment in the same neighborhood will exacerbate existing issues. Thus, the Board is free to consider the current state of a neighborhood's alcohol market, including existing moratoriums and establishments, when determining whether the Application is appropriate for Adams Morgan.

**III. WHEN DETERMINING WHETHER A SUBSTANTIAL CHANGE APPLICATION IS APPROPRIATE, THE BOARD MAY CONSIDER OVERCONCENTRATION WHEN IT IMPACTS THE NEIGHBORHOOD'S PEACE, ORDER, AND QUIET; RESIDENTIAL PARKING NEEDS; AND VEHICULAR AND PEDESTRIAN SAFETY.**

In our prior Order, we found "that the overconcentration of ABC-licensed establishments in Adams Morgan *is currently having an adverse impact on the peace, order, and quiet; residential parking [needs]; and vehicular and pedestrian safety of the neighborhood.*" Colin Unlimited, LLC, t/a Saki, Board Order No. 2011-087, at ¶ 23 (emphasis added). The Applicant's argument that the Board inappropriately relied on overconcentration takes the Board's conclusions out of context. Instead, the Board relied on overconcentration only insofar as it

impacted the neighborhood's peace, order, and quiet; residential parking needs; and vehicular and pedestrian safety. We note that evidence of existing establishments' operations is relevant to determining whether expanding an establishment in the same neighborhood will exacerbate existing issues. Therefore, the Board is entitled to rely on overconcentration when it impacts Adams Morgan's peace, order, and quiet; residential parking needs; and vehicular and pedestrian safety.

### CONCLUSION

As we stated above, we find that the hearing held on July 27, 2011, did not comply with the District of Columbia Administrative Procedure Act. Specifically, the Board agrees that the Applicant received insufficient notice of the issues involved in the hearing, did not have an opportunity to submit evidence, present rebuttal evidence, or present witnesses. We find that Board Order No. 2011-447 and this Order provide sufficient notice of the issues and evidence relied upon by the Board. The Applicant will be permitted to make its case and respond at a Fact Finding Hearing on February 22, 2012, at 1:30 p.m.

### ORDER

Therefore, it is hereby **ORDERED** on this 25th day of January 2012, that the Motion for Reconsideration filed by Colin Unlimited, LLC, t/a Saki (Applicant), at premises 2477 18th Street, N.W., Washington, D.C., be and the same is hereby **GRANTED IN PART** and **DENIED IN PART**. Furthermore, the Board **VACATES** Colin Unlimited, LLC, t/a Saki, Board Order No. 2011-447 (D.C.A.B.C.B. Oct. 19, 2011).

A Fact Finding Hearing held under the District of Columbia's Administrative Procedure Act and the Board's contested case procedures shall be held on February 22, 2012, at 1:30 p.m.

The Fact Finding Hearing on February 22, 2012, shall address the following issues:

- (1) whether the Voluntary Agreement complies with all applicable law and regulations;
- (2) if the answer to (1) is yes, whether the submission of a valid Voluntary Agreement mandates approval of the license by the Board;
- (3) if the answer to (2) is no, whether the Application will adversely impact the neighborhood under District of Columbia Official Code § 25-313, where, in particular, we will consider the following issues:
  - a. whether the imposition of the Adams Morgan Moratorium Zone effects the Board's appropriateness analysis; and

- b. whether the merging of Saki and District into a single tavern creates additional peace, order, and quiet and other appropriateness concerns when the combined premises are used for nightclub activities; and
- (4) whether the Applicant qualifies for licensure; particularly, whether the Applicant is of “good character and generally fit for the responsibilities of licensure” under District of Columbia Official Code § 25-301(a)(1) when Benjamin Dalley previously told the Board that the establishment did not intend to operate as a nightclub and focus on food sales; yet, this does not appear to be the case.

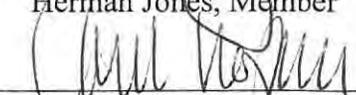
Copies of this Order shall be sent to the Applicant and ANC 1C.

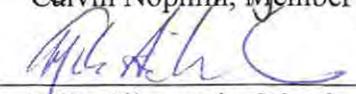
District of Columbia  
Alcoholic Beverage Control Board

  
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Calvin Nophlin, Member

  
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Mike Silverstein, Member

Pursuant to 23 DCMR § 1719.1 (2008), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, Reeves Center, 2000 14th Street, N.W., 400S, Washington, D.C. 20009.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, District of Columbia 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 (2008) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b) (2004).