

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

Notta Tav Urne, LLC)	Case Number:	13-PRO-00124
t/a Pi Restaurant)	License Number:	76784
)	Order Number:	2014-274
Petition to Terminate a)		
Settlement Agreement)		
)		
at premises)		
2309 18th Street N.W.)		
Washington, D.C. 20009)		

BEFORE: Ruthanne Miller, Chairperson
Donald Brooks, Member
Herman Jones, Member
Mike Silverstein, Member
Hector Rodriguez, Member
James Short, Member

ALSO PRESENT: Notta Tav Urne, LLC t/a Pi Restaurant, Petitioner

Alireza Hajaligholi, on behalf of Petitioner

Lennon Duggan, Duggan Brothers, LLC, on behalf of Petitioner

Richard Bianco, Esq., Counsel for Petitioner

Benedicte Aubrun, Reed-Cooke Neighborhood Association, Protestant

Denis James, Kalorama Citizens Association, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

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

INTRODUCTION

The Alcoholic Beverage Control Board (Board) finds good cause to amend the settlement agreement attached to the Retailer's Class CR License held by Notta Tav Urne, LLC, t/a Pi Restaurant, (hereinafter "Petitioner" or "Pi") as follows:

- (1) Pi is permitted to apply for an Entertainment Endorsement;
- (2) The Board is striking the language of the settlement agreement which states: "Hours of Operation for possible future rear deck summer garden: 11:30 a.m. until 11:00 p.m. seven days a week." The Board will consider the issue of the rear deck summer garden's hours as part of an application for a substantial change;
- (3) Pi is no longer required to maintain a sushi menu at all times;
- (4) Pi may apply for a change in its license class; and
- (5) Pi will not be subject to any occupancy provisions in the settlement agreement.

The Board finds that these minor amendments to the agreement will not have a negative impact on the Adams Morgan neighborhood.

Procedural Background

On September 9, 2013, Pi filed a timely Petition to Terminate a Settlement Agreement ("Petition") requesting that the Board terminate its settlement agreement entered into with the Kalorama Citizens Association ("KCA") and the Reed-Cook Neighborhood Association ("RCNA") (collectively the "Protestants"). The Board approved the settlement agreement on February 14, 2005. The Journey Group, Inc. t/a Blue Fin Sushi, Application No. 60833-05/007P, 2 (D.C.A.B.C.B. Feb. 14, 2005) [*Settlement Agreement*]. The settlement agreement was entered into by the Protestants and the prior holder of the license. Id.

The Board found that the Petition satisfied D.C. Official Code § 25-446(d)(2) because it was filed during the Petitioner's renewal period and after four years from the date the Board originally approved the settlement agreement at issue in this matter. The Petition also contained the affidavit required by § 25-446(d)(5). The Alcoholic Beverage Regulation Administration (ABRA) then provided notice to the parties to the settlement agreement and the public in accordance with District of Columbia (D.C.) Official Code § 25-446(d)(3).

Subsequently, protests against the Petition were filed by the Protestants in accordance with District of Columbia (D.C.) Official Code §§ 25-601(1) and 25-602. *ABRA Protest File No. 13-PRO-00124.*

The parties came before the Board's Agent for a Roll Call Hearing on September 23, 2013 and the Protestants were granted standing to protest the Petition. The parties then came before the Board for a Protest Status Hearing on November 13, 2013. The Protest Hearing in this matter occurred on April 10, 2014.

Based on the Protestants' initial protest letters, the Board may only grant the Petition if the Board finds that the request will not have a negative impact on peace, order, and quiet in the area located within 1,200 feet of the establishment and otherwise satisfies § 25-446. D.C. Official Code §§ 25-446(d)(4), 25-602; Letter from Benedicte Aubrun, At-Large and Liaison for ABC Matters, RCNA, to Ruthanne Miller, Chairperson, Alcoholic Beverage Control (ABC) Board (September 7 2013) [RCNA Protest Letter]; Letter from Denis James, President, KCA, to Ruthanne Miller, ABC Board (September 9, 2013) [KCA Protest Letter].

FINDINGS OF FACT

The Board, having considered the evidence, the testimony of the witnesses, the arguments of the parties, and all documents comprising the Board's official file, makes the following findings:

1. Pi's current hours of operation and hours of alcohol sales are as follows: Sunday, 11:30 a.m. to 12:00 a.m., Monday, 11:30 a.m. to 12:30 a.m., Tuesday, 11:30 a.m. to 12:30 a.m., Wednesday, 11:30 a.m. to 1:00 a.m., Thursday, 11:30 a.m. to 2:00 a.m., Friday and Saturday, 11:30 a.m. to 3:00 p.m. See ABRA Licensing File No. ABRA-076754. The current hours of operation and alcohol sales for the summer garden and sidewalk cafe are from 11:30 a.m. to 11:00 p.m., seven days a week. Id.

I. Settlement Agreement

2. Pi holds a Retailer's Class CR License and has a settlement agreement attached to its license. *ABRA Protest File No. 13-PRO-00124, Notice of Public Hearing.* The Board approved the settlement agreement on February 14, 2005. *Settlement Agreement, 2.*

3. The Journey Group, Inc., trading as Blue Fin Sushi, entered into a settlement agreement with the KCA and RCNA on November 12, 2004. *Settlement Agreement, 1.* At the time of signing the agreement, Blue Fin Sushi, located at 2309 18th Street, N.W. operated as a sushi restaurant. Id. The agreement states that the establishment will have "sushi available at all times, on both the first floor and the basement level whenever either floor of the establishment is open for business." Id. at 2, §1. The agreement also requires that Pi "keep...sufficient food supplies to fulfill [sushi] menu items." Id.

4. The agreement includes an "Operation" provision that prohibits the establishment from seeking a change in its license class. Id. at 2, §1.

5. In the agreement, there is a term which provides for a contingency in the event that the establishment receives an ABC license from the Board. Id. The agreement provides that within its first year of operation, contingent upon successfully adding a deck, the establishment will

make reasonable efforts to develop lunch-time business. Id. Should the rear deck be added, its hours of operation would be from 11:30 a.m. to 11:00 p.m., seven days a week. Id. at 3, § 3.

6. The Agreement has a section titled “Occupancy” where it discusses limitations of occupancy for each level of the establishment. Id. at 3§ 4. This section includes several blanks, such as the descriptive vital information taken from the establishment’s Certificate of Occupancy such as total number of occupancy, permit number, and date of issuance. Id. In addition, there are no initials or dates in the corresponding blanks at the bottom of this section. Id.

7. Under a section entitled “Noise/Music,” the agreement prohibits the establishment from featuring any “live entertainment of any type,” which includes “loud speakers, radios, CD players, tape players, television or other mechanical source of sound or noise used on the possible future rear deck summer garden.” Id. at 4, §5.

8. The agreement includes a provision regarding trash, garbage and rodent control. Id. at 4, § 6. This section requires the establishment to maintain regular trash removal service and make every reasonable effort to eliminate food sources for rodents to help eliminate the rate population. Id.

II. Testimony of ABRA Investigator Felicia Dantzler

9. ABRA Investigator Felicia Dantzler investigated the Petition and wrote the Protest Report submitted into the record. *Transcript (Tr.)*, October 16, 2013 at 17. The establishment is located in the Adams Morgan neighborhood. Id. at 21; *ABRA Protest File No. 13-PRO-00124*, Protest Report, 3 [Protest Report]. Seventy-nine licensed establishments operate within 1,200 feet of Pi. Id. Fifty-one of the seventy-nine establishments have settlement agreements attached to their license. Id. Pi has no on-site parking. Id. There is no subway within walking distance of Pi, however, five Metrobus lines operate through the 18th Street corridor. Id.; Protest Report, 7.

10. The establishment is in a four story brick establishment with residences on the top level of the building. Id. at 21-22. There are residential apartment units above the establishment. Id. at 48. The interior of the establishment is a narrow, medium sized floor plan. Id. at 22. There is also a sidewalk café at the entrance and an open deck in the rear of the establishment. Id. Investigator Dantzler described the open deck as having walls to absorb some of the noise. Id. at 49. Nonetheless, she expressed her concern that absent any type of window surrounding the rear deck, noise could possibly emanate from the establishment. Id.

11. As part of the investigation, ABRA investigators monitored the establishment on fifteen separate occasions. Id. at 25; Protest Report, 9. During this monitoring period, investigators did not observe loitering or excessive noise violations. Id. at 26.

12. The Petitioner’s Investigative History shows one violation since 2013. Protest Report, 10-11; *ABRA Protest File No. 13-PRO-00124*, Investigative History, 1. In 2013, the Petitioner failed to make its settlement agreement available upon request and paid a \$250 fine. Protest Report, 10.

13. Investigator Dantzler noted that many of the establishments in Adams Morgan operate until 3:00 a.m. Id. at 31. In contrast, Pi's outdoor seating area operates until 11:00 p.m. Id.

III. Testimony of Alireza Hajaligholi

14. Alireza Hajaligholi is an owner of the Notta Tav Urne, LLC. Id. at 56. Notta Tav Urne, LLC formed in 2007 and has owned Pi since 2008. Id. at 60.

15. Mr. Hajaligholi has owned restaurants and bars in DC for the past thirty-five years. Id. Moreover, he has owned several bars in the Adams Morgan area and also lives there. Id.

16. Mr. Hajaligholi sold the business to Mr. Bill Duggan in June 2012. Id. at 65. However, Mr. Hajaligholi filed the application to terminate the Settlement Agreement in March 2013 because at the time, a transfer to a new owner was pending. Id. at 66.

17. Mr. Hajaligholi discussed his efforts to negotiate an amendment to the settlement agreement with the other parties. Id. at 58. Prior to the mediation in 2009, Mr. Hajaligholi asserted that he left several voicemails with the KCA in an attempt to negotiate. Id. at 69. In addition, during the scheduled mediation, Mr. Hajaligholi agreed to let Denis James draft a new settlement agreement, but never heard a response from the KCA or RCNA in regard to the draft. Id. After the mediation concluded, the parties did not reach a resolution. Id. at 59.

18. During the mediation, Mr. James requested to see the interior of the establishment since he had never been inside. Id. Mr. Hajaligholi honored the request and Mr. James visited Pi. Id.

19. Mr. Hajaligholi filed this Petition due to the restrictions that the agreement places on his establishment. Id. at 57. In his view, the terms in the settlement agreement go beyond and above that of the terms in settlement agreements of nearby establishments. Id.

IV. Testimony of Commissioner William Simpson

20. Commissioner William Simpson is the Chair of the ANC for the Adams Morgan neighborhood and sits on the ANC's Alcoholic Beverage Control Committee. Id. at 77. The Protestants requested that the ANC testify in support of their objections to the Petition. Id. at 109.

21. Commissioner Simpson noted that in 2009 at the Moratorium Zone Public Hearing, the Board found that there are significant problems with peace, order and quiet in the Adams Morgan neighborhood. Id. at 78. He further noted that Adams Morgan experiences many issues with criminal activity, noise, litter, disorderly conduct, crowd control and vehicular and pedestrian safety during the late evening hours. Id. at 78-79. In its Moratorium petition, the ANC concluded that the problems exist largely due to the fact that many licensed establishments in the neighborhood operate as nightclubs due to their entertainment endorsements. Id. at 79.

22. Commissioner Simpson stated that his ANC's concern with the Petition is based on the belief that the termination of the settlement agreement would have an adverse effect on the peace, order and quiet of the neighborhood. Id. at 85. Mr. Hajaligholi is well known in the community for his involvement, as owner, of several other establishments in the neighborhood that effectively operate as nightclubs. Id. at 86.

23. Commissioner Simpson is concerned that if the establishment is sold to a new owner, the remaining concern would be whether the establishment would have an entertainment endorsement. Id. at 90.

V. Testimony of Lennon Duggan

24. Mr. Duggan is the President and sole member of the Duggan Brothers, LLC. Id. at 142. Due to his other full-time position as an Advance Associate for the White House, the day to day operations of the restaurant are handled by ABC licensed managers. Id. at 142-43.

a. Change in Circumstances

25. Mr. Duggan finds the terms and conditions of the settlement agreement to be "extremely restrictive" and makes conducting business "really difficult." Id. at 143-44. Based upon his familiarity with the hours of operations of adjacent establishments, Mr. Duggan does not find them to have any of the same restrictions.¹ Id. at 144-45. As an example, Town Tavern, a licensed establishment that is located on the same street as Pi, has no restrictions on its operating hours. Id. at 145. Further, its sidewalk café operates until the maximum time allotted. Id.

26. In addition to the restriction of hours, Mr. Duggan finds that the inability to charge a cover or host live entertainment is also adversely affecting his business. Id. at 154. The establishment is also not permitted to have dancing, dance floor or a disc jockey. Id. An application for an Entertainment Endorsement is prohibited by the current settlement agreement in effect. Id. at 155.

27. Since Mr. Duggan took over ownership, the establishment has run as a pizza restaurant. Id. at 156-57. However, due to the terms of the settlement agreement, it must also serve sushi. Id. at 156. At times, this proves difficult for the establishment to maintain both menus, particularly since the establishment has not operated as a sushi restaurant since 2004. Id. at 156, 180.

28. Mr. Duggan's position is that the settlement agreement should be terminated because it does not give the establishment the option to compete, or apply for, an Entertainment Endorsement. Id. at 179. Further, this limits Pi's ability to compete with nearby taverns. Id. Should the establishment's settlement agreement be terminated, Mr. Duggan intends for the establishment to operate as a restaurant with extended hours. Id. at 160.

¹ The Board takes administrative notice of the following ABC license holders in the Adams Morgan Neighborhood who operate their summer garden until 2:00 a.m.: ABRA License No. 007053, t/a Perry's Restaurant; ABRA License No. 081997, t/a Jack Rose; ABRA License No. 025273, t/a Madam's Organ; ABRA License No. 070823, t/a Bourbon; ABRA License No. 093592, t/a Roofers Union.

29. Mr. Duggan objects to letter B of the settlement agreement, under the section entitled, "Noise and Music." Id. at 187. This provision provides that the doors and windows of the premises will be kept closed at all times during business hours when the music is being played. Id. Mr. Duggan would like his customers to walk freely between the inside and outside of the restaurant through a door between the back patio and the rest of the restaurant. Id. at 187-88.

30. Mr. Duggan challenges letter D of the settlement agreement which prohibits the establishment from implementing a cover charge. Id. at 184. He finds this to be restrictive in the event that the establishment applies for an Entertainment Endorsement in the future. Id.

31. Mr. Duggan also objects to letter G of the settlement agreement which prevents the establishment from providing live entertainment. Id. at 185. The agreement in effect prevents the establishment from having loud speakers of any kind, radio, CD player, tape player, television or other mechanical source of sound or noise. Id.

VI. Testimony of Benedicte Aubrun

32. Ms. Benedicte Aubrun testified on behalf of the RCNA. Id. at 231. She serves the Association as the ABC liaison and member at large. Id. She currently resides at 1723 Euclid Street has lived in Adams Morgan for seventeen years. Id. at 230, 270.

33. Ms. Aubrun described the changes that she has seen in the neighborhood overtime. Id. at 231. More specifically, she noted that the behavior of the patrons has changed significantly and the noise and crime issues have improved. Id.

34. Ms. Aubrun took photos of the establishment in preparation for the RCNA's protest. Id. at 247-49; Protestant Exhibit 1. She also participated in gathering signatures on its petition by going door to door on the affected properties that were shown in the photographs. Id. at 260; Protestant Exhibit 1.

35. The RCNA is against the termination of the Settlement Agreement based upon its belief that its termination would adversely affect the peace, order and quiet of the neighborhood. Id. at 264, 267, 275.

VII. Testimony of Dirk Bass

36. Mr. Dirk Bass is a resident at 1745 Kalorama Place, a location about twenty yards from the establishment. Id. at 296-97. The condominium building in which he lives has windows that face the alley that abuts the establishment. Id. at 296. Mr. Bass stated that since he has lived there, he has heard minimal noise from Pi. Id. at 305. Assuming the operations remain relatively the same, he is not concerned about the extension of the establishment's hours. Id. at 306, 312. He believes the hours should be the same as everyone else's, provided that Pi follows the same rules as everyone else. Id. at 317, 319-320.

37. Mr. Bass is a signatory of the Petition. Id. at 307. He signed the Petition to oppose a substantial change in operations for the establishment. Id. at 311.

VIII. Testimony of Denis James

38. Mr. Denis James testified on behalf of the Protestants. Id. at 322. Mr. James discussed the circumstances surrounding the original settlement agreement entered into by the parties. Id. at 323-25. Around 2004, the establishment, then called Blue Fin, wanted an outdoor deck to host customers. Id. at 323. Out of concern for the potential noise that would result from outdoor usage, the parties agreed to cease operations at 11 p.m. Id. Blue Fin renovated the basement inside the premises and this space turned into a nightclub-like atmosphere called Blank. Id. at 324.

39. The KCA is concerned about the disruption of peace, order and quiet of the Adams Morgan neighborhood where multiple establishments already operate into the late hours. Id. at 337-38.

CONCLUSIONS OF LAW

40. Under D.C. Official Code § 25-446(d)(1), “Unless a shorter term is agreed upon by the parties, a settlement agreement shall run for the term of a license, including renewal periods, unless it is terminated or amended in writing by the parties and the termination or amendment is approved by the Board. D.C. Official Code § 25-446(d)(1). Accordingly,

The Board may approve a request by fewer than all parties to amend or terminate a settlement agreement for good cause shown if it makes each of the following findings based upon sworn evidence:

- (A)(i) The applicant seeking the amendment has made a diligent effort to locate all other parties to the settlement agreement; or
 - (ii) If non-applicant parties are located, the applicant has made a good-faith attempt to negotiate a mutually acceptable amendment to the settlement agreement;
- (B) The need for an amendment is either caused by circumstances beyond the control of the applicant or is due to a change in the neighborhood where the applicant's establishment is located; and
- (C) The amendment or termination will not have an adverse impact on the neighborhood where the establishment is located as determined under § 25-313 or § 25-314, if applicable.

D.C. Official Code § 25-446(d)(4)(A)-(C).

41. The Board amends the settlement agreement as follows, based on the Board's determination that such amendments satisfy § 25-446. The Board further notes that it did find sufficient evidence in the record to merit additional amendments. The Board further concludes that Pi did not meet its burden of proof to support the termination of the settlement agreement.

I. PI SATISFIED § 25-446(D)(4)(A) BY ATTEMPTING TO NEGOTIATE AN AMENDED SETTLEMENT AGREEMENT IN GOOD FAITH WITH THE KCA AND RCNA.

42. The Board finds that Pi satisfied §25-446(D)(4)(A) through its negotiation with the parties beginning in advance of the 2009 mediation. Under § 25-446(d)(4)(A), in order to terminate or amend a settlement agreement when the other signatories have been located, it must be shown that "the applicant has made a good-faith attempt to negotiate a mutually acceptable amendment to the settlement agreement." D.C. Official Code § 25-446(d)(4)(A)(i)-(ii).

43. The Board gives credit to Mr. Hajalgholi's testimony that he permitted the Protestants to view the establishment. Supra, at ¶ 18. Additionally, all of the parties attended a mediation regarding the settlement agreement. Supra, at ¶ 17.

44. Accordingly, the Board finds that Pi negotiated in good faith and therefore has satisfied §25-446(D)(4)(A).

II. PI DEMONSTRATED THAT SOME OF THE PROVISIONS OF THE SETTLEMENT AGREEMENTS MERIT AMENDMENT UNDER § 25-446(D)(4)(B) BASED ON A CHANGE IN THE NEIGHBORHOOD AND CIRCUMSTANCES BEYOND THE CONTROL OF THE PETITIONER.

45. Pi has provided sufficient evidence to demonstrate that amendments to the option for the establishment to apply for an Entertainment Endorsement and the hours of operation set forth in the settlement agreement are warranted.

46. Under § 25-446(d)(4)(B), in order to terminate or amend the settlement agreement, Pi must show that "[t]he need for an amendment is either caused by circumstances beyond the control of the applicant or is due to a change in the neighborhood where the applicant's establishment is located." § 25-446(d)(4)(B). The Board previously stated in Hank's Oyster Bar that a change to an applicable law, which has a nexus to the settlement agreement attached to a petitioner's license, satisfies § 25-446(d)(4)(B). In re Leeds the Way, LLC t/a Hank's Oyster Bar, Board Order No. 2012-319 at ¶¶ 57-63.

47. The Board finds that Pi, as a matter of law, should have the option to apply for an Entertainment Endorsement. As stated in the D.C. Official Code § 25-446.02, the Board shall not enforce any requirements that prohibit the licensee from applying for changes to licensed operation procedures, including applications for entertainment endorsements and changes of hours. D.C. Official Code § 25-446.02(1) (E). In the instant matter, Pi is currently subjected to a settlement agreement that does not allow "live entertainment of any type," which places the establishment at an unfair competitive advantage with other restaurants in the neighborhood.

Supra, at ¶ 7, 31. This language is clearly restrictive to the license’s ability to utilize the option of applying for an Entertainment Endorsement and accordingly is unenforceable. Therefore, the Board finds a sufficient change in circumstances beyond the Petitioner’s control that warrants an amendment to this provision.

48. Further, the Board notes several changes in the neighborhood that warrant amending the settlement agreement’s operation hours. More specifically, the Board finds sufficient evidence in the record to permit Pi’s ability to apply for an extension of hours for its rear deck. The Board approved the agreement in 2005 and it is undisputed that the agreement restricts Pi’s hours of operation. *Settlement Agreement*, § 3. Notably, the agreement prospectively limited the hours of the rear deck summer garden from 11:30 a.m. until 11:00 p.m. Supra, at ¶ 1. Yet, the remainder of the establishment currently operates until significantly later hours on Thursday through Saturday. Supra, at ¶ 1. It is the Board’s position that the rear deck summer garden is part of the establishment, and Pi should have the ability to apply for an expansion of its hours. The Board credits Investigator Dantzler’s testimony that the noise that would possibly emanate from the rear deck summer garden is surrounded by walls, thus reducing the noise. Supra, at ¶ 10. Further, Investigator Dantzler noted that many of the establishments in the area operate until 3:00 a.m. Supra, at ¶ 13. The Board will consider these issues upon review of any potential substantial change application submitted by Pi. Accordingly, the Board finds a sufficient change in the neighborhood here to remove the provision of the settlement agreement limiting Pi’s hours of operation for its rear deck summer garden.

III. PI DEMONSTRATED THAT AMENDING THE SETTLEMENT AGREEMENT WILL NOT RESULT IN AN ADVERSE IMPACT UNDER § 25-446(D)(4)(C).

49. The Board finds that amending the agreement to allow Pi the ability to apply for an Entertainment Endorsement and to apply for an expansion to the hours of operation for the rear deck summer garden will not have a negative impact on the neighborhood’s peace, order, and quiet.

50. The burden is on the Petitioner to show that “[t]he amendment or termination will not have an adverse impact on the neighborhood where the establishment is located as determined under § 25-313 or § 25-314, if applicable.” § 25-446(d)(4)(C). The only appropriateness standard raised by KCA and the RCNA is § 25-313(b)(2), which states, “[i]n determining the appropriateness of an establishment, the Board shall consider . . . [t]he effect of the establishment on peace, order, and quiet, including the noise and litter provisions set forth in §§ 25-725 and 25-726.” D.C. Official Code § 25-313(b)(2).

A. Amending the settlement agreement will not encourage crime.

51. The Board finds that allowing Pi the ability to apply for an Entertainment Endorsement and to apply for an expansion of the hours of operation for the rear deck summer garden will not subject the neighborhood to an increase in crime or other forms of disorder. Multiple investigations conducted by ABRA show that the establishment is not a source of crime and

disorder in the community, and Pi's record shows that the establishment not engaged in any major violations of the city's liquor laws. Supra, at ¶¶ 4, 5.

B. Amending the settlement agreement will not encourage excessive noise.

52. The Board further finds that allowing Pi the ability to apply for an Entertainment Endorsement and to apply for an expansion of the hours of operation for the rear deck summer garden will not have a negative impact on noise in the neighborhood.

53. Section § 25-725 states, "The licensee under an on-premises retailer's license shall not produce any sound, noise, or music of such intensity that it may be heard in any premises other than the licensed establishment by the use of any: . . . Mechanical device . . ." D.C. Official Code § 25-725(a)(1). Further, § 25-313(b)(2) permits the Board to consider noise beyond the scope of § 25-725. Panutat, LLC, t/a District of Columbia Alcoholic Beverage Control Bd., 2013 WL 5271321, *4 n. 12 (D.C. 2013) ("However, in mandating consideration of the effect on peace, order, and quiet, § 25-313(b)(2) does not limit the Board's consideration to the types of noises described in § 25-725.")

54. The Board credits the testimony of Investigator Dantzler that after monitoring the establishment on fifteen separate occasions, the establishment did not commit any excessive noise violations. Supra, at ¶¶ 4, 42. The Board also credits the testimony of the Mr. Bass, a resident of the neighborhood in close proximity to the establishment, that he has not experienced any problems with noise from Pi. Supra, at ¶ 36. While the Board finds that it is reasonable to suspect that noise would increase with the extended hours of operation of the outdoor rear deck, the Board finds no reason to prevent the establishment from applying for an Entertainment Endorsement. Nor does the Board find a reason to prevent the establishment from applying to expand its rear deck's operation hours. Consequently, the Board will amend the agreement to allow Pi to apply for an extension to the hours of operation for its rear deck summer garden.

C. Amending the settlement agreement will not encourage trash and litter.

55. The Board finds that allowing Pi the ability to apply for an Entertainment Endorsement and to expand the hours of operation for the rear deck summer garden will not subject the neighborhood to increased trash and litter. Under § 25-726, the licensee must comply with the Litter Control Amendment Act of 1987 and ". . . take reasonable measures to ensure that the immediate environs of the establishment, including adjacent alleys, sidewalks, or other public property immediately adjacent to the establishment, or other property used by the licensee to conduct its business, are kept free of litter." D.C. Official Code § 25-726. The record does not show any evidence that the establishment has created a trash or litter problem in the neighborhood. Further, there is a provision regarding trash control in the settlement agreement which both parties would like to remain. Supra, at ¶ 8, 28-31.

56. Therefore, the Board finds that amending the hours of rear deck summer garden and Entertainment Endorsement provisions of the settlement agreement in accordance with this Order will not have an adverse impact on the neighborhood.

IV. THE BOARD FINDS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT ADDITIONAL AMENDMENTS TO THE SETTLEMENT AGREEMENT TO COMPLY WITH APPLICABLE LAWS AND REGULATIONS.

57. The Board addressed the Protestants concerns regarding peace, order, and quiet in Sections I-III of this Order. The Board would also like to note additional amendments to the settlement agreement that it finds necessary as a matter of law. The Board notes that it is only making minor amendments to the settlement agreement and any section not discussed in this order will remain in place and maintain full effect.

A. The Requirement that the Petitioner Maintain a Sushi Menu and Applicable Food Items within the Settlement Agreement is Unenforceable and Irrelevant to the Peace, Order and Quiet of the Neighborhood.

58. The Board finds that the provision of the settlement agreement which requires the Petitioner to maintain a sushi menu and the applicable food items in stock “at all times...whenever the establishment is open for business...” is unenforceable as a matter of law. . Supra, at ¶ 3, 27. Under § 25-446.02, the Board shall not enforce a provision that restrains the ability of an applicant to operate its business.” D.C. Official Code § 25-446.02. It is clear that dictating what food items an establishment must serve to its patrons falls within such restraints. Consequently, the Board cannot sustain this provision and accordingly strikes this language from the settlement agreement.

59. Furthermore, the Board maintains the position that this provision, which has contributed to an adverse economic effect upon the establishment, is not relevant to the Protestant’s concerns regarding peace, order and quiet. Supra, at ¶ 3, 27.

60. For the aforementioned reasons, the Board strikes the provision that sets forth the requirement that the Petitioner maintain a sushi menu and applicable food items at all times from the settlement agreement.

B. The Provision that Restricts the Petitioner from Applying to Change its License Class is Unenforceable as a Matter of Law.

61. The Board also finds that the provision of the settlement agreement which states that the “applicant agrees to seek no change in its license class” is unenforceable as a matter of law. As previously discussed, the Board shall not enforce prohibitions against the applicant applying for a change in license class. Supra, at ¶ 4; D.C. Official Code § 25-446.02 (1)(C). The Board finds this provision to be a direct violation of the D.C. Official Code and accordingly is striking this provision from the settlement agreement.

C. The Section of the Settlement Agreement Restricting Occupancy is Incomplete and Unenforceable as a Matter of Law.

62. Lastly, the Board finds that the provision of the settlement agreement which sets forth several limitations on occupancy is incomplete and unenforceable as a matter of law. Of paramount importance is the fact that this section has several crucial blanks in the document that do not signify the permit number, date, or parties signing the document. Supra, at ¶ 6. As a general contract principal, the parties must express an intent to be bound, agree to all material terms, and assume mutual obligations. Dyer v. Bilal, 983 A.2d 349, 356 (D.C. 2009); See also D.C. Official Code § 25-446.01. In addition, a contract's material terms, such as subject matter, must be "sufficiently definite" so that each party can be "reasonably certain" about what it is promising to do or how it is to perform. Dyer, 983 A.2d at 349. Here, there is no express intent of either party to be bound to this particular provision. The provision has several blanks by terms such as the capacity designated on the establishment's Certificate of Occupancy, the permit number, the date of issuance, and whether the terms are accepted by any of the parties. Supra, at ¶ 6. It is clear that neither party can be reasonably certain about what it is promising to do because this section is missing material instructive terms. As a result, the Board finds this provision to be unenforceable and is therefore stricken from the settlement agreement.

V. THE PETITIONER DID NOT MEET ITS BURDEN OF SHOWING THAT THE TERMINATION OF THE SETTLEMENT AGREEMENT IS WARRANTED.

63. The Board is denying Petitioner's request to wholly terminate the settlement agreement between the parties. When reviewing a settlement agreement, the Board has a duty to, at minimum, "attempt to salvage the agreement by amending it." Maloff v. District of Columbia Alcoholic Beverage Control Bd., 43 A.3d 916, 921 (D.C. 2012). Both Blue Fin and the Protestants gave up rights and gained benefits when originally entering into the settlement agreement. Id. Due to the transfer of the license, Pi was subjected to the terms of the agreement entered into by its predecessor. As noted by the court in Mallof, terminating the settlement agreement- negotiated so that each party gained benefits and relinquished rights- without first attempting to salvage the agreement by amending it, would be unfair. Id. at 921.

64. Therefore, the Board finds that Pi has not met its burden of showing that the change in circumstances beyond its control are so great that that the complete termination of settlement agreement is warranted. Furthermore, the Board finds that Pi has not met its burden of proof in order to show that the complete termination of the agreement is warranted. The Board finds that there is no nexus between the remaining portion of the agreement and the changes in circumstance. The Board also finds that the remaining portions of the agreement should be retained in the interest of preventing adverse impacts on the neighborhood.

VI. THE PETITIONER SATISFIED ALL REMAINING REQUIREMENTS REQUIRED TO AMEND THE SETTLEMENT AGREEMENTS.

65. Finally, the Board is only required to produce findings of fact and conclusions of law related to those matters raised by the Protestants in their initial protest. See Craig v. District of Columbia Alcoholic Beverage Control Bd., 721 A.2d 584, 590 (D.C. 1998) ("The Board's regulations require findings only on contested issues of fact."); 23 DCMR § 1718.2. Accordingly, based on the Board's review of the Petition and the record, Pi has satisfied all

remaining requirements imposed by Title 25 and Title 23 to merit the amendment of its settlement agreement by the Board in accordance with this Order.

ORDER

Therefore, the Board, on this 30th day of July 2014, hereby **AMENDS** the settlement agreement entered into by the Petitioner, the KCA, and the RCNA as follows:

- (1) The Petitioner is permitted to apply for, receive, and operate in accordance with the Entertainment Endorsement offered by D.C. Official Code § 25-113(a). The Board notes that the establishment must receive Board approval of an Entertainment Endorsement before being eligible to have entertainment, a cover charge, or offer facilities for dancing;
- (2) The Petitioner is permitted to apply for a substantial change in its hours of operation for the rear deck summer garden.;
- (3) The Board hereby strikes the following provisions from the settlement agreement:
 - i. “The [applicant shall have] sushi available at all times...the establishment is open for business. Applicant shall keep on hand sufficient food supplies to fulfill menu items.” *Settlement Agreement*, 2 § 1.
 - ii. “Applicant agrees to seek no change in license class.” *Settlement Agreement*, 2 § 1.
 - iii. “Hours of Operation for possible future rear deck summer garden: 11:30 a.m. until 11:00 p.m. seven days a week.” *Settlement Agreement*, 3 § 3.
 - iv. The section entitled “Occupancy” in its entirety. *Settlement Agreement*, 3 § 4.

IT IS FURTHER ORDERED that all other provisions of the Settlement Agreement shall remain in full force and effect.

ABRA shall provide copies of this Order to the Petitioner, the KCA and the RCNA.

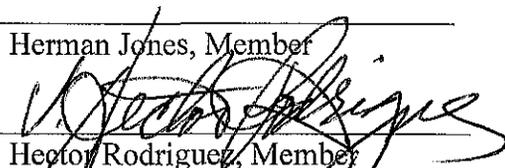
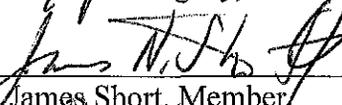
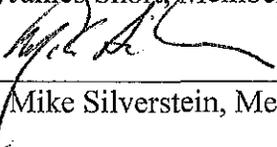
District of Columbia
Alcoholic Beverage Control Board



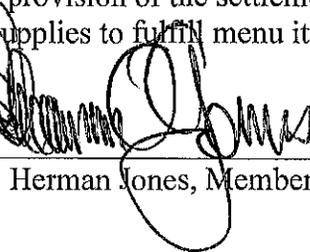
Ruthanne Miller, Chairperson


Donald Brooks, Member

Herman Jones, Member


Hector Rodriguez, Member
James Short, Member
Mike Silverstein, Member

I concur with the majority of the Board's decision to amend the settlement agreement. Nevertheless, I dissent as to the removal of the provision of the settlement agreement to require the Petitioner to keep on hand sufficient food supplies to fulfill menu items selected by the majority.


Herman Jones, Member

Under 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, NW, 400S, Washington, D.C. 20009.

Also, under 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 under 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).

71271

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

In the Matter of:)
)
The Journey Group, Inc.)
t/a Blue Fin Sushi)
)
Application for a Retailer's Class CR)
License)
at premises)
2309 18th Street, NW)
Washington, D.C.)
_____)

Application no.: 60833-05/007P
Order no.: 2005-39

The Journey Group, Inc., Applicant

Peter Lyden, President, on behalf of the Reed-Cooke Neighborhood Association, and
Matt Forman, on behalf of the Kalorama Citizens Association, Protestants

BEFORE: Charles A. Burger, Chairperson
Vera M. Abbott, Member
Judy Moy, Member
Audrey E. Thompson, Member
Peter B. Feather, Member
Albert G. Lauber, Member
Eartha Isaac, Member

ORDER ON VOLUNTARY AGREEMENT AND WITHDRAWN PROTEST

The application for a new Retailer's Class "CR" License, having been protested, came before the Board on November 17, 2004, in accordance with D.C. Official Code § 25-601 (2001). Peter Lyden, President, on behalf of the Reed-Cooke Neighborhood Association, and Matt Forman, on behalf of the Kalorama Citizens Association, filed timely opposition by letters on October 19, 2004.

The official records of the Board reflect that the Protestants and the Applicant have reached an agreement that has been reduced to writing and has been properly executed and filed with the Board. The Board is approving the agreement with the following change. The Board is amending provision 5a) to read as follows: "a) The Applicant agrees to abide by all applicable noise provisions of D.C. laws and regulations, including but not limited to D.C. Official Code § 25-725, as amended." Pursuant to the agreement, dated November 12, 2004, the Protestants have agreed to withdraw their protests, provided, however, the Board's approval of the pending application is conditioned upon the licensee's continuing compliance with the terms of the agreement.

The Journey Group, Inc.
t/a Blue Fin Sushi
Case no. 60833-05/007P
Page two

Accordingly, it is this 14th day of February 2005, **ORDERED** that:

1. The protests of Peter Lyden, President, on behalf of the Reed-Cooke Neighborhood Association, and Matt Forman, on behalf of the Kalorama Citizens Association, are **WITHDRAWN**;
2. The application of The Journey Group, Inc., t/a Blue Fin Sushi, for a Retailer's Class "CR" License at 2309 18th Street, N.W., Washington, D.C., is **GRANTED**;
3. The above-referenced final agreement, is **INCORPORATED** as part of this Order; and
4. Copies of this Order shall be sent to the Protestants and the Applicant.

The Journey Group, Inc.
t/a Blue Fin Sushi
Case no. 60833-05/007P
Page three

District of Columbia
Alcoholic Beverage Control Board

Charles A. Burger

Charles A. Burger, Chairperson

Vera M. Abbott

Vera M. Abbott, Member

not voting

Judy Moy, Member

Audrey E. Thompson

Audrey E. Thompson, Member

Peter B. Feather

Peter B. Feather, Member

not voting

Albert G. Lauber, Member

not voting

Eartha Isaac, Member

Pursuant to 23 DCMR § 1719.1 (April 2004), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, 941 North Capitol Street, N.E., Suite 7200, Washington, D.C. 20002.

**COOPERATIVE AGREEMENT CONCERNING ISSUANCE OF ABC LICENSE
FOR SALE OF ALCOHOLIC BEVERAGES**

AGREEMENT, made and entered into this 12th day of November, 2004, by and between The Journey Group, Inc., trading as Blue Fin Sushi (hereinafter the "Applicant"), the Kalorama Citizens Association (hereinafter the "KCA"), and the Reed-Cooke Neighborhood Association (hereinafter the "RCNA"). These constitute the "Parties".

Whereas, Applicant has filed an Application (No. 60833) with the District of Columbia Alcoholic Beverage Control Board (hereinafter the "Board") for the issuance of a new Class CR-01 License (No.71271) to be located at 2309 18th Street, NW, Washington DC 20009,

Whereas, both the KCA's and RCNA's membership boundaries are within the affected area and both the KCA and RCNA have members residing within the affected area,

Whereas, in recognition of the Board's policy of encouraging parties to a protested proceeding to settle their differences by reaching Cooperative Agreements, the Parties hereto desire to enter into a Cooperative Agreement whereby (1) Applicant will agree to adopt certain measures to address the Protestant's concerns and to include this Agreement as a formal condition of its Application, and (2) the Protestants will agree to the issuance of the license, and withdrawal of the protest, provided that such Agreement is incorporated into the Board's order approving such issuance, which order is thereby conditioned upon compliance with such Agreement,

Whereas, at the time of this Agreement, Applicant has ready for operation the first floor of 2309 18th Street, NW and is applying to the ABC Board under 23DCMR 405.1 for the addition of the basement to the premises for the purpose of storage and service of alcoholic beverages and food,

Whereas, the ABC Board ruled on July 14, 2004 that "significant problems with peace, order and quiet, particularly with respect to noise, litter, disorderly conduct, crowd control, vehicular and pedestrian safety, as well as parking problems to still exist during late evening hours in the Adams Morgan Moratorium Zone", and

Whereas, Blue Fin Sushi, located at 2309 18th Street, NW is located within the Adams Morgan Moratorium Zone, and will contribute incrementally to the aforementioned problems in proportion to its allowable occupancy as it relates to the total combined occupancy of all the "C" and "D" licensed establishments within the Zone,

Whereas, Applicant has recently taken or intends to take certain measures designed to ameliorate the KCA and the RCNA's concerns,

Now, therefore, in consideration of the mutual covenants and undertakings memorialized herein, the Parties hereby agree as follows:

1. Operation

ONE HOUR

At all times, the Applicant shall operate as a bona-fide restaurant with the primary purpose of food preparation and consumption. The kitchen shall be open and operational with cooked food menu items available until ~~1~~ ^{ONE} hour before closing and Sushi available at all times, on both the first floor and the basement level whenever either floor of the establishment is open for business. Applicant shall keep on hand sufficient food supplies to fulfill menu items.

11-17-2003
OK DJKCA
OK SM

Upon granting of the license by the ABC Board, Applicant agrees that the restaurant will, within the first year of operation, and, contingent upon successfully added a deck as set forth herein, make reasonable efforts to develop a lunch-time business.

Applicant agrees to seek no change in license class.

2. Premises.

Applicant agrees that the areas of premise for service of food and alcoholic beverages shall be only the first floor and the basement, except that the rear portion of the basement will be used for office space and storage.

There shall always be sufficient tables and chairs on each floor of the establishment to seat the allowable occupancy of patrons. The tables and chairs will always be arranged for dining and never will be moved aside to allow for dancing, with the exception of New Year's Eve into January 1st of each year until 4:00 am.

Applicant shall maintain the rear portions of the basement as storage and office space for the restaurant. Applicant agrees to maintain rest rooms for patrons on both the first floor and basement levels.

Applicant shall not seek to expand the restaurant beyond the basement and first floor as described in this agreement. Applicant shall not apply to expand the size of the building to the rear except for the purpose of applying for a raised deck on the first floor level that is approved by normal permit application standards, but shall maintain the rear yard at ground level for the purpose of employee parking and storage of trash, waste and recycling items. Any such rear deck shall be seasonal and shall not be enclosed. Trash dumpsters and recycling containers will be kept on the private property of the rear yard. Applicant may use the rear yard as parking to the extent that the parking use does not force the dumpster(s) and/or recycling containers off private space into the public space of the alley.

Applicant will not serve alcoholic beverages or serve food in the basement level before receiving ABC Board approval.

3. Hours of Operation

First Floor and Basement.

Sunday ~~through Wednesday~~: 11:30 am until 12:00 ~~am~~, MIDNIGHT
MONDAY AND TUESDAY: 11:30 AM UNTIL 12:30 AM
WEDNESDAY: 11:30 AM UNTIL 1:00 AM

OK DJKCA, 11-17-2004
OK PCN 4/17/04
OK SM

Thursday: **11:30 am until 2:00 am,**

Friday and Saturday: **11:30 am until 3:00 am,** with the exception of each January 1st, when the Applicant may be open until the legal limit of 4:00 am as provided at 25-723(c).

Hours of operation for possible future rear deck summer garden: **11:30 am until 11:00 pm, seven days a week.**

4. Occupancy

Capacity will not exceed:

First floor dining room and bar: Certificate of Occupancy permit number 70159 issued by the Government of the District of Columbia, DCRA on 2-10-2004, allows an occupancy load on the first floor of: **39**. The Parties agree that should further occupancy be granted to Applicant upon subsequent application and review by DCRA, that the maximum occupancy load of the first floor shall be no more than 45 persons. If no further occupancy is granted, the Parties shall amend this section, removing this and the previous sentence.

Whereas, Applicant has applied to the ABC Board under 23DCMR 405.1 for the use of the basement level of 2309 18th Street, NW for the purpose of storage and service of alcoholic beverages and food, and use as part of the restaurant. The maximum load of the basement Certificate of Occupancy is unknown as of the date of execution of this agreement. Nevertheless, the Parties agree that the occupancy of:

The Basement dining area and bar shall not exceed: 40, or the number of persons allowed by DCRA on a separate Certificate of Occupancy for the basement level, whichever number is smaller.

Upon issuance of separate Certificate of Occupancy for the basement level, the Parties agree to fill in and initial the section below.

Total as shown on DCRA-issued Certificate of Occupancy for the basement level at 2309 18th Street, NW is _____. Basement of 2309 18th Street, NW, Certificate of Occupancy permit no. _____ and date of issuance _____.

Total allowable occupancy of the establishment: _____.

Accepted by: Applicant _____ Date _____, KCA _____ Date _____, RCNA _____ Date _____.

5. Noise/Music

Applicant acknowledges familiarity with and will comply with all applicable noise-control provisions of District of Columbia law and regulations, including, but not limited to:

- a) Preventing emissions of sound, capable of being heard outside the premises, by any musical instrument or amplification device or other device or source of sound or noise, in accordance with the DC Noise Control Act of 1977 (Public Law 2-53), as amended. The Applicant agrees to abide by all Alcoholic Beverage Control regulations, as amended.
- b) The doors and windows of the premises will be kept closed at all times during business hours when music is being played, or a sound amplification device is being employed in the premises, except when persons are in the act of using the door for ingress to or egress from the premises.
- c) Music from inside will not be audible at surrounding residential housing areas.
- d) There will be no cover charge.
- e) There will be no dancing at the establishment with the exception of each New Year's Eve into January 1st until 4:00 am.
- f) There will be no designated dance area.
- g) There will be no live entertainment of any type, with the exception of New Year's Eve into January 1st until 4:00 am and as allowed under 23DCMR 1003.1 and 23DCMR 1003.2 , *which allows, upon Board application and approval, a one-day "substantial change" to provide a requested form of live entertainment* up to 6 times per year including New Year's Eve. Live entertainment does not include the playing of recorded music, which is permitted.
- h) There will be no loudspeakers of any kind, and no radio, cd player, tape player, television or other mechanical source of sound or noise used on the possible future rear deck summer garden.

6. Trash/Garbage/Rodent Control

- a) Applicant shall maintain regular trash/garbage removal service, regularly remove trash from the trash area, and see that the trash area remains clean. Applicant shall deposit trash and garbage only in a rodent-proof dumpster(s) and shall see that dumpster covers fit properly and remain fully closed except when trash or garbage is being added or removed. Applicant will make every reasonable effort to eliminate food sources for rodents to help eliminate the rat population.
- b) Applicant agrees to segregate bottles (and recycle bottles, cans and cardboard in accordance with DC Law) from trash and agrees there will be no loud dumping of bottles, or pickup of the recycling and refuse in the alley behind the restaurant between the hours of 11:00 pm and 8:00 am, seven days a week. No trash, waste or recycling of any kind will ever be left on the ground.
- c) Applicant will provide for the proper removal and recycling of grease and fatty oils from the establishment and will not deposit grease or fatty oils in the trash containers. Applicant agrees to provide the Protestants with a copy of the contract to remove grease/fatty oils from the establishment.

7. Exterior, Including Public Space

Applicant shall assist in the maintenance of the alleyway behind and the space in front of the establishment on 18th Street to at least 18 inches outward from the curb as needed to keep them free of trash and to remove snow and ice from the sidewalk and comply with all applicable D.C. laws and regulations in these respects.

8. Miscellaneous

a) Applicant agrees not to place outside any loudspeaker, tape player, CD player, or other similar device, or to place any inside speaker in such a way that it projects sound into the public space.

b) Applicant agrees to operate the establishment under the terms of its license and will not rent out, or otherwise make available the establishment to third parties for events where the owner-manager is not present and managing the business.

c) Applicant agrees not to place or cause to be placed any fliers, handbills or other similar advertisements in the public space, specifically on trees, lampposts, street signs or any vehicle parked in the public space.

9. Bar/Pub Crawls

Applicant agrees not to promote or participate in bar or pub "crawls", "tours", or similar events.

10. Consideration

Applicant will encourage employees and patrons to be considerate of neighboring residents at all times. Applicant shall make every reasonable effort to prevent or disperse loitering or any other source of noise or disturbance in the areas in front of or in the rear of the premises during business hours and at closing, and to cause patrons and employees to leave those areas quietly at closing. Applicant will encourage employees and patrons leaving the establishment to keep conversations and noise to a minimum from 11:30 pm to 7:00 am.

There shall be no rear entry or exit of patrons at the rear of the building except in the case of emergency.

11. Modification

This Agreement can be modified only by the ABC Board, or by mutual agreement of all the parties with the approval of the ABC Board.

12. Regulations

In addition to the foregoing, Applicant will operate in compliance with all applicable laws and regulations. Further, nothing in this Agreement shall preclude the Protestants

from filing an objection to any request by the Applicant to the Board of Zoning Adjustment.

13. Availability of Voluntary Agreement

Applicant agrees to keep available at all times a copy of this Agreement at his/her establishment and shall familiarize all his/her employees with its conditions.

Applicant.

Kalorama Citizens Association

By:

Shrinath Malur Title

[Signature]

Pres 11-17-04

Date

By

Denis I. E. James,

[Signature]

11-17-2004

Date

Executive Vice President, KCA

Kalorama Citizens Association

Reed-Cooke Neighborhood Association

By

Peter Lyden,

President, RCNA

[Signature]

11/17/04

Date

at the establishment, and (2) to provide the parties with an opportunity to submit written comments to the Board on this issue. Prior to the June 22, 2005 hearing, the Board received written comments from both the Applicant and Denis James, on behalf of the KCA. At the conclusion of the June 22, 2005 hearing, the Board took its decision in the matter under advisement. The Board having considered the evidence, the arguments of the parties, and the documents comprising the official file, makes the following:

FINDINGS OF FACT

1. The Applicant's establishment holds a Class "CR" retailer's license and is located at 2309 18th Street, N.W. (Alcoholic Beverage Regulation Administration ("ABRA") Application File No. 60833.) By letter, dated March 15, 2005, the Applicant filed a substantial change request with the Board to add recorded music by an individual, such as an employee or deejay. (ABRA Application File No. 60833.) Timely protests were filed in opposition to the substantial change request, pursuant to D.C. Official Code § 25-601 (2001), by Alan J. Roth, Chairperson, on behalf of Advisory Neighborhood Commission ("ANC") 1C, and Denis James, President, on behalf of the Kalorama Citizens Association ("KCA"). (Tr. 6/15/05 at 5-6; ABRA Protest File No. 60833-05/039P.)
2. At the June 15, 2005 roll call hearing, the KCA raised the issue of whether the Applicant's existing voluntary agreement, dated November 12, 2004, between the Applicant, the KCA and the Reed Cooke Neighborhood Association ("RCNA"), prohibited a disc jockey at the establishment. (Tr. 6/15/05 at 6-7, 9.) On June 15, 2005, the Board continued the roll call hearing until June 22, 2005 to: (1) provide the Board with an opportunity to hear from the parties with regard to whether the Applicant's November 12, 2004 voluntary agreement prohibits it from applying for a disc jockey at the establishment, and (2) to provide the parties with an opportunity to submit written comments to the Board on this issue. (Tr. 6/15/05 at 11-13.) Prior to the June 22, 2005 hearing, the Board received written comments from both the Applicant and Denis James, on behalf of the KCA. (ABRA Protest File No. 60833-05/039P.)
3. Provision 5(g) of the Applicant's November 12, 2004 voluntary agreement prohibits the Applicant from having "live entertainment of any type", except on New Year's Eve into January 1st until 4:00 a.m. and up to six (6) times per year, including New Year's Eve, under a one-day substantial change as set forth in Title 23 of the District of Columbia Municipal Regulations ("DCMR") § 716 (2004)¹. Additionally, under provision 5(g) of the voluntary agreement, the term "live entertainment" is defined to not include the playing of recorded music, which is permitted at the establishment. (ABRA Application File No. 60833.)
4. The Board heard arguments from the parties on June 22, 2005 with regard to whether provision 5(g) of the establishment's voluntary agreement prohibits it from having a disc jockey. (Tr. 6/22/05 at 1-34.) Mr. Shrinath Malur, President, The Journey Group, Inc., argued that when

¹ The Board notes that provision 5(g) of the November 12, 2004 agreement incorrectly references "23DCMR 1003.1 and 23DCMR 1003.2" as the regulatory authority for one-day substantial changes by the holder of an on-premises retailer's license. The Alcoholic Beverage Control Board adopted a new version of Title 23 of the District of Columbia Municipal Regulations as published in the D.C. Register at 51 DCR 4309 (April 30, 2004). The Board's one-day substantial change authority can now be found at 23 DCMR § 716 (2004).

he entered into the voluntary agreement he thought it just prohibited bands and did not know that the District of Columbia defined "entertainment" to include a disc jockey and that he did not think that "live entertainment" meant a disc jockey. (Tr. 6/22/05 at 4-5, 8.) Mr. Malur argued that he would not have agreed to sign away a right to have a disc jockey play music in the restaurant. (Tr. 6/22/05 at 4.) The KCA argued that provision 5(g) prohibits the Applicant from having a disc jockey. (Tr. 6/22/05 at 11, 14.) Specifically, the KCA argued that the parties were very specific in their discussions with regard to the differences between live entertainment and recorded music and what would be permitted at the establishment in crafting provision 5(g) of the voluntary agreement. (Tr. 6/22/05 at 11-16.) The KCA's position was supported by then Reed Cooke Neighborhood Association President Peter Lyden who indicated that discussions regarding the types of music at the establishment focused on background music with tapes and compact discs rather than disc jockeys, which he considered to be entertainment. (Tr. 6/22/05 at 16-17.) At the conclusion of the June 22, 2005 hearing, the Board took its decision in the matter under advisement. (Tr. 6/22/05 at 34.)

CONCLUSIONS OF LAW

5. The Applicant has filed a substantial change request with the Board which includes seeking permission to have a disc jockey. In this case, the Board must determine whether provision 5(g) of the establishment's November 12, 2004 agreement prohibits the establishment from having a disc jockey on a permanent basis. Specifically, with some limited exceptions, provision 5(g) of the Applicant's voluntary agreement indicates in relevant part that "[t]here will be no live entertainment of any type" at the establishment.

6. Determining what the phrase "no live entertainment" in provision 5(g) of the agreement is intended to prohibit at the Applicant's establishment requires the Board to examine the statutory definition of the term "entertainment." Under D.C. Official Code § 25-101 (21)(A), the term "entertainment" is defined as "live music or any other live performance by an actual person, including live bands, karaoke, comedy shows, poetry readings, and disc jockeys. The term 'entertainment' shall not include the operation of a jukebox, a television, a radio, or other prerecorded music." The definition of "entertainment" found in D.C. Official Code § 25-101 (21) (A) is virtually identical to the definition of the term "entertainment" as set forth in 23 DCMR § 199 (2004) which defines "entertainment" in relevant part as "live music or any other live performance conducted by an actual person or persons, including but not limited to: live bands, karaoke, comedy shows, poetry readings, and disc jockeys."

7. Having considered the terms of provision 5(g) of the November 12, 2004 voluntary agreement, the written arguments articulated by the parties, and the definition of "entertainment" as set forth in D.C. Official Code § 25-101(21)(A) and 23 DCMR § 199 (2004), the Board finds that the intent of the existing voluntary agreement, dated November 12, 2004, between the Applicant, the KCA and the RCNA, is to prohibit a disc jockey from performing at the establishment on a permanent basis. Specifically, while recorded music is permitted at the establishment, provision 5(g) of the November 12, 2004 agreement explicitly prohibits "live entertainment" at the establishment, with limited exceptions. Contrary to the Applicant's argument that a disc jockey is not live entertainment, the definition of "entertainment", as set forth in D.C. Official Code § 25-101 (21)(A) and 23 DCMR § 199 (2004), includes the live

performance of a disc jockey and is therefore synonymous with the term "live entertainment" used in provision 5(g). The Board also finds compelling the argument made by Mr. James that the parties' intent in negotiating provision 5(g) to prohibit "live entertainment" is clarified by the parties' decision to create a specific exception in the voluntary agreement to allow for the playing of recorded music, i.e., background music, which, unlike the spinning of records or compact discs, does not entail a live performance by an actual entertainer.

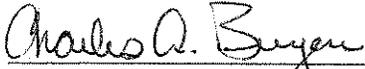
8. Consequently, the Board is denying the substantial change application as it pertains to the establishment's request to have a disc jockey, which the Board finds to be prohibited by the Applicant's November 12, 2004 voluntary agreement. The Board notes that pursuant to D.C. Official Code § 25-446(d)(2), an amendment to a voluntary agreement by fewer than all of the parties to the agreement can only be accepted by the Board during the renewal period and after four (4) years from the date of approval of the agreement. In this instance, the Applicant could seek to unilaterally amend its November 12, 2004 agreement during the 2010 renewal period for class CR licenses.

9. Finally, there is no dispute that the Applicant is permitted to have recorded music, which is permitted by provision 5(g) of the Board-approved voluntary agreement so long as this does not involve a live performance by a disc jockey. This is not considered "entertainment" under the definitions set forth above.

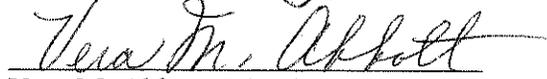
Accordingly, it is this 27th day of September 2006, **ORDERED** that:

1. The substantial change application request of The Journey Group, Inc., t/a Blue Fin Sushi, to have a disc jockey, at 2309 18th Street, N.W., Washington, D.C., is **DENIED**;
2. Copies of this Order shall be sent to the Protestants and the Applicant.

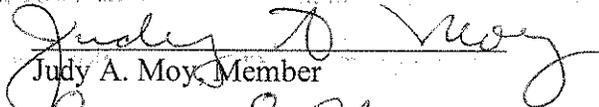
District of Columbia
Alcoholic Beverage Control Board



Charles A. Burger, Chairperson



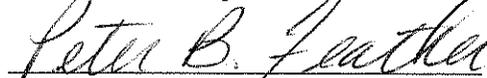
Vera M. Abbott, Member



Judy A. Moy, Member



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Albert G. Lauber, Member

Eartha Isaac, Member

Pursuant to 23 DCMR § 1719.1 (April 2004), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, 941 North Capitol Street, N.E., Suite 7200, Washington, D.C. 20002. 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).