

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

In the Matter of:)	
)	
Hong Deng)	
t/a Eastern Thrifty Market)	
)	License No.: 080728
Application for Single Sales)	Order No.: 2010-507
Exception to a Retailer's)	
Class B License)	
)	
at premises)	
1620 A Street, S.E.)	
Washington, D.C. 20003)	
)	

BEFORE: Charles Brodsky, Chairperson
Mital Gandhi, Member
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Calvin Nophlin, Member
Mike Silverstein, Member

ALSO PRESENT: Hong Deng, t/a Eastern Thrifty Market, Applicant

Nan Ye, Interpreter

Mary Wright, Commissioner, Advisory Neighborhood
Commission (ANC) 6B

Carol Green, Commissioner, Advisory Neighborhood Commission
(ANC) 6B

**ORDER GRANTING MOTION FOR RECONSIDERATION
AND VACATING APPROVAL OF SINGLE SALES APPLICATION**

On June 14, 2010, Hong Deng, t/a Eastern Thrifty Market (Applicant), located at premises 1620 A Street, S.E., Washington D.C., filed a request for an exception to the Single Sales Restriction, which was opposed by the Advisory Neighborhood Commission (ANC) 6B. ANC 6B notified the Alcoholic Beverage Control Board (Board) of its opposition on July 21, 2010. The Board considered the request, the opposition thereto, and the Applicant's history, and determined that a Fact Finding Hearing was necessary. On June 24, 2010, the Board held a Fact Finding Hearing in this matter. On August 11,

2010, in Board Order No. 2010-428, the Alcoholic Beverage Control Board (Board) granted the Applicant's request for an exception to the ban on the sale of individual containers of alcohol that re 70 ounces or less in Ward 6 under D.C. Code § 25-346.

In response to the Board's decision ANC 6B, represented by Commissioner Mary Wright and Commissioner Carol Green, filed a Motion for Reconsideration arguing that Board Order No. 2010-428 is incorrect because the Board put the burden of proof on the ANC when the statute assigns the burden of proof to the licensee. The ANC also argued that the Board incorrectly found that the Applicant received community support. The Board will not address the ANC's community support argument because it is not a valid consideration under § 25-346. *See* D.C. Code § 25-346 (2008).

Nevertheless, the Board agrees with the ANC that it misapplied D.C. Code § 25-346. The Board notes that it is the Applicant who "may apply" for the exception and the statute requires a showing of "clear and convincing evidence" that there are no "adverse impacts" to the community. §§ 25-346(c)(1), 25-346(c)(2)(E). The Board further recognizes that in passing the *Consolidated Mt. Pleasant, Ward 2, and Ward 6 Single Sales Moratorium Act of 2008*, which created § 25-346, the D.C. Council believed that "[t]he presumption is against the sale of single containers and the store has to make the case to the ANC that it should be allowed to sell single containers." *Protestant's Motion for Reinstatement, 2*. In light of the D.C. Council's intent, the Board should interpret § 25-346 to require the Licensee to show, by clear and convincing evidence, that granting the exception will not have an adverse impact on the community or negatively impact enforcement or effectiveness of the ban. § 25-346.

In paragraph 16 of Board Order No. 2010-428, the Board concludes that "the ANC has provided insufficient evidence that granting the Applicant an exception will have a negative impact on the community." *Board Order No. 2010-428, 4*. Thus, the Board incorrectly applied the standard laid out by § 25-346. As such, based on the above, the Board vacates Board Order No. 2010-428 and issues the following opinion:

FINDINGS OF FACT

1. The Applicant is the holder of a Retailer's Class A License at the location of 1620 A Street, S.E., Washington, D.C., which is located within ANC 6B. *See Alcoholic Beverage Regulation Administration (ABRA) Fact Finding File*, License No. 080728.
2. ANC 6B noticed an opposition to this request by way of a letter to the Chairman of the Board stating that the Commission voted not to support an exemption to the "Consolidated Mt. Pleasant, Ward 2 and Ward 6 Single Sales Moratorium Act of 2008" for the Applicant. *See ABRA Fact Finding File*, License No. 78243, letter dated July 14, 2010, from Chairperson David F. Garrison.
3. Mr. Hong Deng appeared before the Board for the Fact Finding Hearing as the owner of the establishment known as Eastern Thrifty Market. *Transcript, July 21, 2010* (hereinafter *Tr.*, at 7/21/10), at 6. Mr. Deng stated that his business relies on the sale of

small items to customers and does not sell bulk items. *Tr.*, at 7/21/10 at 8. He stated that he has seen his revenue decline because of the restriction. *Tr.*, at 7/21/10 at 8. He also stated that the restriction was preventing him from selling certain products that were not available in multiples or in packs. *Tr.*, at 7/21/10 at 13. The establishment does not have any prior violations. *ABRA Investigative History for Eastern Thrifty Market*. Nevertheless, the Applicant is alleged to have violated the moratorium on single sales and the establishment's voluntary agreement on May 22, 2010, which is still pending review before the Board. *See Case #10-CMP-00108*.

4. Mr. Deng testified that the restriction on the sale of individual containers of alcohol has not reduced the amount of litter found in the street. *Tr.*, at 7/21/10 at 8. Mr. Deng stated that he cleans the street immediately near his establishment. *Tr.*, at 7/21/10 at 45.

5. Mr. Deng stated that 50 to 60 percent of his inventory is made of beer or wine. *Tr.*, at 7/21/10 at 14. He stated that after the restriction was enacted he stated that his sales decreased by 60 percent. *Tr.*, at 7/21/10 at 21.

6. In addition to selling alcohol, the Applicant also sells bread, candy, and household items. *Tr.*, at 7/21/10 at 24.

7. Commissioner Wright stated that the moratorium on the sale of singles has reduced loitering, littering, and anti-social behavior in the community. *Tr.*, at 7/21/10 at 25. She stated that many people complained about public urination and finding cans and bottles on their property before the ban went into effect. *Tr.*, at 7/21/10 at 25-27. She stated that the restriction on the sale of individual containers of alcohol has improved the quality of life in the neighborhood. *Tr.*, at 7/21/10 at 26.

8. Commissioner Wright testified that no other store near the Applicant had an exemption from the single sales moratorium. *Tr.*, at 7/21/10 at 28. She stated that approximately 12 people, who live near the Applicant, came to the ANC's meeting in order to object to lifting the restriction on the sale of singles at the Applicant's establishment. *Tr.*, at 7/21/10 at 29-30. She stated that the members of the public who attended the meeting were concerned that lifting the restriction would encourage public urination, littering, and noise. *Tr.*, at 7/21/10 at 32.

9. Commissioner Wright stated that before the moratorium people who bought alcohol from the Applicant were dropping litter in residents' yards. *Tr.*, at 7/21/10 at 35. Commissioner Green stated that currently individuals are dropping soda cans and bottles in people's yards and theorized that people drinking alcohol are more likely to litter. *Tr.*, at 7/21/10 at 35.

10. Commissioner Green stated that Eastern High School is two blocks from the Applicant's establishment. *Tr.*, at 7/21/10 at 36. Commissioner Green stated that, since enacting the moratorium, loitering outside the Applicant's establishment has decreased. *Tr.*, at 7/21/10 at 38. Neither Commissioner Green nor Commissioner Wright stated that

they had ever contacted the school to complain about schoolchildren loitering near the Applicant's establishment. *Tr.*, at 7/21/10 at 38-39.

11. The Board took administrative notice that two ABC establishments were located near the Applicant. *Tr.*, at 7/21/10 at 39. Neither store is authorized to sell singles and are approximately within two blocks of the Applicant. *Tr.*, at 7/21/10 at 39-40. Commissioner Green testified that another liquor store is located on Kentucky Avenue and is approximately four blocks from the Applicant. *Tr.*, at 7/21/10 at 41.

12. Mr. Deng testified that he has never called the police to complain about loitering or public urination while working in the store. *Tr.*, at 7/21/10 at 46.

13. The Applicant has the support of 69 people who live near his establishment but does not have the support of ANC 6B. *See ABRA Fact Finding File, License No. 78243, see Application for Exception to Single Sales Restrictions, letter dated July 14, 2010, from Chairperson David Garrison.*

CONCLUSIONS OF LAW

14. The *Consolidated Mt. Pleasant, Ward 2, and Ward 6 Single Sales Moratorium Act of 2008* became effective on December 24, 2008, which established a moratorium on the sale of beer, malt liquor, and ale in containers that are 70 ounces or less. The law allows a licensee to apply for an exception to the moratorium's restriction. *See* D.C. Code §§ 25-345 and 25-346. In determining whether to grant an exception to the moratorium, the Board shall give great weight to the ANC where the licensee is located and consider "[w]hether [an] exception will negatively impact the enforceability and effectiveness of the ban," the absence of any primary or secondary tier violations, evidence of participation in the community and attendance at ANC and Police Service Area community meetings, and "[c]lear and convincing evidence that there have been no significant adverse community impacts, such as loitering, littering, or other anti-social behavior in the vicinity of the licensee establishment." D.C. Code § 25-346(c)(2)(A)-(E). Finally, based on the language and intent of the D.C. Council in passing § 25-346, the burden of proof is on the Licensee requesting the exception.

15. The Board is not persuaded by Applicant's position in light of the arguments against the Application presented by the ANC. 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). Accordingly, the Board "must elaborate, with precision, its response to the ANC issues and concerns." *Foggy Bottom Ass'n*, 445 A.2d at 646. Here, ANC 6B alleged that if the Board granted the Applicant an exception this would lead to littering, loitering, noise, and anti-social behavior.

16. The Board will not consider charges that have not been adjudicated. As such, the Applicant has no history of violations.

17. Based on testimony from both the Applicant and the ANC Commissioners present at the hearing, the Applicant has provided insufficient evidence that granting the Applicant an exception will not have a negative impact on the community. Here, the ANC has testified that the moratorium has reduced loitering, littering, and other anti-social behavior. Before the ban, the Commissioners testified that many people complained about public urination and finding litter on their property. The ANC also noted that the quality of life in Ward 6 improved dramatically after the ban went into effect. Further, no testimony presented by the Applicant convinces the Board that the Applicant can prevent littering and public urination.

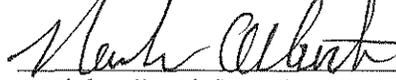
18. Therefore, based on the evidence provided, the Board denies the Application for an Exception to the Single Sales Restriction.

ORDER

Based on the findings of fact and conclusions of law, the Board on this 6th day of October 2010, hereby **VACATES** Board Order No. 2010-428 and **DENIES** the Application of Hong Deng, t/a Eastern Thrifty Market, for an Exception to the Single Sales Restriction. The Board notes that the Applicant was previously granted the exception in Board Order No. 2010-428. As such, in order to give the Applicant adequate time to dispose of his inventory of singles, the Board will **STAY** this Order for thirty (30) days, which should give the Applicant sufficient time to apply for a disposal permit under 23 DCMR § 204 (2008).

District of Columbia
Alcoholic Beverage Control Board

Charles Brodsky, Chairperson



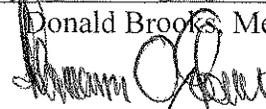
Nick Alberti, Member



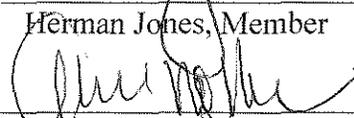
Mital M. Gandhi, Member



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, 1250 U Street, N.W., Third Floor, Washington, D.C. 20009.