THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:	)	
	)	
2461 Corporation	)	
t/a Madam's Organ	)	
	)	Case Number: 14-PRO-00007
Petition to Terminate a	)	License Number: ABRA-025273
Settlement agreement	)	Order Number: 2015-005
for a Retailer's Class CT License	)	
	)	
at premises	)	
2461 18th Street N.W.	)	
Washington, D.C. 20009	)	
	)	

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

ALSO PRESENT: 2461 Corporation, t/a Madam's Organ, Petitioner

William Duggan, Owner, on behalf of Petitioner

Richard Bianco, Esq., Counsel for Petitioner

William Simpson, Chairperson, Advisory Neighborhood Commission (ANC) 1C, 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 CT License held by 2461 Corporation, t/a Madam's Organ, (hereinafter "Petitioner" or "Madam's Organ"). The Board's reasoning and changes are described below.

Procedural Background

On September 24, 2013, Madam's Organ filed a timely Petition to Terminate a Settlement agreement ("Petition") requesting that the Board terminate its settlement agreement entered into with the ANC 1C ("Protestant"). The settlement agreement was originally approved by the Board on May 21, 2008. 2461 Corporation, t/a Madam's Organ, Application No. 35287-07/025P, 12 (D.C.A.B.C.B. May 21, 2008) [*Settlement agreement*].

The Board reviewed the Petition and 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 to the public in accordance with District of Columbia (D.C.) Official Code § 25-446(d)(3).

ABRA provided public notice of the Petition on January 10, 2014. Notice of Public Hearing 14-PRO-00007 (January 10, 2014). The notice indicated that the last day to file objections against the Petition was February 24, 2014. *Id.* Subsequently, a protest against the Petition was timely filed by ANC 1C in accordance with District of Columbia (D.C.) Official Code §§ 25-601(1) and 25-602. *ABRA Protest File No. 14-PRO-00007.*

The parties came before the Board's Agent for a Roll Call Hearing on March 10, 2014 and the Protestant was granted standing to protest the Petition. The parties then came before the Board for a Protest Status Hearing on May 21, 2014. The Protest Hearing in this matter occurred on October 8, 2014, where the parties argued their respective cases.

Based on the Protestant's initial protest letter, 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 Billy Simpson, Chairperson for ANC 1C to Ruthanne Miller, Chairperson, Alcoholic Beverage Control (ABC) Board (February 6, 2014) [ANC 1C Protest Letter].

Issues Under Consideration

The Board must determine whether the Applicant's settlement agreement merits termination in accordance with D.C. Official Code § 25-446.

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:

I. Background

1. Madam's Organ holds a Retailer's Class CT License and has an existing settlement agreement attached to its license. *ABRA Protest File No. 14-PRO-00007,* Notice of Public Hearing. The Board approved the settlement agreement on May 21, 2008. *ABRA Licensing File No. ABRA-025273*. The agreement is between the Applicant and ANC 1C.

2. The official records of the Board reflect that on June 6, 2012, the Board granted the Petition to Terminate a Settlement agreement filed by Madam's Organ, which resulted in the termination of a different settlement agreement, dated January 15, 2003. 2461 Corporation, t/a Madam's Organ, Case Number 11-PRO-00016, Board Order No. 2012-250, 3 (D.C.A.B.C.B. Jun. 6, 2012).

3. Subsequently, on October 17, 2012, the Board denied a Motion for Reconsideration filed by the Petitioner in which it requested that the Board also terminate the Petitioner's 2008 Settlement agreement. 2461 Corporation, t/a Madam's Organ, Case Number 11-PRO-00016, Board Order No. 2012-406, 3 (D.C.A.B.C.B. Oct. 17, 2012).

4. Under the existing 2008 settlement agreement, Madam's Organ's hours of operation for inside and the summer garden are as follows: Sunday through Thursday 9:00 a.m. – 2:00 a.m., and Friday and Saturday 9:00 a.m. – 3:00 a.m. See *ABRA Licensing File No. ABRA-025273*. Madam's Organ's hours of sales, service and consumption for inside and the summer garden are as follows: Sunday through Thursday 9:00 a.m. to 1:30 a.m. and Friday and Saturday 9:00 a.m. to 2:30 a.m. Id. Finally, the establishment's hours of entertainment are as follows: Sunday through Thursday, 6:00 p.m. to 1:30 a.m., Friday and Saturday 6:00 p.m. to 2:30 a.m. Id.

II. Testimony of ABRA Investigator Abyie Ghenene

5. ABRA Investigator Abyie Ghenene investigated the Petition and wrote the Protest Report submitted into the record. *Transcript* (*Tr.*), October 8, 2014 at 12. *ABRA Protest File No. 14-PRO-00007*, Protest Report. Investigator Ghenene interviewed the Protestants, led by William Simpson, Chair of Advisory Neighborhood Commission (ANC) 1C. *Tr.* 10/08/14 at 12. Mr. Simpson informed Investigator Ghenene that the termination of the Settlement agreement would conflict with a compromise made in 2008 whereby the Applicant agreed to the terms of the settlement agreement in exchange for a license class change from CR (restaurant) to CT (tavern). *Tr.* 10/08/14 at 12.

6. The Adams Morgan neighborhood where the establishment is located is monitored by different ABRA investigators every night. *Tr.* 10/08/14 at 13. Investigator Ghenene monitors the area between nine and 15 times a week. *Tr.* 10/08/14 at 13. He cannot differentiate the noise

emitting from the establishment from any other noise in the neighborhood. *Tr.* 10/08/14 at 14, 22. He stated that the neighborhood is very busy and lively, and that he did not witness any excessive noise coming from the establishment. *Tr.* 10/08/14 at 14, 17. ABRA monitors the Adams Morgan neighborhood on a frequent basis due to the density of ABC licensed establishments. *Tr.* 10/08/14 at 27. There is also a large police presence in the neighborhood which has helped with the peace, order and quiet issues related to a lively nightlife. *Tr.* 10/08/14 at 27, 32.

7. As part of his investigation, Investigator Ghenene also interviewed Bill Duggan, owner of the establishment. *Tr.* 10/08/14 at 14. He informed Investigator Ghenene that his primary reason for seeking to terminate the settlement agreement is to be able to compete with other establishments in the neighborhood who have extended holiday hours privileges. *Tr.* 10/08/14 at 15. Mr. Duggan indicated to Investigator Ghenene that he has no plans to remove the kitchen or to stop selling food if the settlement agreement is terminated. *Tr.* 10/08/14 at 15.

8. Investigator Ghenene reviewed the establishment's investigative history and found no record of violations. *Tr.* 10/08/14 at 16. He reviewed ABRA's Noise Task Force complaint log and discovered two complaints. *Tr.* 10/08/14 at 16, 23. One of the complaints was not substantiated and the other has not been adjudicated. *Tr.* 10/08/14 at 16, 23.

III. Testimony of William Duggan

9. William Duggan is president of 2461 Corporation, trading as Madam's Organ. *Tr.* 10/08/14 at 41. He has operated the establishment for 24 years. *Tr.* 10/08/14 at 42. His venue hosts live music every night of the week. *Tr.* 10/08/14 at 43, 53. He attributes his successful business to the fact that the establishment has not changed much over the years. *Tr.* 10/08/14 at 43, 53.

10. Mr. Duggan has always served food, and he has no intention of changing or discontinuing food service. *Tr.* 10/08/14 at 44, 47; 121. In 2011, he was designated one of the best bars in DC by Playboy Magazine, and one of the rating factors was the food. *Tr.* 10/08/14 at 44. He also received the National Good Neighbor Restaurant Award in 2011 for his interaction with the neighborhood. *Tr.* 10/08/14 at 99. He is actively involved with the community, and he also works closely with the Metropolitan Police Department. *Tr.* 10/08/14 at 100, 103, 105. Mr. Duggan enjoys a good relationship with his neighbors and the neighborhood. *Tr.* 10/08/14 at 54.

11. The establishment was also recognized by the Washington Post in 2014 for their soul food. *Tr.* 10/08/14 at 46-47; Applicant's Exhibit No. 8. Mr. Duggan advertises his food service in WeAr Magazine and has done so for the last 12 years. *Tr.* 10/08/14 at 46. Selling food is part of his business model. *Tr.* 10/08/14 at 52.

12. The retailer class for the Madam's Organ license was converted from a CR (restaurant) license to a CT (tavern) license in 2008. *Tr.* 10/08/14 at 48, 142-143. Mr. Duggan entered into a new settlement agreement at that time. *Tr.* 10/08/14 at 48. One of the terms of the 2008 settlement agreement was the requirement to sell food. *Tr.* 10/08/14 at 49. It was never Mr. Duggan's understanding that every term in the 2008 Settlement agreement would live in

perpetuity. *Tr.* 10/08/14 at 51. Some of the other retail class conversions at the time were permitted to omit the food sales requirements from their settlement agreements. *Tr.* 10/08/14 at 51.

13. Mr. Duggan is seeking to terminate his settlement agreement due to changes in the law, the neighborhood, the ANC, and agreements between the ANC and other ABC-licensed establishments. *Tr.* 10/08/14 at 52, 108-109. He cites current restrictions on hours in his settlement agreement as an example of changes in the law that were not foreseen by establishments at the time that the agreements were drafted. *Tr.* 10/08/14 at 52.

14. Other ABC-licensed establishments in the neighborhood have less restrictive agreements with the ANC. *Tr.* 10/08/14 at 53. The Roofers Union is located across the street from Madam's Organ and they have no agreement at all. *Tr.* 10/08/14 at 53.

15. Mr. Duggan made a good faith effort to work with the ANC regarding his efforts to terminate the settlement agreement. *Tr.* 10/08/14 at 54. He met with the Chair of the ANC, William Simpson, at his establishment to negotiate the various issues related to the settlement agreement. *Tr.* 10/08/14 at 54, 87-88, 161. He testified that he negotiated with Mr. Simpson in good faith without reaching an agreement on new terms. *Tr.* 10/08/14 at 56, 87. Additionally, Mr. Duggan participated in a mediation session with Mr. Simpson, where he again, negotiated in good faith, to no avail. *Tr.* 10/08/14 at 56, 198. Mr. Duggan did not submit a proposal to the ANC because he did not think Mr. Simpson was amenable to it. *Tr.* 10/08/14 at 90.

16. Mr. Duggan informed Mr. Simpson that he thought the ANC should have initiated amending settlement agreements for all of the establishments whose terms restricted their hours and prohibited them from exercising the extended holiday hours privilege. *Tr.* 10/08/14 at 55, 113-115. He contacted ANC Commissioner Wilson Reynolds and suggested that as a policy matter the ANC should rid hour restrictions from all settlement agreements. *Tr.* 10/08/14 at 90-91, 94.

17. Mr. Duggan's efforts to terminate his settlement agreement were caused by circumstances beyond his control. *Tr.* 10/08/14 at 57, 126, 139. The City Council passed a law allowing ABC-licensed businesses to enjoy extended holiday hours. *Tr.* 10/08/14 at 57, 141. Mr. Duggan is not permitted that privilege due to restrictions in his 2008 settlement agreement. *Tr.* 10/08/14 at 57, 141.

18. He loses business to his neighboring establishments who are allowed to operate with later hours. *Tr.* 10/08/14 at 57-58, 110-111. Additionally he has 40 employees who are not earning wages when the establishment is not operating on extended hours. *Tr.* 10/08/14 at 59. The lost hours have translated into a tremendous amount of money over the years. *Tr.* 10/08/14 at 82.

19. The hours listed in Mr. Duggan's 2008 settlement agreement were the maximum legal statutory hours at the time. *Tr.* 10/08/14 at 58; Applicant's Exhibit No. 2. Mr. Duggan does not believe it was the ANC's intention in 2008 to limit the hours an establishment can operate. *Tr.* 10/08/14 at 59. In 2008, establishments were automatically permitted to open until 4:00 am on

New Year's Eve. *Tr.* 10/08/14 at 60, 107. Now licensees have to apply for the privilege. *Tr.* 10/08/14 at 60.

20. Mr. Duggan's settlement agreement also requires him to sell an amount of food, specifically $1,300.00 per occupied seat. *Tr.* 10/08/14 at 60, 154. He is less concerned with the requirement than he is that some settlement agreements in his neighborhood are more restrictive than others, and thus, it creates an economic and competitive disadvantage. *Tr.* 10/08/14 at 61, 119, 122. He complies with all of the terms of his existing settlement agreement, and the operations of his establishment will not change without the settlement agreement. *Tr.* 10/08/14 at 95-97, 165.

21. The settlement agreement for Rendezvous Lounge does not require food sales. *Tr.* 10/08/14 at 62-63; Applicant's Exhibit No. 3. The settlement agreement for Town Tavern does not require food sales. *Tr.* 10/08/14 at 63-64; Applicant's Exhibit No. 4. The settlement agreement for DC Shenanigans requires that the licensee sell food four out of seven days. *Tr.* 10/08/14 at 66-67, 120; Applicant's Exhibit No. 5. There is no requirement that there be a certain amount of food sold. *Tr.* 10/08/14 at 67. The settlement agreement for Mellow Mushroom provides that there is no set food amount sales if the licensee has a kitchen, advertises food and promotes food sales. *Tr.* 10/08/14 at 68; Applicant's Exhibit No. 6. The settlement agreement for Pharmacy Bar does not require food sales. *Tr.* 10/08/14 at 69; Applicant's Exhibit no. 7. Roofer's Union has no settlement agreement at all. *Tr.* 10/08/14 at 70.

22. Mr. Duggan does not believe that termination of his settlement agreement will impact the peace, order and quiet of the neighborhood. *Tr.* 10/08/14 at 71-72. His operations have been the same since he opened 24 years earlier and nothing in his operations will change simply because there is no longer an agreement in place. *Tr.* 10/08/14 at 71-72. He has never incurred a violation with ABRA. *Tr.* 10/08/14 at 72, 104.

23. The Adams Morgan neighborhood has changed considerably since 2008, and for the better. *Tr.* 10/08/14 at 73, 95. The increased police presence has addressed a number of issues. *Tr.* 10/08/14 at 73-76. The restrictions on businesses have created a number of empty storefronts. *Tr.* 10/08/14 at 77, 131. Investors who want to do business in Adams Morgan find an adversarial atmosphere with the ANC. *Tr.* 10/08/14 at 77. Mr. Duggan finds it to be a hardship to follow all of the regulations. *Tr.* 10/08/14 at 77.

24. Mr. Duggan stated that there is no noise problem during the day because there aren't a lot of people out and about. *Tr.* 10/08/14 at 78. He served brunch to his customers for quite a while, but there just isn't much business during the day. *Tr.* 10/08/14 at 175. Additionally, his practice of closing the windows at 10:00 pm will not change if the settlement agreement is terminated because the law requires closure at 10:00 pm. *Tr.* 10/08/14 at 167-168.

25. Mr. Duggan believes that the purpose of settlement agreements is to address concerns, not anticipate them. *Tr.* 10/08/14 at 14, 163. Additionally, he cannot depend on the ANC to be pro-active in mutually amending old agreements when the laws change. *Tr.* 10/08/14 at 80-81. He also believes that every issue addressed by the terms of his settlement agreement is also a provision in the law or the regulations. *Tr.* 10/08/14 at 163. He initially signed the settlement

agreement because in 2008, parties rarely went to hearing yet one could not proceed with the application for a license without an agreement. *Tr.* 10/08/14 at 164-165.

IV. Testimony of ANC Commissioner William Simpson

26. ANC Chair William Simpson testified on behalf of the Protestant. *Tr.* 10/08/14 at 180. He was contacted by Mr. Duggan in the fall of 2013 to discuss the settlement agreement. *Tr.* 10/08/14 at 182-184. Commissioner Simpson responded immediately and agreed to meet with Mr. Duggan at the establishment. *Tr.* 10/08/14 at 184, 196. The meeting lasted for an hour or so. *Tr.* 10/08/14 at 184, 196, 259. The only issue raised by Mr. Duggan at the meeting was the matter concerning the hours of operation, sales and service. *Tr.* 10/08/14 at 184, 205. Mr. Duggan did not raise the issue regarding the food sales requirement. *Tr.* 10/08/14 at 184.

27. Commissioner Simpson repeatedly informed Mr. Duggan that if he wanted the ANC to address the hours, he should provide a proposal that Commissioner Simpson could present to the full Commission. *Tr.* 10/08/14 at 185, 190, 204-205, 259, 262. Mr. Duggan never submitted the proposal and Commissioner Simpson never heard from him again. *Tr.* 10/08/14 at 185, 236-237. Mr. Duggan made no effort to follow up after the initial meeting. *Tr.* 10/08/14 at 185.

28. Commissioner Simpson assumed that Mr. Duggan was not interested in arriving at a mutually acceptable amendment to the settlement agreement. *Tr.* 10/08/14 at 234. He did contact another ANC Commissioner, Wilson Reynolds, by telephone to discuss the issue regarding the hours limitations in the Settlement agreement. *Tr.* 10/08/14 at 185-186.

29. Commissioner Simpson believes that to satisfy the first prong regarding a good faith attempt to negotiate an amendment, parties must have an actual desire to resolve their differences. *Tr.* 10/08/14 at 196, 232-233. He interprets Mr. Duggan's position as one of ridding the settlement agreement altogether notwithstanding that he entered into it with the community. *Tr.* 10/08/14 at 197, 230. He does not consider Mr. Duggan to have acted in good faith, and that his bargaining position is inconsistent with the requirements of the statute. *Tr.* 10/08/14 at 197.

30. Commissioner Simpson testified that there was no substantive discussion regarding the settlement agreement at the mediation because Mr. Duggan was not interested. *Tr.* 10/08/14 at 199. He believes it would be highly problematic to reward the licensee by granting the termination of the settlement agreement when he has made no effort to negotiate. *Tr.* 10/08/14 at 243.

31. With regard to the second prong of the termination test, Commissioner Simpson believes that any changed circumstances in the Adams Morgan neighborhood have actually favored licensed establishments. *Tr.* 10/08/14 at 190-191, 194. Examples of this are the new streetscape, the growth of new businesses, and the construction of new residence buildings. *Tr.* 10/08/14 at 191. He has lived in Adams Morgan since 2005 and he has witnessed a lot of positive growth. *Tr.* 10/08/14 at 193.

32. There are 50 establishments in the Adams Morgan neighborhood that are subject to food sales requirements. *Tr.* 10/08/14 at 191. Circumstances have not changed that would make the

requirement less applicable or less relevant. *Tr.* 10/08/14 at 192. Commissioner Simpson acknowledged that the change in law regarding extended hours was a circumstance beyond the establishment's control. *Tr.* 10/08/14 at 204. He offered to negotiate an amendment to the Settlement agreement to address the hours restriction. *Tr.* 10/08/14 at 204, 208, 219, 233, 261.

33. The ANC has regularly adopted a resolution for the ABC Board's consideration to waive hours restrictions for New Year's Eve for all of its affected licensees. *Tr.* 10/08/14 at 220-221. The ANC is very considerate of the business community and wants to reach cooperative agreements whenever possible. *Tr.* 10/08/14 at 229.

34. With regard to the third prong, Commissioner Simpson believes that the termination of the Settlement agreement would have an adverse impact on peace, order and quiet. *Tr.* 10/08/14 at 192. This can be expected anytime the percentage of food sales declines relative to the alcohol sales. *Tr.* 10/08/14 at 192, 210. Elimination of the food sales requirement would adversely impact the neighborhood. *Tr.* 10/08/14 at 193. Without a requirement to sell food, the neighborhood risks establishments slipping toward an alcohol-only service. *Tr.* 10/08/14 at 209, 245-246.

35. The ANC Commission has been very clear with tavern licensees regarding their desire to have food sales requirements. *Tr.* 10/08/14 at 210. The ANC is committed to creating a robust dining scene for the neighborhood. *Tr.* 10/08/14 at 210. Commissioner Simpson acknowledged that there are other Adams Morgan taverns do not have a settlement agreement or a requirement to sell food. *Tr.* 10/08/14 at 211-214, 225.

36. Commissioner Simpson believes that licensees should be able to adapt their business models to changed circumstances within the parameters of the law and their existing settlement agreements. *Tr.* 10/08/14 at 195. He acknowledged that settlement agreements restrict change and that is intentional in order to curtail the business interest in favor of the interests of the residents. *Tr.* 10/08/14 at 195. He is not aware of any licensee who has been granted extended hours for all of the 16 days permitted under the law. *Tr.* 10/08/14 at 221-222.

37. The ANC does expect the terms of the settlement agreement such as food sales requirements, and provisions regarding vermin, trash, and pub crawls to be honored. *Tr.* 10/08/14 at 236. Commissioner Simpson is not certain he could support the termination of a settlement agreement because each of them contains useful provisions and are a valuable tool for the community. *Tr.* 10/08/14 at 238.

CONCLUSIONS OF LAW

38. 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).

39. The Board amends the settlement agreement as follows, based on the Board's determination that such amendments satisfy § 25-446. However, the Board concludes that Madams Organ did not meet its burden of proof to support the termination of all the provisions of the settlement agreement.

I. MADAM'S ORGAN SATISFIED § 25-446(D)(4)(A) BY ATTEMPTING TO NEGOTIATE AN AMENDED SETTLEMENT AGREEMENT IN GOOD FAITH WITH THE ANC 1C.

40. The Board finds that Madam's Organ satisfied § 25-446(D)(4)(A) through its efforts to negotiate with the Protestant when it met with the Protestant for over an hour in the fall of 2013. 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).

41. Accordingly, the Board finds that Madam's Organ negotiated in good faith and therefore has satisfied § 25-446(D)(4)(A).

II. MADAM'S ORGAN DID NOT MAKE A SUFFICIENT SHOWING THAT THE SETTLEMENT AGREEMENT SHOULD BE TERMINATED IN ITS ENTIRETY; BUT RATHER IT DEMONSTRATED THAT ONE OF THE PROVISIONS MERITS AMENDMENT UNDER § 25-446(D)(4)(B) BASED ON A CHANGE IN THE NEIGHBORHOOD AND CIRCUMSTANCES BEYOND THE CONTROL OF THE PETITIONER, AND THAT SUCH AMENDMENT WILL NOT HAVE AN ADVERSE IMPACT ON THE NEIGHBORHOOD.

42. The Board determines that Madams Organ did not make a sufficient showing that every provision in the 2008 settlement agreement met the statutory requirement for termination based upon circumstances beyond the control of the Applicant, or upon a change in the neighborhood where the applicant's establishment is located. D.C. Official Code § 25-446(d)(4)(B). Accordingly, the Board finds that the settlement agreement should not be terminated in its entirety.

43. However, Madams Organ has provided sufficient evidence to demonstrate that an amendment is warranted. Under § 25-446(d)(4)(B), in order to terminate or amend a settlement agreement, a licensee must show "[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 the liquor law, which has a nexus to the settlement agreement attached to an applicant'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.

44. The Board approved the Madams Organ's settlement agreement in 2008. Supra, at ¶ 1. As of May 1, 2013, the Council of the District of Columbia amended D.C. Official Code § 25-723 for the purpose of extending the legal hours of operation for all on-premise retail license holders on holidays and to place limits on settlement agreements, among other changes. D.C. Official Code §§ 25-446.01-25-446.02, 25-723; see generally Council of the District of Columbia, Omnibus Alcoholic Beverage Regulation Amendment Act of 2012, § 2 (effective May 1, 2013, D.C. Law 19-3210). Under the new law, settlement agreements may not (1) require the approval of third parties before a licensee may engage in an ownership change, § 25-446.02(1)(A); (2) require notice to third parties regarding the intent to transfer ownership, § 25-446.02(1)(B); (3) require the creation of restrictions that prevent a licensee from applying for changes to its operation, including changing its hours, § 25-446.02(1)(E); (4) require the creation of new administrative procedures beyond those required by ABRA or another D.C. agency, § 25-446.02(2); (5) require a licensee to attend meetings, § 25-446.02(3); and (6) require the licensee to submit documents to third parties. D.C. Official Code § 25-446.02(5).

45. Consequently, the Board finds that Madams Organ merits an amendment to its agreement that aligns the agreement with current law.

46. Specifically, the Board finds that Madams Organ merits an amendment to Paragraph 2 (Hours). Paragraph 2, as written, conflicts with the change in the District of Columbia's alcohol law in 2013 that extends the legal hours of operation for all on-premise retail license holders on various holidays.

47. In order to grant an amendment to this provision, the Board must also find that "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." § 25-446(d)(4)(C). The Board has determined that amendments to a settlement agreement that align the agreement with current law shall generally be deemed not to have an adverse impact on the neighborhood. To do otherwise, would require the Board to act contrary to the intent of the Council of the District of Columbia when it amended Title 25 in 2013. Therefore, the Board

finds that the amendments to the agreement, which the Board will describe in its Order below, shall not have an adverse impact on the neighborhood.

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

48. Finally, the Board is only required to produce findings of fact and conclusions of law related to those matters raised by the Protestant 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, Madam's Organ 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 14th day of January 2015, hereby **DENIES** the Petition to Terminate the Settlement agreement filed by 2461 Corporation, Inc., t/a Madams Organ.

IT IS FURTHER ORDERED that the settlement agreement entered into by Madam's Organ and ANC 1C shall be **AMENDED** as follows:

1. The Board strikes all of section 2 (Hours) except for the last paragraph. The portion that is stricken states:

   The approved hours of operation are:
   Sunday: 9:00 a.m. – 2:00 a.m.
   Monday through Thursday: 9:00 a.m. – 2:00 a.m.
   Friday & Saturday: 9:00 a.m. – 3:00 a.m.

   The parties agree that the Applicant may open, at the Applicant's discretion, at any time between 9:00 a.m. and 6: 00 p.m., but under no circumstances will be open to the public later than 6:00 p.m. each day of operation with the exception of all federal holidays, the day after and Christmas Eve, New Year's Eve and Easter when the establishment may open at 7 p.m.

IT IS FURTHER ORDERED that all other provisions of the 2008 settlement agreement shall remain in full force and effect.

ABRA shall provide copies of this Order to the Petitioner and ANC 1C.

District of Columbia
Alcoholic Beverage Control Board

Nick Alberti, Member

Donald Brooks, Member

Herman Jones, Member

Mike Silverstein, Member

Hector Rodriguez, Member

James Short, Member

I concur with the Majority's decision to strike Paragraph 2 of the Settlement Agreement - Hours - as indicated above. However, I would also strike Paragraph 1 (Operation) (3) and (4) – to delete the provisions regarding a food sales requirement and maintaining books and records for food sales. With respect to these requirements, Applicant produced evidence that the need for the amendment is caused by circumstances beyond the control of the applicant and is due to a change in the neighborhood. That evidence was in the form of settlement agreements entered into by the ANC and other similarly licensed establishments subsequent to Applicant's settlement agreement that did not have these requirements, as well as similarly licensed establishments that were not subject to settlement agreements at all. Supra, at ¶¶ 13, 14. In addition, the record keeping required by these requirements places an administrative burden on the Applicant contrary to law enacted after the parties entered the settlement agreement, D.C. Official Code § 25-446.02(2). That statute states that the Board shall not enforce the following provisions in settlement agreements: (2) Statements that require the creation of new administrative procedures beyond those required by ABRA or another D.C. agency. The Applicant is licensed as a tavern and as such, should not have to bear the additional responsibilities of a licensed restaurant, including administrative burdens of filing food reports and maintaining books and records. Accordingly, these provisions also require an amendment to align with current law.

Applicant also submitted compelling evidence that termination of these provisions will not have an adverse impact on the neighborhood. The record shows that Applicant is committed to maintaining its kitchen and serving food even without the requirement in the existing settlement agreement to do so. He has a record of 24 years of food service (many before the settlement agreement). Selling food is part of his business model. Supra, at ¶11. Moreover, there, are in fact,

four (4) other provisions in the settlement agreement under 1. Operation that impose requirements upon the Applicant related to serving food.

Finally, Applicant's good record and service to his community provide additional equitable reasons that he should not be subject to a life sentence to these two provisions where there is no evidence that elimination of those provisions will result in any adverse impacts to the neighborhood, particularly in light of the other four provisions that address the same concern.

Ruthanne Miller, Chairperson

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, 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, 430 E Street, N.W., Washington, D.C. 20001; (202/879-1010). 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).

THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
2461 Corporation t/a Madam's Organ Restaurant Application for a Class Change at premises 2461 18th Street, N.W. Washington, D.C.	Case No. License No. Order No.	35287-07/025P 25273 2008-202

BEFORE: Peter B. Feather, Chairperson
Judy A. Moy, Member
Mital M. Gandhi, Member

ALSO PRESENT: Fred P. Moosally, III, General Counsel
Alcoholic Beverage Regulation Administration

Jennifer L. Johnson, Assistant Attorney General
Alcoholic Beverage Regulation Administration

Richard Bianco, Esquire, on behalf of the Applicant

Denis James, on behalf of the Kalorama Citizens Association

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The Application, filed by 2461 Corporation, t/a Madam's Organ (Applicant) for a Class Change from a Retailer's Class CR license to a Retailer's Class CT license at premises 2461 18th Street, N.W., Washington, D.C., initially came before the Alcoholic Beverage Control Board (Board) for a Roll Call hearing on February 28, 2007 and was continued until April 11, 2007. Protests against the Application were timely filed in the case by Advisory Neighborhood Commission (ANC) 1C by letter dated February 9, 2007 and the Kalorama Citizens Association (KCA) by letter dated January 24, 2007.

The filed protest issues, pursuant to D.C. Official Code § 25-602(a) (2001), are whether the issuance of the license would adversely impact: (1) the peace, order, and quiet of the neighborhood, and (2) residential parking and vehicular and pedestrian safety. Subsequent to the Roll Call hearing, the ANC and the Applicant signed a voluntary

agreement and the ANC agreed to support the CT class change application. The case came before the Board for a public protest hearing on February 27, 2008. At the conclusion of the protest hearing, the Board took the matter under advisement. The Board, having considered the evidence, the testimony of the witnesses, the arguments of counsel, and the documents comprising the Board's official file, makes the following:

FINDINGS OF FACT

1. The Applicant's establishment is located in Adams Morgan at 2461 18th Street, N.W., where it has operated for approximately 11 years. (Tr. 2/27/08 at 10; ABRA License File No. 25273.) The Applicant is requesting a Class Change from a Retailer's Class CR license to a Retailer's Class CT license. (Tr. 2/27/08 at 10, 21.) The establishment is located in a C-2-B zone which is defined as a commercial area zoned within a residential living area. (ABRA Exhibit 1.) There are approximately 62 Alcoholic Beverage Control (ABC) establishments with liquor licenses operating within 1,200 feet of the establishment. (Tr. 2/27/08 at 24; ABRA Exhibit 1.) The establishment is bounded by Champlain Street, N.W. to the east, 18th Street, N.W. to the west, Columbia Road to the north and Belmont Road to the south. (Tr. 2/27/08 at 24; ABRA Exhibit 1.) The Applicant's location also falls within the boundaries of the Adams Morgan Moratorium Zone which prohibits, in part, holders of Retailer's Class CR or DR licenses from changing to a Class CN, CT, CX, DN, DT or DX license. (See 23 DCMR § 304.4 (2005)). The Board's regulations make an exception by allowing license holders whose Class Change applications were filed prior to August 2, 2006 to proceed. (See 23 DCMR § 304.4.) The Board held a fact finding hearing on April 11, 2007 to address issues related to the filing of the application and determined that the Applicant's Class Change application was timely filed. (Tr. 4/11/07 at 63-64.)

2. The Applicant currently holds a Retailer's Class CR license and has a Certificate of Occupancy dated April 14, 2006, for operations on the first, second, and third floors. (ABRA Exhibit 1.) The mezzanine level also has a summer garden area. (Tr. 1/16/08 at 36; ABRA Exhibit 1.) The Applicant's Hours of Operation are Sunday to Thursday from 5:00 p.m. to 2:00 a.m., and Friday and Saturday from 5:00 p.m. to 3:00 a.m. (Tr. 2/27/08 at 27; ABRA Exhibit 1.) The Applicant's hours of sale and service of alcohol are Sunday to Thursday from 5:00 p.m. to 1:30 a.m., and Friday and Saturday from 5:00 p.m. to 2:30 a.m. (ABRA Exhibit 1.) There are no schools, recreation centers, day care centers, or public libraries located within 400 feet of the establishment. (ABRA Exhibit 1.)

3. By letter dated February 9, 2007, the ANC protested the Applicant's license application for a Class Change. (ABRA Protest File No. 35287-07/025P.) The ANC letter indicates that they are concerned about the impact of the application on the peace, order, and quiet, of the neighborhood. (ABRA Protest File No. 35287-07/025P.) KCA filed a letter of protest dated January 24, 2007 indicating a concern for peace, order, and quiet as well as a negative impact on residential parking and vehicular and pedestrian safety. (ABRA Protest File No. 35287-07/025P.)

4. Susan Mitchell is an investigator with the Alcoholic Beverage Regulation Administration (ABRA). At the time of the protest hearing, she had been with ABRA for six months. (Tr. 2/27/08 at 19.) Investigator Mitchell and other ABRA investigators visited the establishment on approximately 33 different occasions between October 28, 2007 and January 17, 2008 during evening hours. (Tr. 2/27/08 at 23; ABRA Exhibit 1.) Investigator Mitchell described the establishment as a large restaurant occupying a three story building that includes four interior bar areas and a fifth bar in a summer garden that is built off the back of the third floor. (Tr. 2/27/08 at 25; ABRA Exhibit 1.) The first floor of the establishment includes a slightly raised stage area which is used mostly for live band performances. (Tr. 2/27/08 at 25; ABRA Exhibit 1.) The stage backs up directly to the establishment's first floor front windows. (Tr. 2/27/08 at 25; ABRA Exhibit 1.)

5. With regard to peace, order and quiet, on November 21, 2007, Investigator Mitchell conducted a regulatory inspection of the establishment and observed a number of patrons standing outside talking and smoking while a live band was performing inside. (Tr. 2/27/08 at 26.) The front portion of the main floor was densely crowded with patrons. (Tr. 2/27/08 at 47; ABRA Exhibit 1.) There is also a summer garden on a deck in the rear of the third floor. (Tr. 2/27/08 at 47; ABRA Exhibit 1.) During the inspection Investigator Mitchell noticed that the ABC license for the establishment did not include a summer garden endorsement. (Tr. 2/27/08 at 26; ABRA Exhibit 1.) ABRA records indicate that although the original 1997 application for an ABC license does include a summer garden request, ABRA never issued a summer garden endorsement. (Tr. 2/27/08 at 26, 34; ABRA Exhibit 1.) She did not observe anyone drinking alcohol near the entryway where a bench is located. (Tr. 2/27/08 at 47.) The bench is in front of the establishment and provides seating for some of the smokers. (Tr. 2/27/08 at 48; ABRA Exhibit 1.)

6. With regard to crowd noise, Investigator Mitchell noted that the establishment is located in the Adams Morgan entertainment district and that there are dozens of ABC establishments located on both sides of the street offering alcoholic beverages and various types of entertainment. (Tr. 2/27/08 at 27; ABRA Exhibit 1.) The sidewalks are narrow and often crowded with pedestrians who are intoxicated and rowdy on Thursday, Friday, and Saturday evenings. (Tr. 2/27/08 at 27; ABRA Exhibit 1.) ABRA investigators routinely observed groups of loud, boisterous pedestrians outside of the establishment as well as outside many of the other Adams Morgan establishments. (Tr. 2/27/08 at 28; ABRA Exhibit 1.) Patrons of the establishment were also observed smoking and talking outside which adds to the elevated crowd noise. (Tr. 2/27/08 at 28; ABRA Exhibit 1.) She found the talking and smoking by patrons in front of the establishment to be no different than what would be found at the other establishments on 18th Street. (Tr. 2/27/08 at 38.) There was no more noise coming from patrons outside the establishment then there were from other patrons. (Tr. 2/27/08 at 38.) Investigator Mitchell indicated that she did not use a noise meter to measure the noise as it is not required. (Tr. 2/27/08 at 45.)

7. With regard to music-related noise, Investigator Mitchell stated that when the window and doors are open and music is being played inside it can be heard outside of the establishment. (Tr. 2/27/08 at 28; ABRA Exhibit 1.) Music can also be heard when the windows and doors are closed. (Tr. 2/27/08 at 28; ABRA Exhibit 1.) The current voluntary agreement does not forbid music from being heard outside the establishment nor does it place any restriction on open doors and windows. (Tr. 2/27/08 at 28; ABRA Exhibit 1.) The music heard emanating from the establishment was consistent with the volume heard from nearby establishments. (Tr. 2/27/08 at 29; ABRA Exhibit 1.) As to a speaker mounted outside of the premises, the Board previously ruled that the speaker was not an ABC violation. (Tr. 2/27/08 at 29; ABRA Exhibit 1.)

8. Investigator Mitchell also observed that vehicular traffic noise becomes elevated during evening hours, especially Thursday nights and weekends with the frequent sounding of horns. (Tr. 2/27/08 at 29; ABRA Exhibit 1.) She indicated that the Protestant's concern is that the conversion of the establishment to a tavern will result in a nightclub atmosphere, disturbing the peace, order, and quiet. The Applicant told her that he has no intention of changing the quality or quantity of food that is currently being offered. (Tr. 2/27/08 at 30.)

9. As to parking, patrons of the establishment have very limited street parking, which does not turn over frequently, a garage with about 300 spaces and a valet service for $15.00 an hour. (Tr. 2/27/08 at 31; ABRA Exhibit 1.) The garage usually fills up on Fridays and Saturdays between 11:00 p.m. and 1:00 a.m. (Tr. 2/27/08 at 31; ABRA Exhibit 1.) At around 11:00 p.m. one evening, she observed a sign indicating that the garage was full. (Tr. 2/27/08 at 38; ABRA Exhibit 1.) There are also multiple bus lines that run through Adams Morgan, several of which offer service after 3:00 a.m. daily. (Tr. 2/27/08 at 31; ABRA Exhibit 1.) Investigator Mitchell did not have any concerns regarding parking that were not related to an increase in occupancy. (Tr. 2/27/08 at 39.)

10. With regard to vehicular and pedestrian safety, during evening hours traffic on 18th Street, N.W., is slow moving with vehicles sometimes at a stop, creating a potential safety hazard. (Tr. 2/27/08 at 32; ABRA Exhibit 1.) Pedestrians frequently jaywalk across 18th Street which occurs throughout the entertainment district and not just in the vicinity of the establishment. (Tr. 2/27/08 at 32; ABRA Exhibit 1.) Increasing capacity at the establishment could increase the number of patrons jaywalking, but Investigator Mitchell was not able to find any evidence that this would actually happen. (Tr. 2/27/08 at 32-33.)

11. Investigator Mitchell does not think that converting from a Class CR to a CT retailer's license would impact the overall peace, order, and quiet. (Tr. 2/27/08 at 33.) She also testified that the traffic was terrible and did not see the license conversion as having a significant impact. (Tr. 2/27/08 at 33.) There are residences next door to the establishment, but she is not sure if they would be able to distinguish the noise as coming from the establishment, as opposed to other establishments in the area. (Tr. 2/27/08 at 35.) She does not feel that there is more noise at the establishment than there is at other establishments. (Tr. 2/27/08 at 36; ABRA Exhibit 1.) Even with the speaker outside, the

level of noise, the volume is not unusual. (Tr. 2/27/08 at 37.) She noted that the neighboring establishments offer live music as well. (Tr. 2/27/08 at 40.)

12. Investigator Mitchell believes that an April 23, 2005 noise violation listed in the Investigative history was actually an occupancy violation. (Tr. 2/27/08 at 41-43.) There have been other noise complaints investigated in the past. (Tr. 2/27/08 at 49-50.)

13. Amy Vestal is a general manager at the establishment. (Tr. 2/27/08 at 53.) She has worked there for thirteen years. (Tr. 2/27/08 at 53.) As general manager she handles employee issues, maintains inventory, and schedules entertainment. (Tr. 2/27/08 at 53.) She has a regular shift which is Monday, Tuesday, Thursday, and Friday from 10:00 a.m. to 6:00 p.m., occasionally on Wednesday and one to two nights a month, usually on Saturdays. (Tr. 2/27/08 at 54.) Ms. Vestal was present during three of the ABRA investigative visits. Two of those visits were during the day when the establishment was not open. (Tr. 2/27/08 at 54.) Noise was never raised as an issue during the inspections. (Tr. 2/27/08 at 54.) During her thirteen years at the establishment the ABC Board has never taken action related to noise. (Tr. 2/27/08 at 55.) In terms of controlling noise, with the exception of people coming in and out, the Applicant keeps the front door closed. (Tr. 2/27/08 at 65.) The windows are regular, not heavy duty. (Tr. 2/27/08 at 65.) The volume for the speaker outside is controlled and not very loud. (Tr. 2/27/08 at 66.)

14. With regard to the restaurant food requirement, Ms. Vestal is in charge of tallying gross receipts for each quarter and testified that the establishment always falls short of the 45 percent, $2,000.00 requirement. (Tr. 2/27/08 at 55.) If a conversion to a retailer's class CT license is granted, there are no plans to terminate wait staff or kitchen staff. They plan to open for brunch on Saturdays and Sundays if this is permitted. (Tr. 2/27/08 at 56.) Ms. Vestal handles advertising, and makes a point to advertise the food. (Tr. 2/27/08 at 56.) In an advertisement for the City Paper's food guide, the establishment ran an advertisement promoting the establishment's soul food. (Tr. 2/27/08 at 58; Applicant Exhibit 1.) Another advertisement, in Eats magazine promotes the establishment's food and includes quotes from reviews of the establishment which included favorable comments about the food. (Tr. 2/27/08 at 59-60; Applicant Exhibit 2.) The kitchen closes at midnight during the week and at 1:00 a.m. on weekends. (Tr. 2/27/08 at 63.)

15. Bill Duggan is the President of 2461 Corporation which has operated the establishment under a Class CR retailer's license for about 16 or 17 years. (Tr. 2/27/08 at 68.) It has been at its current location for 11 years. (Tr. 2/27/08 at 68.) Mr. Duggan testified that a Class CT license is being sought because the establishment does not make the minimum food sales requirement of 45 percent or $2,000.00 per seat because they sell a higher percentage of alcohol even though they do serve a substantial amount of food. (Tr. 2/27/08 at 68, 70.)

16. The establishment entered into a voluntary agreement with the ANC. (Tr. 2/27/08 at 70, Applicant's Exhibit 3.) Mr. Duggan noted the differences between a CR and CT license: a 45 percent or $2,000.00 per seat food sales requirement, there is no requirement for a kitchen for a CT license, and no food sales requirement. (Tr. 2/27/08 at 69-70.) In

addressing these issues, the voluntary agreement requires maintenance of a kitchen and wait staff, which may include bartenders who serve food, and the supplies and equipment necessary for the daily preparation and service of prepared food items. The food items do not include snack foods such as peanuts, popcorn, potato chips, and pretzels. (Tr. 2/27/08 at 74.) This is the same requirement which exists for a Class CR license, and the same one the establishment has been following, according to Ms. Vestal. (Tr. 2/27/08 at 74.)

17. The voluntary agreement with the ANC also requires that food service continue until two hours prior to closing. (Tr. 2/27/08 at 74.) This is also a requirement for a Class CR license which they have been following. (Tr. 2/27/08 at 75.) The agreement also dictates that there be food sales of at least $1300.00 per occupant, based on 99 seats for dining, including the bar. (Tr. 2/27/08 at 75.) Mr. Duggan testified that the operational standards will not change and that there are no plans to downsize the wait or kitchen staff. (Tr. 2/27/08 at 75-76.) The menu selection will not be reduced but will instead be expanded for brunch and lunch. (Tr. 2/27/08 at 76.) As to noise, the voluntary agreement provides that windows are required to be closed at 12:30 a.m. (Tr. 2/27/08 at 79.) There is also recognition in the agreement that the speaker which is outside, but within the building line is in compliance. (Tr. 2/27/08 at 80.) Mr. Duggan stated that changing the food percentage requirement would not affect the noise emanating from the establishment. (Tr. 2/27/08 at 80.) He also noted that the closest residential unit is three doors away. (Tr. 2/27/08 at 80-81.) Several of the establishments adjacent to the Applicant offer live music. (Tr. 2/27/08 at 82.) There speaker outside is in the upper corner of the enclosed area of the front porch, which is open. (Tr. 2/27/08 at 83.) The speaker is 6 inches by 9 inches and the voluntary agreement requires that it not be increased in size. (Tr. 2/27/08 at 84.)

18. As for the summer garden, Mr. Duggan recounted requesting a summer garden when he filed his 1997 application. It was brought to his attention during the past year, however, by the former ABC Board chairman, that the summer garden endorsement still needed to be rectified. (Tr. 2/27/08 at 85-86.)

19. Mr. Duggan is unaware as to whether any of the adjacent establishments have voluntary agreements allowing them to keep their windows open while live music is playing. (Tr. 2/27/08 at 89-90.) In terms of operations Mr. Duggan has indicated that he does not wish to change the operation of the establishment. (Tr. 2/27/08 at 90.)

20. Mr. Duggan testified that noise emanating from the establishment has not been a problem over the years. (Tr. 2/27/08 at 95.) In the voluntary agreement it says that music is not to be heard in the closest residence. On occasion there will be someone outside talking loudly and the only thing that can be done is to ask them to stop talking loudly. (Tr. 2/27/08 at 95.) The later in the evening, the louder the sound of people talking carries. (Tr. 2/27/08 at 96.) There are no residences that are affected by the establishment, other than in the back of the establishment and they have never had any complaints. (Tr. 2/27/08 at 97.) He has never had a complaint from a Ms. Morgan at Idle Time Books, and he has known her for 25 years. (Tr. 2/27/08 at 98.) Her deck is on the

rear of the building and the summer garden is in the rear of the establishment. They are three doors down from one another. (Tr. 2/27/08 at 98-99.) Mr. Duggan attends ANC meetings regularly. (Tr. 2/27/08 at 98.)

21. Denis James is the President of the KCA. (Tr. 2/27/08 at 108.) KCA protested the license request on the grounds that granting the license would lead to a disturbance of the peace, order and quiet of the surrounding neighborhood and have a negative impact on residential parking needs and vehicular and pedestrian safety. (Tr. 2/27/08 at 110.) KCA would like to craft provisions in a voluntary agreement that would temper the effects of the change from a Class CR to CT retailer's license, focusing specifically on food service and noise issues. (Tr. 2/27/08 at 110.) The KCA is not opposed to a change in license class with a food receipt requirement of $1300.00 along with the food service provisions in the proposed voluntary agreement with the ANC. The KCA does not agree that exceptions should be created for this establishment. The window, which is directly behind the bandstand, should not be allowed to remain open after 12:30 a.m., nor should the loudspeaker be allowed to broadcast into the public space what is going on inside of the establishment. (Tr. 2/27/08 at 111.)

22. Mr. James requested that the Board take judicial notice of reports prepared in 2000 and 2004 by acoustic engineering firm, Miller, Beam and Paganelli. (Tr. 2/27/08 at 112-118.) They were provided to the ABC Board as part of the moratorium hearings. (Tr. 2/27/08 at 112-118.) These reports were designated as Protestant's Exhibits 1 and 2. (Tr. 2/27/08 at 118.) Both reports show that the noise in the area of the establishment, when measured according to the D.C. Noise Control Act significantly exceeded the maximum permissible noise levels. Both of the readings show that the noise level on 18th Street, N.W., was twice as loud as what is allowed under the D.C. Noise Control Act. (Tr. 2/27/08 at 123.) The KCA is opposed to an agreement that would allow the window to remain open with live bands playing directly behind it and an exterior loudspeaker. (Tr. 2/27/08 at 123.) Mr. James testified that given Mr. Duggan's testimony that nothing has changed at the establishment, that the sound levels will be the same as they were in the past. (Tr. 2/27/08 at 124.)

23. The KCA will also not sign an agreement that contains a provision where KCA would agree in advance not to protest a license request to increase the occupancy. (Tr. 2/27/08 at 125.) The total number of patrons allowed in the establishment has a direct bearing on the effect on the surrounding community. (Tr. 2/27/08 at 125.) KCA believes that such an issue should be dealt with as a separate issue when the request is made. (Tr. 2/27/08 at 125.)

24. In the transcript from the January 23, 2008 status hearing, there is testimony that the KCA did not have a seat at the table when the agreement was constructed. (Protestant's Exhibit 3.) Mr. James testified that the KCA and ANC currently have a joint agreement with Madam's Organ. The ANC has voted to approve the new voluntary agreement. The KCA argued that the allowance for an open window and outdoor speaker be deleted from the proposed agreement as they would violate D.C. law. (Tr. 2/27/08 at 136.) KCA would also like to have the forfeiture of the right to protest a request for an increase in

occupancy eliminated. (Tr. 2/27/08 at 136.) Counsel for the Applicant objected to Mr. James' testimony regarding occupancy, as the right to protect such a request for increased occupancy remains in tact. (Tr. 2/27/08 at 138.)

25. Mr. James supports the last call provision of the voluntary agreement. (Tr. 2/27/08 at 139.) KCA would like assurance that the establishment will not become a nightclub. (Tr. 2/27/08 at 140.) KCA would also like to have the Applicant file a request for a summer garden to clarify what areas of the establishment compose the summer garden. (Tr. 2/27/08 at 140.) Mr. James would also like clarification as to the Entertainment Endorsement to find out whether it covers all of the types of entertainment offered at the establishment. (Tr. 2/27/08 at 141.) If there is noise that can be reduced in a reasonable fashion by a reasonable measure such as keeping a window closed or not having an outside speaker, Mr. James believes this would be a reasonable solution. (Tr. 2/27/08 at 142-143.)

26. Mr. James does not want the establishment to be permitted to have its windows open until 12:30 a.m. (Tr. 2/27/08 at 147.) He is concerned that it would undo reasonable measures that have come into being with the combined work of the ANC and KCA by allowing a voluntary agreement that would have an exception to keeping doors and windows closed. (Tr. 2/27/08 at 147.) Mr. James believes that the voluntary agreement is at odds with itself, when it says in one paragraph that it is going to be in compliance with the D.C. Noise Control Act, but gives an exclusion for an open window and speaker. (Tr. 2/27/08 at 149.) Mr. James is concerned primarily about the window directly behind the bandstand and the speaker. (Tr. 2/27/08 at 150.) The window at issue is a French window that swings open. (Tr. 2/27/08 at 151.)

CONCLUSIONS OF LAW

27. Pursuant to D.C. Official Code § 25-313(a) (2001), an Applicant must demonstrate to the Board's satisfaction that the establishment for which a liquor license is sought is appropriate for the neighborhood in which it is located. Having considered the evidence and testimony upon which this determination must be made, the Board concludes that the Applicant has demonstrated that changing its license class from a restaurant to tavern is appropriate for the area in which the establishment is located. The Board will consider a request for a summer garden after receiving an Application from the licensee. The Board also approves the Applicant's Voluntary Agreement with the ANC.

28. The Board recognizes that pursuant to D.C. Official Code § 1-309.10(d) and D.C. Official Code § 25-609, an ANC's properly adopted written recommendations are entitled to great weight from the Board. See Foggy Bottom Ass'n v. District of Columbia ABC Bd., 445 A.2d 643 (D.C. 1982). In this case, ANC 1C reached a voluntary agreement with the Applicant. The Board found the terms of the voluntary agreement to be appropriate and entitled to great weight in this case.

29. Pursuant to D.C. Official Code § 25-313(b)(2) (2001) and 23 DCMR § 400.1(a) (2004), the Board must determine under the appropriateness standards whether permitting the Applicant to change its license class from a restaurant to a tavern will have an adverse effect on the peace, order, and quiet of the neighborhood. Notwithstanding the prohibition on the conversion of license classes in the Adams Morgan Moratorium Zone contained in 23 DCMR § 304.4, the Board may approve a change of license class application filed prior to August 2, 2006 by the holder of a Retailer's Class CR license. In this case, the issue was addressed at a fact finding held on April 11, 2007 and the Board determined that the application was timely filed with the Board prior to August 2, 2006.

30. KCA also sent a protest letter to the Board, dated January 24, 2007, stating its concerns regarding the impact of the tavern conversion on the peace, order, and quiet of the neighborhood, and residential parking and vehicular and pedestrian safety. This is the second contested protest hearing that the Board has held to consider an application for a change of license class. In considering this application, the Board is required to determine the impact of the class change under the appropriateness standards, including the effect on peace, order, and quiet. Given the history of the Adams Morgan neighborhood and the adverse impact of the many ABC establishments already noted by the Board in prior decisions, any application for a class change in the Adams Morgan neighborhood must be given careful scrutiny. In this particular matter, the Board took into account the fact that the ANC had entered into a voluntary agreement with the establishment, resolving the protest issues raised in its protest letter as to a license class change and its affect on the peace, order, and quiet of the neighborhood.

31. The protest issues raised by the KCA, including peace, order, and quiet, relate to the window, outdoor speaker, and a concern that the noise level will be in violation of the D.C. Noise Act if the establishment's license is converted from a Class CR to a Class CT license. In addressing these issues, the Board heard testimony from Investigator Mitchell that the license conversion would have no impact on the peace, order, and quiet of the neighborhood. Her testimony did not reveal any significant problems with peace, order, and quiet during visits that were attributable solely to the establishment. Investigator Mitchell did note a bar in a summer garden that is built off the back of the third floor However, the ABC license for the establishment does not include a summer garden endorsement. She and Mr. Duggan testified that although a summer garden was requested in the original 1997 application, a summer garden endorsement was not issued. Upon filing a summer garden endorsement Application with all of the required information, the Board will make a decision at that time.

32. The Board also took into consideration Investigator Mitchell's testimony regarding crowd noise and the sidewalks being crowded with pedestrians who are intoxicated and rowdy, but noted that her observations included groups outside of other Adams Morgan establishments. Her testimony that patrons smoking and talking outside of the establishment contributed to the noise level in the area was also considered by the Board. However, one of the primary concerns expressed by Mr. James relates to music that is heard outside when the front window and door are open. Investigator Mitchell testified

that when the windows and doors are both open and closed, music can be heard outside. However, the Board found Investigator Mitchell's testimony that the volume of music heard was consistent with the volume heard from nearby establishments to be significant. She also testified that the speaker had not been ruled in the past to constitute an ABRA violation. Her observations of traffic noise were also taken into account.

33. Ms. Vestal's testimony that the ABC Board has never taken action related to the noise and that the volume is controlled were also important factors. The Board was especially concerned about noise as it impacts surrounding residents, but found that the testimony that surrounding residences are not impacted by the noise and that they have never received any complaints which have resulted in Board action to be significant. Although the Board took judicial notice of reports prepared by acoustic engineering firm, Miller, Beam and Paganelli which were presented by Mr. James, and showed that the noise exceeded the maximum permissible noise levels under the D.C. Noise Control Act, the Board is not giving the findings of these reports much weight as they are from 2000 and 2004 and not directly related to the establishment. Although Mr. James makes a strong argument that individual establishments contribute to the noise levels in the area, his concern about windows and doors not being closed until 12:30 is not problematic given that there appears to be little connection to the Applicant converting from a Class CR to a CT license. Mr. James has raised concerns that the establishment may morph into a nightclub if a license conversion occurs. However, there does not appear to be sound justification for this concern. Mr. Duggan and Ms. Vestal have testified that there are no plans to change the establishment. Other than reducing the food sales requirement to $1300.00, the operational standards will not change and there are no plans to downsize the wait or kitchen staff. The advertisements which were shown that highlight food at the establishment, also provide assurance that there will continue to be a focus on food sales, as there has been in the past. Instead of being reduced, the menu selection will be expanded for brunch and lunch.

34. There is no reason to believe that converting to a Class CT license would result in changes to the establishment so significant that there would be an increase in the noise levels heard outside of the establishment. The Board does not see that there is a sufficient reason to delete the portion of the voluntary agreement referencing the time of closure for doors and windows. As a Board member stated during the hearing, should there be a noise violation, the Department of Consumer and Regulatory Affairs should be contacted. There is no conflict, as Mr. James suggests between allowing windows and doors to remain open and compliance with the D.C. Noise Control Act. As to the speaker, the Board has previously found that the speaker lies within the building lines and that it is in compliance with the voluntary agreement and the applicable ABC provisions.

35. Mr. James also objects to the part of the voluntary agreement which state that the ANC will not protest or object to an increase in occupancy, as he finds that there is a connection between the total number of patrons in the establishment and the effect on the surrounding community. This provision of the voluntary agreement will not prohibit the KCA from protesting a request for an increase in occupancy, such rights under D.C. law cannot be forfeited.

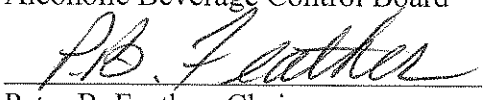
36. Pursuant to D.C. Official Code § 25-313(b)(3) (2001) and 23 DCMR § 400.1(b) (2004), the Board must determine whether converting the license class will have an adverse effect on residential parking needs and vehicular and pedestrian safety. The testimony of Investigator Mitchell and Mr. James revealed that street parking is challenging in the area of the establishment. Specifically, Investigator Mitchell testified that there is limited street parking, and a garage that is usually full by 11:00 p.m. on Fridays and Saturdays. She did not however have any concerns regarding parking that were not related to an increase in occupancy. While parking exists, street parking in the vicinity of the establishment is very limited, patrons can use public transportation. While the testimony revealed that parking on the street is significantly limited, the parking problem cannot be solely attributable to the establishment. There is also no correlation between conversion to a Class CT license and an increase in parking problems. Increased occupancy is not at issue here, and as previously stated, there is no reason to believe that converting to a CT license will result in increased occupancy. Thus, the Board does not find that the license conversion application will further impact the residential parking limitations that currently exist.

37. The Board finds no evidence based upon the record as a whole, that the Applicant's establishment would have an adverse impact on real property values.

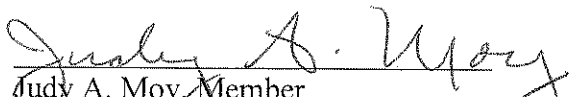
ORDER

Therefore, it is hereby **ORDERED** on this 21st day of May 2008 that the Application for a Class Change filed by 2461 Corporation, t/a Madam's Organ at premises 2461 18th Street, N.W., Washington, D.C., for a Retailer's Class CT license be and the same is hereby **APPROVED**. The Applicant's Voluntary Agreement with ANC 1C is also **APPROVED** and **INCORPORATED** as part of this Order.

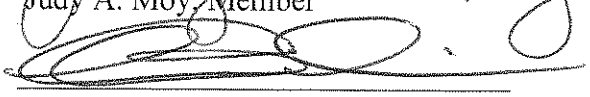
District of Columbia
Alcoholic Beverage Control Board



Peter B. Feather, Chairperson



Judy A. Moy, Member



Mital Gandhi, 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).

Cooperative Agreement Concerning
Substantial Change of License for Sale of Alcoholic Beverages

THIS AGREEMENT, made and entered into this 10 day of February 2008, by and between 2461 Corporation, trading as Madam's Organ ("Applicant"), and Advisory Neighborhood Commission 1C ("ANC 1C") "Protestant"), witnesseth:

Whereas, Applicant has sought from the District of Columbia Alcoholic Beverage Control Board (hereinafter the "Board") a substantial change of Class CR-01 License (No.25273) to a CT-01 License located at 2461 18th Street, NW, Washington, DC; and

Whereas, the establishment falls within the boundaries of Advisory Neighborhood Commission 1C (ANC 1C), and

Whereas, this is a matter of concern for ANC 1C due to the absence of a clear or statutory requirement for a "Tavern" to serve any measurable amount of food; and

Whereas, in recognition of the Board's policy of encouraging parties 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 ANC 1C's concerns and to include this Agreement as a formal condition of it Application, and (2) ANC 1C will agree to the approval of the application provided that such Agreement is incorporated into the Board's order approving such application, which order is thereby conditioned upon compliance with such Agreement; and

Whereas, Applicant has recently taken or intends to take certain measures designed to ameliorate Protestants' concerns,

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

1. Operation.

The Applicant shall make a good faith effort to sell and serve food. For purposes of this agreement, a "good faith effort" to sell or serve food shall be met if the Applicant:

(1) Maintains a kitchen, kitchen staff and waitstaff (which may include bartenders who serve food to patrons), and the supplies and equipment necessary for the daily preparation and service of prepared food menu items other than snack food, (for example, appetizers, soups, salads, sandwiches, entrees, desserts, etc.). For purposes of this section, "snack food" is defined as items such as: peanuts, popcorn, potato chips, pretzels, etc.; and

(2) Be open from at least 6 p.m. to 11:30 p.m. daily for the service of prepared food menu items; Serve brunch or lunch for a minimum of four (4) hours on Saturdays and Sundays when open prior to 6 p.m. on those days; and on other days when the

establishment is open prior to 6 p.m. service of prepared food menu items shall be available to patrons; and

(3) The Applicant has gross annual food sales of at least $1300 per occupant based on 99 seats for dining (including the bar); and

(4) Continues to keep and maintain, while licensed as a tavern, the same books and records required to be kept by restaurants and hotels pursuant to D.C. Official Code §25-113(J)(3)(A) (2004); and

(5) The Applicant offers food service until at least two (2) hours prior to closing;

(6) The Applicant promotes food sales inside of the establishment by offering menus to seated patrons, and through the use of a sandwich board or menu displays at tables featuring food items; and

(7) The Applicant's exterior advertising to the public emphasizes food and does not primarily advertise drink specials.

2. Hours

The approved hours of operation are:

Sunday:	9:00 a.m. - 2:00 a.m.
Monday through Thursday:	9:00 a.m. - 2:00 a.m.
Friday & Saturday:	9:00 a.m. - 3:00 a.m.

The parties agree that the Applicant may open, at the Applicant's discretion, at any time between 9:00 a.m. and 6:00 p.m. but under no circumstances will open to the public later than 6:00 p.m. each day of operation with the exception of all federal holidays, the day after and Christmas Eve, New Year's Eve and Easter when the establishment may open at 7 p.m.

Last call will be announced ½ hour prior to closing, each night of operation.

3. Seating and Capacity

Seating capacity will not exceed:
Interior tables and bar: 99

Occupancy limits under the Applicant's license will remain unchanged and subject to applicable law that may apply; however ANC-1C agrees not to protest or otherwise object to a lawfully permitted increase in the occupancy limits for Applicant's existing space and layout to an amount that has been approved as safe and in compliance with applicable law by the governmental agency or agencies which may have jurisdiction, including the Department of Consumer and Regulatory Affairs and the Office of the Fire Marshall.

4. Noise/Music/Dancing

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

a) Preventing emissions of sound, capable of being heard in any premises other than the licensed establishment, by any musical instrument or amplification device or other device or source of sound or noise, in accordance with D.C. Official Code §25-725 (2001). Further, the Applicant agrees to abide by all relevant provisions of the D.C. Noise Control Act of 1977 (D.C. Law 2-53), including 20 DCMR, Chapters 27 and 28, as amended.

b) Except when persons are in the act of using the door for ingress to or egress from the premises, the doors and windows of the establishment will remain closed from 12:30 a.m. until closing when live music is being played or a sound amplification device other than the loud speaker referenced in paragraph (d), below is being employed in the premises.

c) Music from inside will not be audible in surrounding residential premises other than the licensed establishment in accordance with §25-725.

d) The parties recognize and agree that there is currently a loudspeaker on the exterior of the premises located within the building line. Applicant shall be allowed to maintain or repair such loudspeaker or to replace it with a loudspeaker of equivalent amplification as may be necessary. Provided however Applicant agrees not to place outside in the public space any additional loudspeaker, tape player, CD player or other similar device, or to place any inside speaker in such a way that it projects loud sound into the public space.

5. Trash/Garbage/Rodents

Applicant shall maintain regular trash/garbage removal service, regularly remove trash from the trash and dumpster area, and see that the trash and dumpster area remain clean. Applicant shall deposit trash and garbage only in rodent-proof dumpsters, 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 and eliminate the rat population. Applicant will recycle the following items as per DC Law 7-226: cardboard, glass, and cans.

Applicant will provide for the proper removal of grease and fatty oils from the establishment and will not deposit grease or fatty oils in the dumpster.

6. Exterior including public space

Applicant shall assist in the maintenance of the alleyway behind and the space in front of the establishment 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. Applicant shall make every reasonable effort to prevent or disperse loitering or any other source of noise or disturbance in the areas in front or to the rear of the premises during business hours and at closing, and to encourage patrons to leave those areas at closing.

7. Bar/Pub Crawls

Protestant acknowledges that Applicant has not previously participated in bar or pub "crawls", "tours", or any other similar event. In cooperation with Protestant's efforts to discourage such events in the future, Applicant agrees to continue its policy of non-participation in such events. As used in this paragraph, the concept of bar or pub "crawls" or "tours" does not include situations in which a third party arranges for a pre-formed group of patrons to be served at the Applicant's establishment, or in which a pre-formed group of patrons is transported as a group by a third party to and from multiple establishments including the Applicant's.

8. Consideration

Applicant will encourage employees and patrons to be considerate of neighboring residents at all times. Applicant will encourage employees and patrons leaving the establishment to keep conversations and noise down from 11:00 PM to 7:00 AM.

9. Modification

This Agreement can be modified only by the ABC Board, or by mutual agreement of the parties with the approval of the ABC Board. In the case of ANC 1C, any modification must be approved, in writing, at a regularly scheduled public meeting by a majority of Commissioners present and constituting a quorum.

10. Regulations

In addition to the foregoing, Applicant will operate in compliance with all applicable laws and regulations.

11. Withdrawal of Protest

Protestant agrees to the issuance of the renewal of the license and withdrawal of their respective protests, *provided* that this Cooperative Agreement is incorporated into the Board's order renewing the license, which order is thereby conditioned upon compliance with such Cooperative Agreement.

12. Availability of Cooperative Agreement

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

APPLICANT:

By: _____
Bill Duggan, President
2461 Corporation t/a Madam's Organ

PROTESTANT:

By: _____
M. Mindy Moretti
ANC1C ABC & Public Safety Comm. Chair