

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

In the Matter of:)

Prospect Dining, LLC)
t/a Chinese Disco)

Holder of a)
Retailer's Class CR License)

at premises)
3251 Prospect Street, N.W.)
Washington, D.C. 20007)

Case No.: 17-CMP-00033
License No.: 78058
Order No.: 2018-110

BEFORE: Donovan Anderson, Chairperson
Nick Alberti, Member
Mike Silverstein, Member
James Short, Member
Donald Isaac, Sr., Member

ALSO PRESENT: Prospect Dining, LLC, t/a Chinese Disco, Respondent

Ki Jun Sung, Owner and Counsel, on behalf of the Respondent

Walter Adams, Assistant Attorney General
Office of the Attorney General for the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

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

INTRODUCTION

The Alcoholic Beverage Control Board (Board) finds Prospect Dining, LLC, t/a Chinese Disco, (hereinafter "Respondent" or "Chinese Disco") exceeded the occupancies set by its Certificate of Occupancy (COO), its Board's approved license, and its settlement agreement by permitting 240 patrons inside the establishment on January 22, 2017, in violation of D.C. Official Code §§ 25-762(b)(1) and 25-446. In total, the Respondent shall pay a \$2,750 fine.

Procedural Background

This case arises from the Notice of Status Hearing and Show Cause Hearing (Notice), which the Board executed on October 23, 2017. *ABRA Show Cause File No. 17-CMP-00033*, Notice of Status Hearing and Show Cause Hearing, 2 (Oct. 23, 2017). The Alcoholic Beverage Regulation Administration (ABRA) served the Notice on the Respondent, located at premises 3251 Prospect Street, N.W., Washington, D.C., on October 23, 2017. *ABRA Show Cause File No. 17-CMP-00033*, Service Form. The Notice charges the Respondent with multiple violations, which if proven true, would justify the imposition of a fine, as well as the suspension or revocation of the Respondent's license.

Specifically, the Notice charges the Respondent with the following violations:

Charge I: [On January 22, 2017,] [y]ou failed to obtain the Board's prior approval before making a substantial change by increasing the maximum occupancy of the licensed establishment in violation of D.C. Official Code § 25-762(b)(1).

Charge II: [On January 22, 2017,] [y]ou violated your Settlement Agreement, approved by the Board on March 30, 2005, by increasing the maximum occupancy of the licensed establishment

Notice of Status Hearing and Show Cause Hearing, 3-4.

Both the Government and Respondent appeared at the Show Cause Status Hearing on November 29, 2017. The parties proceeded to a Show Cause Hearing and argued their respective cases on January 10, 2018. After the hearing, the parties submitted proposed findings of fact and conclusions of law, which the Board considered in reaching its final decision.

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. Chinese Disco holds a Retailer's Class CR License at 3251 Prospect Street, N.W., Washington, D.C. *ABRA License No. 78058*. Chinese Disco's Certificate of Occupancy (COO) set the maximum occupancy of the premises to 199 people, while the establishment's license and settlement agreement further limit the occupancy to 99 people. *Infra*, at ¶¶ 5, 12.

II. ABRA Investigator Kevin Puente

2. On January 22, 2017, ABRA received a noise complaint related to Chinese Disco. *Transcript (Tr.)*, January 10, 2018 at 11. ABRA Supervisory Investigator John Suero assigned

ABRA Investigator Kevin Puente to investigate the complaint while Investigator Puente was in the field. *Id.* Based on this assignment, Investigator Puente and ABRA Investigator Mark Brashears made their way to Chinese Disco. *Id.* at 12. Investigator Puente and Investigator Brashears arrived at Chinese Disco around 12:15 a.m. *Id.* at 13. Outside, a line formed outside the establishment where patrons were waiting for admittance. *Id.* Investigator Puente did not observe patrons in the nearby courtyard or observe loud music playing outside. *Id.*

3. Investigator Puente proceeded to notify the manager that ABRA had received a noise complaint. *Id.* at 13-14. Investigator Puente then spoke with ABC Managers Devin Davies and Greg Bartholomew. *Id.* at 14-15. During this conversation, Investigator Puente and Mr. Bartholomew walked around the establishment and reviewed the establishment's liquor license and settlement agreement. *Id.* at 17-18.

4. Inside Chinese Disco, Investigator Puente observed a disc jockey playing music and people dancing. *Id.* at 15. Near the front entrance, he also observed a large group of patrons congregating in front of the main bar blocking egress to the corridor leading to Chinese Disco's foyer and exit. *Id.* at 54.

5. Investigator Puente asked Mr. Bartholomew to provide him with the establishment's liquor license. *Id.* at 18. Chinese Disco's liquor license indicates that it has a maximum occupancy of 99 people. *Case Report No. 17-MP-00033, Exhibit No. 15.* A settlement agreement attached to Chinese Disco's liquor license further provides that "The establishment shall have a maximum capacity of ninety-nine persons" and that this limit "shall not be exceeded." *Case Report No. 17-MP-00033, Exhibit No. 4 at Settlement Agreement, § 1.* Moreover, the agreement provides that the license holder "shall ensure that a clear passageway is maintained at all times for the safe egress of occupants in case of fire or other emergency." *Id.*

6. After reading these documents, Investigator Puente asked Mr. Bartholomew how many patrons were inside the premises. *Id.* at 18. Mr. Bartholomew radioed for information from other employees inside the premises. *Id.* Mr. Bartholomew then told Investigator Puente that there were 150 people inside. *Id.*

7. Mr. Bartholomew also told Investigator Puente that Chinese Disco used two clickers to track patrons. *Id.* One clicker tracked patrons coming in, while another tracked patrons going out. *Id.* at 19. A picture of the clickers used by Chinese Disco taken around this time shows that one clicker had the number 291, while another had the number 51. *Id.* at 19, 34. This means that under the system described by Mr. Bartholomew, the clickers indicated that there were 240 people inside. *Id.* at 19-20.

8. After receiving this information, Investigator Puente attempted to walk around the establishment. *Id.* at 20. Nevertheless, he observed that it was very crowded by the main bar, and he stood by the end of the bars and took photos instead. *Id.*

9. Investigator Puente then proceeded to inform Mr. Bartholomew that the establishment was overcapacity. *Id.* In response, Mr. Bartholomew told Investigator Puente that "he didn't realize the occupancy was 99." *Id.*

10. During the hearing, Chinese Disco stipulated that the establishment was overcapacity during Investigator Puente's visit. *Id.* at 30.

11. Half an hour after Investigator Puente arrived, a fire marshal arrived at the establishment. *Id.* at 40. The fire marshal warned Chinese Disco to keep the front door clear so that patrons could exit. *Id.*

III. Ki Jun Sung

12. Ki Jun Sung indicated that the establishment has multiple exits, besides the one through the corridor and foyer. *Id.* at 57. Mr. Sung admitted that the establishment had also violated the capacity approved by the Board on at least one other occasion in the past. *Id.* at 68-69. He further admitted that the establishment's Certificate of Occupancy currently only allows for 199 people. *Id.* at 65. Mr. Sung further indicated that Chinese Disco has made no physical change to the premises. *Id.* at 80.

CONCLUSIONS OF LAW

13. The Board has the authority to fine, suspend, or revoke the license of a licensee who violates any provision of Title 25 of the District of Columbia (D.C.) Official Code pursuant to D.C. Official Code § 25-823(a)(1). D.C. Code § 25-830; 23 DCMR § 800, *et seq.* (West Supp. 2018). Furthermore, after holding a Show Cause Hearing, the Board is entitled to impose conditions if the Board determines "that the inclusion of the conditions would be in the best interests of the locality, section, or portion of the District in which the establishment is licensed." D.C. Official Code § 25-447.

I. Standard of Proof

14. In this matter, the Board shall only base its decision on the "substantial evidence" contained in the record. 23 DCMR § 1718.3 (West Supp. 2018). The substantial evidence standard requires the Board to rely on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clark v. D.C. Dep't of Employment Servs.*, 772 A.2d 198, 201 (D.C. 2001) *citing Children's Defense Fund v. District of Columbia Dep't of Employment Servs.*, 726 A.2d 1242, 1247 (D.C.1999).

II. Chinese Disco Violated § 25-762(b)(1) on January 22, 2017, by Permitting 240 People to Enter the Premises When its Occupancy was Limited to 99 People.

15. The Board finds Chinese Disco in violation of § 25-762(b)(1) for allowing 240 people inside the premises when its Board approved occupancy was 99 people.

16. Under part (a) of the substantial change law, "Before a licensee may make a change in the interior or exterior, or a change in format, of any licensed establishment, which would substantially change the nature of the operation of the licensed establishment as set forth in the initial application for the license, the licensee shall obtain the approval of the Board in

accordance with § 25-404.” D.C. Code § 25-762(a). In part (b), the substantial change law provides that a violation may occur if the license holder “Increase[s] the occupancy of the licensed establishment” D.C. Code § 25-762(b)(1).

17. Previously, in *Mason Inn*, the Board adjudicated a case involving an allegation that the licensee violated § 25-762(b)(1) by allowing more people than permitted by the license. *In re 2408 Wisconsin Avenue, LLC, t/a Mason Inn*, Case No. 12-251-00368, Board Order No. 2013-595, ¶¶ 24-25 (D.C.A.B.C.B. Dec. 11, 2013). There, the Board indicated that “[§] 25-762 does not only apply to physical changes to an establishment, but may also apply to situations where a licensee changes the manner in which the establishment is used.” *Id.* at ¶ 19. The Board noted that the statute contains other examples of violations that refer specifically and only to use, and not permanent physical changes, such as adding nude dancing, providing music, or adding carry-out food sales. *Id.* at ¶ 19 (citing D.C. Code § 25-762(b)(8) through (13) and (15) as examples, including adding nude dancing, providing music, or adding carry-out food sales). Moreover, in *Mason Inn*, the Board indicated that it “has consistently interpreted § 25-762 as applying to single events or incidents.” *Id.* at ¶ 20. The Board further stated that licensees are “required to report its occupancy to the Board in its initial application and any such changes are considered an amendment to the initial or original application for licensure.” *Id.* at ¶ 22. Moreover, any “[Certificate of Occupancy] provided by the [licensee] in ABRA’s records is considered part of the [licensee’s] initial application.” *Id.* at ¶ 22. As a result, the Board rejected the argument that § 25-762(b)(1) is limited to physical changes, and found that uses and acts may also constitute a violation. *Id.* at ¶ 19.

18. This interpretation is consistent with the statutory language of §§ 25-762(a) and (b)(1). First, as noted above, presuming that the terms interior, exterior, format, or nature in § 25-762(a) refer only to permanent physical changes is unreasonable and nullifies the statute, in light of clear language in the statute referring only to uses and acts on the premises. *Goba v. District of Columbia Dept. of Employment Services*, 960 A.2d 591, 594 (D.C. 2008) (“An interpretation of the statute that nullifies some of its language is neither reasonable nor permissible”). Second, nothing in the phrase “a change in the interior or exterior, or a change in format” excludes uses and acts in the interior or exterior of the establishment. Moreover, the term “format” means “A plan for the organization and arrangement of a specified production,” which refers to more than just the physical layout of a premises, and may include concepts such as how many patrons are allowed in. D.C. Code § 25-762(a); *Webster’s II New College Dictionary* (2001) (“format”) (emphasis added). Third, the term “nature” is defined as the “Essential characteristics and qualities” of a thing, which indicates that the phrase “nature of the operation” in § 25-762(b)(1) does not exclude how the property will be used, and may include concepts such as how many patrons are allowed in. D.C. Code § 25-762(a); *Webster’s II New College Dictionary* (2001) (“nature”). As a result, interpreting the phrase “increase the occupancy of the licensed establishment” to refer to uses and acts constitutes a reasonable interpretation. D.C. Code § 25-762(b)(1).

19. In light of this interpretation, on January 22, 2017, it is undisputed that Chinese Disco had more patrons than permitted by law. *Supra*, at ¶¶ 5-7, 10. The Board further credits the occupancy count provided by the clickers based on Investigator Puente’s observations of the interior and Chinese Disco’s use of the devices to track admissions and exits; therefore, the Board determines that there were 240 people inside the establishment. *Supra*, at ¶ 7. Not only did this violate the establishment’s COO, which limited the maximum occupancy of the premises to 199 people, it also violated the Board approved occupancy of 99 people, which controlled in this case. *Supra*, at ¶¶ 5, 12.

20. By approving Chinese Disco for a license with a capacity of 99 people, both the Board and the community had reasonable expectations that it would operate within those limitations and avoid the crowd control issues of a much larger establishment. Whether out of ignorance or negligence, allowing 240 people inside the premises fundamentally changes the nature of the business and its operations beyond what was approved or what was expected. *Supra*, at ¶¶ 6-7, 9. More importantly, this type of use in violation of the Board approved occupancy and the COO clearly endangers everyone inside the premises.

21. As part of its argument against the charge, Chinese Disco argues that there was no change that constitutes a change in the interior, exterior, or format of the establishment under the substantial change law. *Tr.*, 1/10/18 at 80. In light of the Board’s prior ruling in *Mason Inn*, the Board disagrees. In this case, because the manner of use of the premises may qualify as a substantial change, the Government’s evidence that Chinese Disco allowed more people to enter than allowed by Chinese Disco’s Board approved occupancy and COO constitutes an increase in occupancy in violation of § 25-762(b)(1). Moreover, even if it were a valid defense, Chinese Disco cannot argue that it was a one time occurrence or not part of the nature or format of its operations, as the owner admitted that the establishment had violated its occupancy on a prior occasion. *Supra*, at ¶ 12. For these reasons, the Board finds in favor of the Government and sustains Charge I.

III. Chinese Disco violated its Settlement Agreement on January 22, 2017, by Permitting 240 People to Enter the Premises.

22. The Board also finds Chinese Disco in violation of its settlement agreement on January 22, 2017. Under § 25-446(e), “upon a determination that a licensee has violated a settlement agreement, the Board shall penalize the licensee. . . .” D.C. Code § 25-446(e). Chinese Disco’s settlement agreement requires that “The establishment shall have a maximum capacity of ninety-nine persons” and that this limit “shall not be exceeded.” *Case Report No. 17-MP-00033, Exhibit No. 4* at Settlement Agreement, § 1. Moreover, the agreement provides that the license holder “shall ensure that a clear passageway is maintained at all times for the safe egress of occupants in case of fire or other emergency.” *Id.*

23. In this case, the establishment had 240 patrons, which violated its Certificate of Occupancy, its Board approved license, and the terms of its settlement agreement. *Supra*, at ¶¶

5, 7, 19. Inside the premises, Investigator Puente found it difficult to move around the severely crowded establishment. *Supra*, at ¶¶ 4, 8, 19. In light of the occupancy violations and the conditions observed the investigator, Chinese Disco violated both the letter and the spirit of the settlement agreement by violating the occupancy figure contained in the agreement and not providing its customers with a “clear passageway . . . at all times” or “safe egress” based on the severity of the overcrowding. *Supra*, at ¶ 5. Therefore, under these circumstances, the Board finds in favor of the Government and sustains Charge II.

IV. Penalty

24. In this case, the violation § 25-762 represents the license holder’s first primary tier violation, while the violation § 25-446 represents the license holder’s third secondary tier violation. 23 DCMR § 800 (West Supp. 2018); *Case Report No. 17-MP-00033*, Investigative History. The fine range for a first time primary tier offense falls between \$1,000 and \$2,000. 23 DCMR §§ 800, 801.1(a) (West Supp. 2018). The fine range for a third secondary tier offense falls between \$750 and \$1000. 23 DCMR § 802.1(C) (West Supp. 2018). The Board imposes the maximum fine for the violation of § 25-762 because this offense directly impacted the safety of Chinese Disco’s patrons. The Board imposes the minimum fine for the violation of the settlement agreement based on its similarity to the other offense.

ORDER

Therefore, the Board, on this 28th day of March 2018, finds that Prospect Dining, LLC, t/a Chinese Disco, guilty of violating the substantial change law and its settlement agreement. The Board imposes the following penalty on Chinese Disco:

- (1) For the violation described in Charge I, Chinese Disco shall pay a \$2,000 fine.
- (2) For the violation described in Charge II, Chinese Disco shall pay a \$750 fine.


IT IS FURTHER ORDERED that the Respondent must pay all fines imposed by the Board within thirty (30) days from the date of this Order, or its license shall be immediately suspended until all amounts owed are paid.

IT IS FURTHER ORDERED, in accordance with 23 DCMR § 800.1, the violations found by the Board in this Order shall be deemed a primary tier violation and a secondary tier violation.

IT IS FURTHER ORDERED that the Board’s findings of fact and conclusions of law contained in this Order shall be deemed severable. If any part of this determination is deemed invalid, the Board intends that its ruling remain in effect so long as sufficient facts and authority support the decision.

The ABRA shall deliver copies of this Order to the Government and the Respondent.


District of Columbia
Alcoholic Beverage Control Board



Donovan Anderson, Chairperson



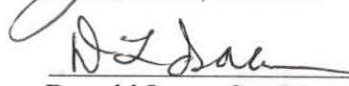
Nick Alberti, Member



Mike Silverstein, Member



James Short, Member



Donald Isaac, Sr., Member

Pursuant to D.C. Official Code § 25-433(d)(1), 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 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).