

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

In the Matter of:)
)
)

Colin Unlimited, LLC)
t/a Saki)

) License No.: 81909
) Case No.: 10-PRO-00180
) Order No.: 2011-447

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, Interim Chairperson
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

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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, 2011, the Applicant acknowledged that the request was substantial. ANC 1C, in a letter, dated December 10, 2011, 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 D.C. 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 D.C. 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.

We note that "prior to rendering a final decision on a licensing request . . . , the Board may hold a fact-finding hearing to obtain further information from an applicant or licensee." 23 DCMR § 1611.1 (2008). Pursuant to D.C. Official Code §§ 25-313 and 25-404, the Board may not grant an Application for a Substantial Change until it determines that it is appropriate for the section of the District where it is to be located. D.C. Code § 25-313(a) (Supp. 2011); 23 DCMR § 1607.2 (2008).

The Board, having considered the evidence and all documents comprising the Board's official file, makes the following:

FINDINGS OF FACT

1. The Applicant is requesting a substantial change to its Retailer's Class CT License, whereby the Applicant will occupy the space now occupied by District, holder of a Retailer's Class CR License, ABRA License No. 081908. *ABRA Licensing File No. 81909*. Specifically, the Applicant has requested a total of 145 additional sets; 120 additional seats to its dining space and 25 seats for a new summer garden. *ABRA Licensing File No. 81909, Notice of Public Hearing*. The Application is certified by Benjamin Dalley. *ABRA Licensing File No. 81909, Summer Garden/Sidewalk Café Endorsement*. We note that District is currently authorized for 120 seats. *ABRA Licensing File No. 081908*.

2. The Applicant's establishment is located at 2477 18th Street, N.W. *ABRA Licensing File No. 81909*. Benjamin Dalley and Matthew Cronin own Saki and District, which occupy the same building. *Transcript (Tr.)*, July 27, 2011 at 13. Saki occupies the building's first floor and basement. *Tr.*, 7/27/11 at 13. In turn, District occupies the second and third floors of the building. *Tr.*, 7/27/11 at 14.
3. Mr. Dalley testified that combining the space under the Saki license will reduce the establishment's operating expenses. *Tr.*, 7/27/11 at 14. He estimates that the Applicant will save approximately \$5,000.00 per month if the Application is granted. *Tr.*, 7/27/11 at 14.
4. Mr. Dalley testified that District and Saki are not performing well. *Tr.*, 7/27/11 at 15. Indeed, Mr. Dalley estimated that in 2010 Saki made between \$130,000.00 and \$140,000.00 in food sales. *Tr.*, 7/27/11 at 25. In addition, Saki, a sushi restaurant, is no longer viable, because other sushi restaurants have opened in Adams Morgan. *Tr.*, 7/27/11 at 18. Finally, District is not attracting customers who are walking or driving by the establishment, because, unlike Saki, it has a small front entrance. *Tr.*, 7/27/11 at 14, 17, 27, 30, 47.
5. Mr. Dalley and Mr. Cronin want to improve their business by implementing a new concept. *Tr.*, 7/27/11 at 18. Accordingly, they testified that they plan to expand the concept for District into the Saki space and focus on comfort foods, such as burgers and sandwiches. *Tr.*, 7/27/11 at 18-19, 23, 55. Mr. Dalley and Mr. Cronin believe that District's business model in a larger space will perform better and attract more customers than the Applicant's current business model for Saki. *Tr.*, 7/27/11 at 58.
6. As part of the plan, the front entrance of Saki will be remodeled to coincide with the theme at District. *Tr.*, 7/27/11 at 22, 24. After remodeling Saki, the establishment will only use the kitchen currently being used by District. *Tr.*, 7/27/11 at 35-36. Once the consolidation is complete, the owners intend to operate the consolidated business under District's trade name. *Tr.*, 7/27/11 at 52. The owners estimate that the consolidated establishment will have an occupancy of 219 people. *Tr.*, 7/27/11 at 71.
7. Mr. Cronin testified that it is very difficult for District to meet its food sales numbers. *Tr.*, 7/27/11 at 19, 44. As such, the establishment has been forced to give large parties major discounts in order to ensure that the establishment sells enough food to satisfy the law. *Tr.*, 7/27/11 at 19, 44. Mr. Cronin noted that District's current space is more suited for private events than restaurant space. *Tr.*, 7/27/11 at 61. As such, the majority of District's sales come from the sale of alcoholic beverages. *Tr.*, 7/27/11 at 51. Indeed, if the Application is granted, the owners intend to continue offering entertainment and having late-night functions at the establishment. *Tr.*, 7/27/11 at 59.
8. District's Retailer's Class CR License was transferred to District and Saki's current owners with the stated expectation that they would "comply with the statutory food sales requirements." *Tr.*, May 6, 2009 at 7 (Chloe, ABRA License No. 060621) ("The Board stated . . . that the entity receiving the transfer of the Chloe license would need to demonstrate to the

Board its ability to comply with the statutory food sales requirements. The Board's expectations today is that C. Fields Group LLC will provide testimony sufficient to establish its experience, history and success in the food industry and its plans for a successful and marketable restaurant in the Adams Morgan Neighborhood. Our understanding is that the applicant is aware of the Board's expectations"). When we transferred District's Retailer's Class CR License to Saki's present owners, they told the Board that they intended to turn the establishment into a "viable restaurant" during a Fact Finding Hearing on May 6, 2009. *Tr.*, 5/6/09 at 10. When asked about entertainment at the establishment, Mr. Dalley stated that "[t]he plan is just . . . background music mostly" and that the plan was to have "music playing but people still dining." *Tr.*, 5/6/09 at 29, 30. Mr. Dalley asserted that the establishment would not have any dancing and would only utilize a DJ on one or two occasions. *Tr.*, 5/6/09 at 30, 34 ("there might be a DJ playing music, but it's not going to be something where you get up and you want to dance all night, you know. It's going to be background music."). He then stated that the establishment was "not going to be a nightclub." *Tr.*, 5/6/09 at 31-32.

9. We also note the following exchange between Mr. Dalley and former Chairperson Feather during the Fact Finding Hearing on May 6, 2009:

CHAIRMAN FEATHER: [A]re you going to start converting into a club Mr. Dalley, you're on the record on this one, that's why I asked the question. And, you know, if that's not your plan, now's the time to tell us. I mean if you're a fine dining establishment until 2:00 in the morning, we believe what you're saying

Tr., 5/6/09 at 31-32.

MR. DALLEY: To answer your question. Our goal is if we do translate to more entertainment and using that license to make it more of a lounge, which means that you sit down and you eat and you might be – you know, there might be a DJ playing music, but it's not going to be something where you get up and you want to dance all night, you know. It's going to be background music

Tr., 5/6/09 at 33-34. CHAIRMAN FEATHER: [Let's] make sure we're absolutely clear. Because I've got a feeling that at least there's some chance we'll come back and refer to this record if things change over time. *Tr.*, 5/6/09 at 35.

10. The owners have installed a new camera system with 16 security cameras. *Tr.*, 7/27/11 at 68, 85. The owners also provided nine security staff members with security training. *Tr.*, 7/27/11 at 68. Finally, the establishment presently hires the Metropolitan Police Department Reimbursable Detail to provide additional security. *Tr.*, 7/27/11 at 74-75.

11. The establishment is located in the Adams Morgan Moratorium Zone. See 23 DCMR 304, *et. seq* (2008). We note that our 2007 Notice of Rulemaking, which reaffirmed our imposition of the Adams Morgan Moratorium Zone, states that

“ . . . testimony and evidence . . . reveals that significant problems with peace, order, and quiet, particularly with respect to late night noise, litter, rowdy behavior, and vehicular and pedestrian safety, as well as parking problems, continue to occur despite the presence of an existing moratorium in Adams Morgan. For example, . . . videotapes . . . demonstrated acute problems with late night noise, public vomiting, and violent and rowdy behavior caused by patrons of ABC establishments in the Adams Morgan Moratorium Zone. The testimony of [Metropolitan Police Department (MPD)] Inspector Patrick Burke . . . indicated that the amount of alcohol served in the Adams Morgan Moratorium Zone can be directly attributed to a disproportionate number of calls for service for disorderly conduct, simple assaults, assaults, and other criminal activity even with MPD officers present Written testimony submitted to the Board also established that the late night activity of ABC establishments, *including taverns*, is generating a substantial adverse impact on Adams Morgan residents located either within or in close proximity to [Adams Morgan].

Alcoholic Beverage Regulation Administration, Notice of Final Rulemaking, Adams Morgan Moratorium Zone, 2 (2007) (emphasis added).

12. We also stated the following about the Adams Morgan Moratorium Zone in our 2008 Notice of Final Rulemaking:

[i]n considering the appropriateness standards set forth in D.C. Official Code §§ 25-313(b) (2008 Supp.), the Board found the testimony and evidence put forward by MPD, ANC 1C, KCA, RCNA, several Adams Morgan businesses and licensees, and individual Adams Morgan residents to reveal that significant problems with peace, order, and quiet, particularly with respect to criminal activity, noise, litter, disorderly conduct, crowd control, and vehicular and pedestrian safety, as well as parking problems . . . continue to exist in Adams Morgan during late evening hours in the Adams Morgan Moratorium Zone. Additionally, the testimony provided by MPD and the KCA revealed a number of significant public safety issues, including a large number of calls for police service, including for disorderly conduct and assaults, and traffic congestion problems caused by taxis and patrons of ABC establishments in the Adams Morgan Moratorium Zone. The testimony of MPD Lieutenant John Kutnewski also indicated that crime would increase and that an increased police presence would be needed if the moratorium was lifted. Testimony from individual residents also reflected that late at night they have to deal with: loud noise, the disorderly departure of some patrons of ABC establishments, and a variety of parking and vehicular and pedestrian safety problems.

Alcoholic Beverage Regulation Administration, Notice of Final Rulemaking, Adams Morgan Moratorium Zone, 2 (2008).

13. Both owners admitted that, in their experience, Adams Morgan has many issues . Mr. Cronin has personally observed his customers get accosted. *Tr.*, 7/27/11 at 83, 88-89. He also noted that many of the problems in Adams Morgan are caused by juveniles looking to create “mischief” and intoxicated individuals. *Tr.*, 7/27/11 at 88.

14. The Applicant and ANC 1C have submitted a Voluntary Agreement. The proposed Voluntary Agreement requires the establishment's kitchen to remain open at least 2.5 hours before closing. *ABRA Licensing File No. 81909, Voluntary Agreement, § 1(B)*. The agreement also requires the establishment to keep at least 35 seats available for customers at all times. § 1(C); *Tr.*, 7/27/11 at 33. The agreement requires that the establishment maintain at least \$250,000.00 in gross annual food sales. § 1(F). The establishment must also to maintain its books and records as if it was a restaurant or hotel licensee under D.C. Code § 25-113(j)(3)(A) and file quarterly reports as required for restaurants under D.C. Code §§ 25-113(b)(2)(A) and 25-113(b)(2)(B). § 1(G)-(H). Finally, the Applicant is required to show ANC 1C its quarterly reports, but is not required to leave them with ANC 1C. § 1(I).

15. We note that the Applicant's current Voluntary Agreement, dated September 24, 2008, requires Saki to have "gross annual food sales of at least \$135,000.00 or thirty percent (30%) of its total annual gross revenues of food and alcoholic beverage[]" sales. *Haca Ventures, Inc., t/a Saki*, Board Order No. 2008-263, 5 (D.C.A.B.C.B. Oct. 1, 2008).

CONCLUSIONS OF LAW

16. Pursuant to D.C. Official Code §§ 25-313 and 25-404, the Board may not grant an Application for a Substantial Change for a Retailer's Class CT License until it determines that it is appropriate for the section of the District where it is to be located. D.C. Code § 25-313(a) (Supp. 2011); 23 DCMR § 1607.2 (2008). The Board concludes that the Application is inappropriate for Adams Morgan. Therefore, we deny the Application.

17. The Board recognizes that pursuant to D.C. Official Code § 1-309.10(d) (Supp. 2011) and D.C. Official Code § 25-609 (2001), an ANC's properly adopted written recommendations are entitled to great weight from the Board. *See Foggy Bottom Ass'n v. District of Columbia Alcoholic Beverage Control 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. Here, ANC 1C, under D.C. Official Code § 25-609, have asserted in their recommendation that the Application will adversely impact the peace, order, and quiet of the neighborhood. We will give ANC 1C's recommendation great weight below.

18. We find that the Application will detrimentally impact the peace, order, and quiet of Adams Morgan and exacerbate current problems regarding residential parking and vehicular and pedestrian safety in the neighborhood.

19. Under D.C. Official Code § 25-313, "[t]o qualify for . . . an application for the approval of a substantial change in operation as determined by the Board under § 25-404, an applicant shall demonstrate to the satisfaction of the Board that the establishment is appropriate for the . . . section . . . of the District where it is to be located." D.C. Code § 25-313 (Supp. 2011). In determining the appropriateness of the Application, the Board shall consider the effect of the establishment on peace, order, quiet, real property values, residential parking needs, and

vehicular and pedestrian safety. § 25-313(b)(1)-(3). We also note that “[t]here shall be a presumption that a substantial change in the nature of the operations of a licensed establishment is appropriate, if after public notice is given . . . , no objection to the change is filed with the Board.” 23 DCMR § 1505.2 (2008); D.C. Code § 25-404(c) (Supp. 2011).

20. As a preliminary matter, we note that this Application was properly noticed and protested by ANC 1C. See Letter from M. Mindy Moretti, ANC 1C ABC & Public Safety Committee Chair, to Charles Brodsky, Chairperson, Alcoholic Beverage Control Board (Dec. 10, 2010). As such, because an objection to the change was filed, we do not presume that the Application is appropriate under D.C. Official Code § 25-404(c) and 23 DCMR § 1505.2.

21. Additionally, we note that even if no objection was filed, it does not prohibit the Board from determining the appropriateness of the establishment. Otherwise, there would be no need for the Board, and the community would be the sole decision-maker.

22. In considering the appropriateness of the Application, we must consider our past decisions regarding the impact of Adams Morgan ABC-licensed establishments on the Adams Morgan neighborhood. See Knopff v. District of Columbia Alcoholic Beverage Control Bd., 381 A.2d 1372, 1385 (D.C. 1977) (“Because there is no jury to shield . . . greater flexibility and discretion as to admission [of evidence] are permitted. Failure to apply these generous principals of admissibility can be a basis for reversal of an agency decision . . .”). The Adams Morgan Moratorium Zone prohibits the Board from issuing new Retailer’s License Class CR, CN, CT, CX, DR, DN, DT, or DX licenses “fourteen (1400) hundred feet in all directions from the intersection of 18[th] Street and Belmont Road, N.W., Washington, D.C.” 23 DCMR § 304. (2008).

23. When we previously reaffirmed our support of the Adams Morgan Moratorium Zone, we noted that the Adams Morgan Moratorium Zone has “significant problems with peace, order, and quiet, particularly with respect to criminal activity, noise, litter, disorderly conduct, crowd control, and vehicular and pedestrian safety, as well as parking problems . . . during late evening hours . . .” *2008 Notice of Final Rulemaking, Adams Morgan Moratorium Zone, at 2*. We also noted that there are significant public safety issues, including a large number of calls for police service, including for disorderly conduct and assaults, and traffic congestion problems caused by taxis and patrons of ABC establishments in the Adams Morgan Moratorium Zone.” *Id.* We were also impressed by the testimony of MPD Inspector Patrick Burke “that the amount of alcohol served in the Adams Morgan Moratorium Zone can be directly attributed to a disproportionate number of calls for service for disorderly conduct, simple assaults, assaults, and other criminal activity even with MPD officers present.” *2007 Notice of Final Rulemaking, Adams Morgan Moratorium Zone, at 2*. Finally, we credited the testimony of individual residents that “late at night they have to deal with: loud noise, the disorderly departure of some patrons of ABC establishments, and a variety of parking and vehicular and pedestrian safety problems.” *2008 Notice of Final Rulemaking, Adams Morgan Moratorium Zone, at 2*. As such, based on our previous findings, we find that the overconcentration of ABC-licensed

establishments in Adams Morgan is currently having an adverse impact on the peace, order, and quiet; residential parking; and vehicular and pedestrian safety of the neighborhood.

24. Based on this finding, it would be irrational to approve a total of 145 additional seats for a tavern in Adams Morgan, when the neighborhood is already experiencing severe stress from the existing ABC-licensed establishments in the neighborhood. Supra, at ¶ 1. A tavern license has no minimum food requirements, may have a 140 square foot dance floor, and is permitted to rely heavily on alcohol sales for revenue. See D.C. Code § 25-113(c)(1)-(2) (Supp. 2011). Furthermore, combining the space occupied by Saki and the District will give the establishment over 200 seats, and essentially create a large nightclub environment, which, in turn, creates additional security and crowd control concerns. Supra, at ¶ 6. Consequently, providing additional occupancy in the Applicant's tavern will simply create more of the problems that the Adams Morgan Moratorium Zone was meant to alleviate. Supra, at ¶¶ 11-12.

25. We do not find that the Applicant's assertion that it will focus on food sales in the future credible. We recall the Applicant's previous assertions that it did not intend to operate a nightclub and intended to focus on food service during the late-night hours. Supra, at ¶ 8-9. These assertions are blatantly countered by the fact that the majority of sales at District are from the sale of alcohol. Supra, at ¶ 7. Indeed, the main purpose of the Application appears solely to escape the District of Columbia's strict food sales requirements for restaurants and the harsh penalties for violating these rules. Supra, at ¶ 7; *Tr.*, 7/27/11 at 43-45. As such, we are simply not persuaded to allow the Applicant to have "a more comfortable food service requirement," which gives the Applicant more leeway to use its establishment for nightclub activities. *Tr.*, 7/27/11 at 11.

26. We further find that the Voluntary Agreement negotiated by the parties does not address the Board's concerns and does not prevent the establishment from relying heavily on alcohol sales. The penalty for violating a Voluntary Agreement is only a secondary tier violation, because it is an unlisted offense. See D.C. Code § 25-830; 23 DCMR 800 *et seq.* (2008). This is much less severe than the possible revocation or suspension of the Applicant's license that violating the food sales requirement could engender. See 23 DCMR § 2101 *et seq.* (2008). Therefore, we find that granting the Application will give the Applicant little incentive to focus on food sales, as previously promised by the Applicant. See supra at ¶¶ 7-9.

27. We are also not persuaded by the argument that the Application will have no significant impact on the neighborhood, because the District is already operating at the capacity requested by Saki. The District is a separate license and, unlike Saki, currently bound by the statutorily minimum food requirements for a Retailer's Class CR License, which strongly deters licensees from relying heavily on the sale of alcohol for revenue. See D.C. Code § 25-113(b)(3)(B)(i)(I)-(II) (Supp. 2011).

28. Based on the current problems experienced by Adams Morgan, the Applicant's plan to remove the food sales requirements on the space controlled by District reduces the protections currently enjoyed by the neighborhood. If we approved the Application, it would give the

Applicant a free hand to rely heavily on alcohol sales and create, in effect, a large nightclub. It is our view, that such an arrangement is too risky for the District of Columbia, whose resources to devote to Adams Morgan are already being used to their fullest, and to residents, who currently have to experience these problems on a weekly basis. Supra, at ¶¶ 11-12. Therefore, we find that the Applicant has failed to meet its burden and deny the Application, because it will detrimentally impact the peace, order, and quiet, and residential parking and vehicular and pedestrian safety of the Adams Morgan neighborhood.

29. It is our view that providing additional tavern space in Adams Morgan is inappropriate at this time and contrary to the intent of the Adams Morgan Moratorium Zone. Simply put, Adams Morgan does not have the capacity to handle an additional 145 seats for a tavern license.

ORDER

Therefore, it is hereby **ORDERED** on this 19th day of October, that the Application for a Substantial Change 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 **DENIED**.

District of Columbia
Alcoholic Beverage Control Board

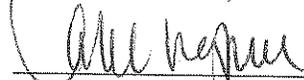


Nick Alberti, Interim Chairperson

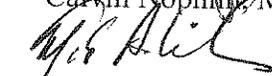


Donald Brooks, Member

Herman Jones, Member



Calvin Nophlin, Member



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, 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 (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).