THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:	)		
	)		
Café Eagle, LLC	)	License Number:	085990
t/a Café Eagle	)	Case Number:	10-PRO-00181
	)	Order Number:	2012-347
	)		
Application for a New	)		
Retailer's Class CT License	)		
at premises	)		
1414 9th Street, N.W.	)		
Washington, D.C. 20001	)		
	)		

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

ALSO PRESENT: Café Eagle, LLC, t/a Café Eagle, Applicant

Kiflom Meles, Esq., on behalf of the Applicant

Charles D. Reed, Chairperson, Advisory Neighborhood Commission 2F, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER ON FINDINGS OF FACT, CONCLUSIONS OF LAW, AND VOLUNTARY AGREEMENT

I. Procedural History

The official records of the Alcoholic Beverage Control Board (Board) reflect that Café Eagle, LLC, t/a Café Eagle, (Applicant) filed an Application for a new Retailer's Class CT License located at premises 1414 9th Street, N.W., Washington, D.C.[1] On December 9, 2010, Advisory Neighborhood Commission (ANC) 2F filed a timely protest

[1] Board Order No. 2011-470 mistakenly listed the Applicant as applying for a Retailer's Class CR License when it had applied for a Retailer's Class CT License, which we considered when we found in favor of the Applicant. This Order corrects and replaces Board Order No. 2011-470.

against the Applicant. The parties came before the Board for a Roll Call Hearing on January 24, 2011, and a Protest Status Hearing on March 9, 2011.

On March 9, 2011, ANC 2F and the Applicant submitted a proposed Voluntary Agreement, dated February 25, 2011, (Agreement) to the Board under D.C. Official Code § 25-446 during the Protest Status Hearing. The Board reviewed the Agreement on March 3, 2011, and May 4, 2011.

The Board then indicated to the parties that §§ 2, 4, 10, and 12 of the Agreement lacked compliance "with all applicable laws and regulations." D.C. Code § 25-446(c) (West Supp. 2011). Specifically, the Board communicated to the parties that § 2 of the Agreement could not deny the Board the ability to determine whether a change is substantial; § 4 could not compel the Applicant to offer special inducements to the community; § 10 could not prohibit the Applicant from seeking an entertainment endorsement; and § 12 could not compel the Applicant to use a specific business approved by the community or compel the Applicant to provide a copy of its pest control contract to ANC 2F.

In turn, on April 20, 2011, ANC 2F submitted a letter that expressed its disagreement with the Board's decision regarding the Agreement. In a letter dated May 12, 2011, ANC 2F urged the Board to grant the Applicant a temporary license and stipulated that it would not present any evidence in opposition to the Application. The Board held the Protest Hearing on September 28, 2011. ANC 2F sent the Board an additional email regarding the Board's proposed changes on October 10, 2011, after the close of the Protest Hearing.[2]

II. Issues

The issues presented to the Board at the Protest Hearing were (1) whether, under D.C. Official Code § 25-602, the Application will adversely impact the peace, order, and quiet and real property values of the area located within 1,200 feet of the establishment; and (2) whether the Agreement complies with § 25-446(c). D.C. Code § 25-313 (West Supp. 2011); 23 DCMR §§ 1607.2; 1607.7(b) (2008).

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:

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[2] On October 10, 2011, ANC 2F clarified its position in an email and offered to make a number of changes to the Voluntary Agreement. *Email from Charles Reed, Chairperson, ANC 2F, to Martha Jenkins, General Counsel, Alcoholic Beverage Regulation Administration* (Oct. 10, 2011) (*Email*, October 10, 2011). Because we do not know if the Applicant agrees with these changes, as a matter of due process, we will not address them in the operative portions of this Order. Nevertheless, we will comment on the proposed changes in order to provide guidance to the parties.

FINDINGS OF FACT

I. Appropriateness

1. The Board granted the Applicant a temporary license on May 25, 2011.[3] See *ABRA Licensing No. 085990.* The record does not contain any evidence that the Applicant has had or will have a negative impact on the neighborhood's peace, order, and quiet and real property values. Furthermore, the Applicant has applied for a restaurant license, which means that food sales must account for at least 45 percent of the establishment's gross annual receipts or that the establishment has gross annual food sales of at least $2,000 per occupant. D.C. Code §§ 25-101(43)(A)(x), (B)(v)(i), 25-113(b)(3)(b)(i)(I)-(II) (West Supp. 2011).

II. Voluntary Agreement

2. On March, 2, 2011, the parties submitted the Agreement to the Board for approval. *Letter from Charles D. Reed, Chairperson, ANC 2F, to Charles Brodsky, Chairperson, Alcoholic Beverage Control Board* (Mar. 2, 2010). Yohannes Araya, on behalf of the Applicant, and ANC Commissioner Michael B. Benardo, on behalf of ANC 2F, signed the Agreement. *ABRA Protest File No. 10-PRO-00181, Voluntary Agreement, 10.*

3. Section 2 of the Agreement presently states, "**Nature of Business.** .... Any change from [the Applicant's current business] model shall be considered by the parties to be a substantial change in operation of great concern to residents and require approval by the ABC Board." Voluntary Agreement, § 2.

4. The parties have agreed to modify the Agreement by striking § 2. *ABRA Protest File No. 10-PRO-00181, Letter from Charles D. Reed, Chairperson, ANC 2F to Charles Brodsky, Chairperson, Alcoholic Beverage Control Board*, 2 (Apr. 20, 2011) (*Letter,* April 20, 2011*)*; *Transcript (Tr.)*, September 28, 2011, at 28, 62.

5. Section 4 of the Agreement states:

> **Local Restaurant.** Applicant wishes to position itself principally as a neighborhood restaurant serving Shaw and Logan Circle area residents . . . Applicant is considering offering special inducements to such residents as a means of attracting their patronage. It is understood that any inducements are not required of the Applicant as a provision under this Agreement.

Voluntary Agreement, § 4.

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[3] The Applicant's file indicates that it was issued a stipulated license even though the Application was processed by the Licensing Division as a temporary license under D.C. Official Code § 25-115.

6. Section 10 of the Agreement states, "**Dancing, Music and Entertainment.** . . . . Applicant agrees that it shall not seek an entertainment endorsement to its liquor license." *Voluntary Agreement,* § 10.

7. Section 12 of the Agreement states, "**Rats and Vermin Control.** . . . . Applicant shall enter into a pest control contract with a licensed pest control company containing provisions commercially reasonable terms [sic] and reasonably agreeable to the Community." *Voluntary Agreement,* § 12. The Agreement then states, "Applicant shall provide proof of its rat and vermin control contract upon request of the Community." *Voluntary Agreement,* § 12.

CONCLUSIONS OF LAW

8. Under D.C. Official Code § 25-602, the Applicant must demonstrate to the Board's satisfaction that the Application is appropriate for the neighborhood in which it is located. We find that the Application is appropriate, because the Applicant's current operations, authorized by the Board, have not had a negative impact on the neighborhood. Furthermore, we reject the Agreement submitted by the parties, because it does not comply with § 25-446.

I. Great Weight

9. The Board also recognizes that under D.C. Official Code § 1-309.10(d) and D.C. Official Code § 25-609, an ANC's properly adopted written recommendations are entitled to great weight from the Board. See Foggy Bottom Ass'n v. District of Columbia ABC Bd., 445 A.2d 643 (D.C. 1982). Accordingly, the Board "must elaborate, with precision, its response to the ANC['s] issues and concerns." Foggy Bottom Ass'n, 445 A.2d at 646. Here, ANC 2F recommends approving the Agreement and, in the alternative, denying the Application, because it will adversely impact the peace, order, and quiet and real property values of the neighborhood. We disagree with ANC 2F's recommendation. Our discussion below explains the Board's reasoning and addresses ANC 2F's concerns; thus, satisfying the great weight requirement.

II. Appropriateness

10. We find that the Application is appropriate and will not have a negative impact on the neighborhood's peace, order, and quiet or real property values. We note that the Board issued the Applicant a temporary license on May 25, 2011. Supra, at ¶ 1. There is no evidence in the record that the Applicant's operations have negatively affected the neighborhood's peace, order, and quiet and real property values. Furthermore, a well-managed restaurant is an asset to the community. Lastly, we note that ANC 2F has not submitted any evidence regarding appropriateness into the record. We, therefore, find that the Application will not have an adverse impact on the neighborhood.

III. Voluntary Agreement

11. We recognize that the parties have agreed to modify § 2 and, as a result, we only address this provision as a guide to parties negotiating voluntary agreements in the future. We further find that §§ 4, 10, and 12 of the Agreement contravene § 25-446(c). Section 4 conflicts with the District of Columbia Human Rights Act of 1977, because it asks the Applicant to discriminate on the basis of place of residence. Section 10 conflicts with § 25-446(d)(2), because it would require the Board to punish the Applicant for seeking to amend or terminate the Agreement. Finally, § 12 demonstrates that the parties have failed to create a valid contract, because it leaves the pest control contract subject to future negotiations with ANC 2F. Therefore, we reject the Agreement.

12. Voluntary agreements have two functions: (1) the agreement settles the protestants' claims against the applicant; and (2) the terms of the agreement becomes a part of the applicant's license, and will later form the basis of charges against the applicant, in the case of a violation of the agreement. D.C. Code §§ 25-446, 25-823(6) (West Supp. 2011).

13. Under § 25-446, the parties may "negotiate a settlement and enter into a written voluntary agreement setting forth the terms of the settlement." D.C. Code § 25-446(a) (West Supp. 2011). "The signatories to the agreement shall submit the agreement to the Board for approval." D.C. Code § 25-446(b) (West Supp. 2011). The statute instructs the Board to determine if the agreement "complies with all applicable laws and regulations" and, if the Applicant "otherwise qualifies for licensure, the Board shall approve the license application, conditioned upon the licensee's compliance with the terms of the voluntary agreement." D.C. Code § 25-446(c) (West Supp. 2011).

14. Under 23 DCMR § 1609, a voluntary agreement

> shall relate to either: (a) The operations of the establishment; (b) The sale, service, and consumption of alcoholic beverages at the establishment; or (c) A topic covered in Title 25 of the D.C. Official Code or [Title 23], including [peace, order, and quiet; noise; litter; residential parking needs; vehicular and pedestrian safety; and residential property values].

23 DCMR § 1609.1 (2008); D.C. Code § 25-313, *et seq.* (West Supp. 2011).

15. Once incorporated into the applicant's license, the Board interprets the agreement according to the principles of contract law. Prospect Dining, LLC, t/a George v. District of Columbia Alcoholic Beverage Control Bd., No. 10-AA-605, 1 (D.C. 2011) (unpublished) (finding that a voluntary agreement "is in essence a contract between its signatories") citing North Lincoln Park Neighborhood Ass'n v. District of Columbia Alcoholic Beverage Control Bd., 727 A.2d 872, 875 (D.C. 1999); see also Prospect Dining, LLC, t/a George, Board Order No. 2011-178, ¶ 56 (D.C.A.B.C.B. May 4, 2011) (stating that "voluntary agreements should be interpreted as if they were contracts").

16. If the Board finds that the Applicant has violated the terms of the agreement, the Board has the power to fine, suspend, or revoke the Applicant's ABC license. D.C. Code § 25-446(e) (West Supp. 2011); 23 DCMR §§ 1609.2, 1609.4 (2008).

a. Section 2

17. Although the parties have agreed to modify § 2, we write to affirm our disagreement with § 2 as previously conceived by the parties. We reject § 2, because only the Board may determine whether a proposed change is substantial under §§ 25-404 and 25-762.

18. Section 25-404 assigns the Board the responsibility of determining whether a proposed change by a licensee is substantial. D.C. Code §§ 25-404(b)(1), 25-762(a)-(b) (West Supp. 2011).

19. Here, the Agreement states that any deviation from the Applicant's business model "shall be considered by the parties to be a substantial change . . . and require approval by the ABC Board." *Voluntary Agreement*, § 2. As written, the Agreement seeks to define what constitutes a substantial change and take this determination away from the Board. In the Board's view, any language that seeks to define a substantial change contrary to §§ 25-404 and 25-762 must be rejected.

20. ANC 2F argues that the language does not bind the Board. *Letter,* April 20, 2011, at 2. Even if we accepted this argument, we would still reject the Agreement, because (1) under ANC 2F's interpretation, the language serves no purpose; and (2) the language merely confuses future license holders as to their rights under the Agreement. As such, we find that § 2 does not conform with the law.

b. Section 4

21. ANC 2F's argument that no law prohibits § 4 is simply incorrect. *Letter,* April 20, 2011 at 3. On its face, § 4 of the Agreement violates § 2-1402.31 of the District of Columbia Human Rights Act of 1977, because it asks the Applicant to discriminate on the basis of residence.

22. The District of Columbia Human Rights Act defines restaurants as places of public accommodation. D.C. Code § 2-1401.02(24) (West Supp. 2011). Places of public accommodation may not "deny, either directly or indirectly, any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations" based on a person's "place of residence." D.C. Code § 2-1402.31(a)-(a)(1). (West Supp. 2011).

23. Here, the Agreement asks the Applicant, who seeks to operate a restaurant, to "consider[] offering special inducements to . . . residents." *Voluntary Agreement,* § 4. Section 4 of the Agreement violates the District of Columbia Human Rights Act, because the Applicant cannot offer special discounts based on an individual's residence.

Although the provision's terms render it optional, we cannot approve the Agreement while it encourages the Applicant to discriminate in violation of the law.[4] *Letter,* April 20, 2011, at 3.

24. Separately, we also find that the provision of discounts and special benefits to patrons or the public do not relate to a topic covered by Title 25 of the District of Columbia Official Code and Title 23 of the District of Columbia Municipal Regulations. Under § 1609.1, the Agreement must relate to a topic covered by Title 25 and Title 23. § 1609.1(c). Here, there is no connection between the benefits described in § 4 and peace, order, and quiet; residential parking needs; vehicular and pedestrian safety; or real property values. Consequently, we cannot approve the Agreement so long as § 4 requests that the Applicant provide special inducements to residents.

c. Section 10

25. We find § 10 unlawful, because, by punishing the Applicant for merely seeking to have entertainment, the Agreement would have the Board punish the Applicant for exercising its statutory right under § 25-446(d)(2) to seek an amendment to or termination of the Agreement.

26. Under § 25-446(d)(2), the Applicant may unilaterally amend or terminate its Agreement when certain conditions are met. D.C. Code § 25-446(d)(2) (West Supp. 2011). Section 25-446(d)(2) applies to all voluntary agreements and cannot be overridden by the parties.

27. Here, the Agreement mandates that the Applicant "not seek an entertainment endorsement to its liquor license." *Voluntary Agreement,* § 10. ANC 2F argues that § 10 merely bars the Applicant from having an entertainment endorsement. *Letter,* April 20, 2011, at 3-4. However, this interpretation ignores the actual words used in § 10. The plain language of the Agreement asks the Board to punish the Applicant any time it *seeks* an entertainment endorsement. The verb to seek means to "[t]o try to obtain." Webster's II New College Dictionary (2001) (seek). Under this definition, the Board must punish the Applicant any time it tries to obtain an entertainment endorsement; which, we interpret to include negotiating to amend § 10, applying for an entertainment endorsement, and, most importantly, applying to terminate or amend the Agreement under § 25-446(d)(2).[5] See Prince Const. Co., Inc. v. District of Columbia Contract

[4] We note that in ANC 2F's October 10, 2011, email, the ANC offered to move this provision to the Voluntary Agreement's recitals. *Email,* October 10, 2011. This change does not alter the Board's decision, because there are no circumstances under which the Applicant can offer the inducements desired by ANC 2F. Finally, the Board opposes leaving the provision in the Agreement, because, even as a recital, the provision will confuse the public and potential future holders of Applicant's ABC license as to the Applicant's obligations under the law.

[5] Although we do not reach the issue, we question whether, under the First Amendment, the Board may punish an Applicant solely for applying for an entertainment endorsement. See City of Chicago v. Morales, 527 U.S. 41, 52 (1999) citing Broderick v. Oklahoma, 413 U.S. 601, 612-615 (1973) (The First Amendment invalidates overbroad laws that "[substantially] inhibit the exercise of First Amendment rights

Appeals Bd., 892 A.2d 380, 385 (stating that a contract should be construed within its four corners and enforced as written). Based on the foregoing, we cannot approve the Agreement while § 10 conflicts with § 25-446(d)(2).

28. As such, we find that § 10 contravenes § 25-446(d)(2). We advise the parties that, if they merely intend to prevent the Applicant from having an entertainment endorsement, the language should read as follows: Applicant agrees that it shall not have any entertainment in its establishment that requires an endorsement to its liquor license under § 25-113a(b).

d. Section 12

29. Finally, the Board cannot incorporate the Agreement into the Applicant's license, because § 12 leaves the pest control contract, a material provision of the agreement, subject to future negotiations with ANC 2F. Furthermore, ANC 2F cannot compel the Applicant to provide it with its pest control contract.

30. The proposed Agreement is subject to the law of contracts. Prospect Dining, LLC, No. 10-AA-605, at 1. A valid contract cannot leave material terms for future agreement. Edmund J. Flynn Co. v. LaVay, 431 A.2d 543, 547 (D.C. 1981). A contract's material terms "must be sufficiently definite" so that the "promises and performance to be rendered by each party are reasonably certain." Rosenthal v. National Produce Co., Inc., 573 A.2d 365, 370 (D.C. 1990) (citation omitted).

31. In Strauss, the appellee claimed that the following language created a binding contract: "further compensation on NCG originated deals will be agreed to on a case by case basis" Strauss v. NewMarket Global Consulting Group, LLC, 5 A.3d 1027, 1035 (D.C. 2010). The court described the proffered language as "vague and indefinite." Id. Thus, the court held that the language did not create a contract. Id. at 1029, 1035.

32. Here, the Agreement submitted by the parties contains the following language: "Applicant shall enter into a pest control contract with a licensed pest control company containing provisions commercially reasonable terms [sic] and reasonably agreeable to the Community." *Voluntary Agreement,* § 12. We find that the parties have made the hiring of a proper pest and vermin control company a material term of the Agreement. Nevertheless, as in Strauss, the phrase, "reasonably agreeable," implies that the parties will negotiate in the future over the Applicant's chosen pest control company; yet, the parties have not placed any objective limits on these negotiations. Therefore, we cannot approve the Agreement so long as § 12 leaves open a material term of the Agreement for future negotiations.

. . . when 'judged in relation to the [law]'s plainly legitimate sweep.'"); Moore v. Darlington Twp., 690 F. Supp. 2d 378, 395 (W.D. Pa. Feb. 17, 2010) (application for workers compensation benefits protected by the Petition Clause of the First Amendment).

33. Furthermore, ANC 2F cannot compel the Applicant to provide it with its pest control contract, because this provision does not relate to the operation of the establishment or a topic covered in Title 25 or Title 23.

34. Under § 1609, the Agreement must relate to the operation of the establishment or a topic covered by the ABC laws, including peace, order, and quiet; noise; litter; residential parking needs; vehicular and pedestrian safety; and residential property values. § 1609(a), (c).

35. Here, § 12 requires the Applicant to provide ANC 2F with its pest control contract. We recognize that the Agreement may require the Applicant to enter into an extermination contract, because such a provision relates to the control of litter under § 25-726. D.C. Code § 25-726 (West Supp. 2011). Nevertheless, ANCs do not have the authority to enforce the ABC laws. As a result, providing an ANC with documentation serves no purpose; especially, when the Agreement does not authorize any further lawful action on the part of ANC 2F after it receives the pest control contract. Simply put, if ANC 2F has a problem with vermin, it should file a complaint with ABRA, not take matters into its own hands. For these reasons, we find that § 12 does not conform with the law.

IV. Conclusion

36. For these reasons, we find that the Application is appropriate. Furthermore, we find that §§ 4, 10, and 12 of the Agreement contravene § 25-446(c). As such, we grant the Application and reject the Agreement.

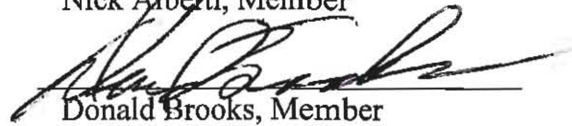
37. On a final note, the only issue raised by the Protestants pursuant to D.C. Official Code § 25-602 is whether the Agreement complies with § 25-446(c) and whether the Application will adversely impact the peace, order, and quiet and real property values of the neighborhood. As such, the Board is not required to make findings of fact related to any other issues. 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 (2008). Therefore, based on our review of the Application and the record, we find that the Applicant is fit for licensure under § 25-301(a)(1), as well as satisfied any additional remaining requirements imposed by Title 25 and Title 23 that we have not expressly discussed in this Order.

ORDER

Therefore, based on the foregoing findings of fact and conclusions of law, the Board, on this 12th day of September 2012, **REJECTS** the Agreement, dated February 25, 2011, because it contravenes D.C. Official Code § 25-446(c). Furthermore, we **APPROVE** the Application for a new Retailer's Class CT License submitted by Café Eagle, LLC, t/a Café Eagle. Copies of this Order shall be sent to ANC 2F and the Applicant.

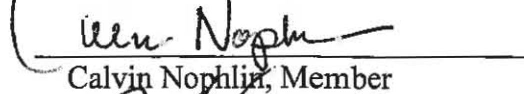
District of Columbia
Alcoholic Beverage Control Board

Nick Alberti, Member

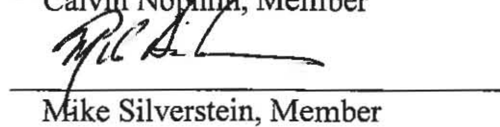


Donald Brooks, Member

Herman Jones, Member



Calvin Nophlin, Member



Mike Silverstein, 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, Reeves Center, 2000 14th Street, N.W., 400S, Washington, D.C. 20009.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (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. <u>See</u> D.C. App. Rule 15(b).