

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

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In the Matter of: )		
Prospect Dining, LLC )	License Number:	078058
t/a George )	Case Number:	10-PRO-00130
Petition to Terminate a )	Order Number:	2011-178
Voluntary Agreement )		
at premises )		
3251 Prospect Street, N.W. )		
Washington, D.C. 20007 )		
_____ )		

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

ALSO PRESENT:   Prospect Dining, LLC, t/a George, Petitioner

                          Andrew Kline, on behalf of the Petitioner

                          Bill Starrels, Vice-Chairperson, ANC 2E, Protestant

                          Karen Cruse, on behalf of the Citizens Association of Georgetown (CAG),  
                          Protestant

                          Edward Emes, on behalf of A Group of Five or More Individuals,  
                          Protestant

                          Timothy Altemus, Esq., on behalf of the Protestants

                          Martha Jenkins, General Counsel  
                          Alcoholic Beverage Regulation Administration

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

Prospect Dining, LLC, t/a George (Petitioner), which holds a Retailer's Class CR License, at premises 3251 Prospect Street, N.W., Washington, D.C., and represented by Andrew Kline, filed a Petition to Terminate a Voluntary Agreement (Petition). A timely protest was filed by Advisory Neighborhood Commission (ANC) 2E on September 3, 2010, A Group of Five or More Individuals on October 7, 2010, and the Citizens Association of Georgetown (CAG) on October 8, 2010 (collectively the "Protestants"). Attorney Timothy Altemus is serving as the Protestants' designated representative.

The Petition came before the Alcoholic Beverage Control Board (Board) for a Roll Call Hearing on October 25, 2010, and a Status Hearing was held on December 8, 2010. The parties attended mediation on November 9, 2010, and November 30, 2010, but were not able to negotiate a new voluntary agreement. The Protest Hearing was held on January 26, 2011, and February 9, 2011.

Both parties submitted Findings of Fact and Conclusions of Law. The Board has included both documents in this matter's official record. The Board also notes that although Chairperson Brodsky presided over the hearing, he did not participate in the deliberations or the vote deciding this matter.

On January 20, 2011, the Petitioner filed a Motion to Dismiss the protest of ANC 2E. ANC 2E provided a written response to the Petitioner's Motion to Dismiss on January 26, 2011.

The Board denied the Petitioner's Motion to Dismiss. The Petitioner claimed that ANC 2E should be denied standing in this matter because the Petitioner was not given notice of the meeting where ANC 2E discussed its Petition in accordance with D.C. Code § 1-309.11(c) (2001). The Petitioner's argument is flawed because it fails to acknowledge that ANCs are only required to provide notice of its meetings by using at least two of the following means:

- (1) Posting written notices in at least 4 conspicuous places in each single-member district within the Commission area;
- (2) Publication in a city or community newspaper;
- (3) Transmitting or distributing notice to a list of residents and other stakeholders in the community; and
- (4) In any other manner approved by the Commission.

The ANC, in its reply, demonstrated that it provided notice of the meeting to discuss the Petition through a newspaper advertisement, ANC 2E's website, two separate listservs, and an email list. Although it is unfortunate that ANC 2E may not have personally notified the Petitioner of the meeting, there was no requirement that it do so. As such, the Motion to Dismiss is denied and the Board will resolve the protest on the merits.

Pursuant to D.C. Code §§ 25-602(a) (2001) and 25-446 (Supp. 2010), the protest issues are whether the Petition will adversely impact the peace, order, quiet, residential parking, vehicular and pedestrian safety, and property values in the neighborhood.

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 OF FACT

1. The Petitioner requested that the Board terminate its Voluntary Agreement. *See ABRA Protest File No. 10-PRO-00130*. The Petitioner's establishment is located at 3251 Prospect Street, N.W. *ABRA Protest File No. 10-PRO-00130, Protest Report 2*. The establishment is located in a C-2-A zone. *ABRA Protest File No. 10-PRO-00130, Protest Report 3*. There are 35 ABC establishments operating within 1200 feet of 3251 Prospect Street, N.W. *ABRA Protest File No. 10-PRO-00130, Protest Report 4-5*. There are no schools, recreation centers, public libraries, or day care centers located within 400 feet of the establishment. *ABRA Protest File No. 10-PRO-00130, Protest Report 6*.
2. The Board called Investigator Jabriel Shakoor to testify. *Transcript*, January 26, 2011 at 15. Investigator Shakoor is an employee of the Alcoholic Beverage Regulation Administration (ABRA) and was assigned to investigate the current protest. *Tr.*, 1/26/11 at 15. ABRA investigators monitored the establishment on six separate occasions between December 9, 2010, and December 31, 2010. *Tr.*, 1/26/11 at 18. ABRA investigators did not observe any loitering, criminal activity, or excessive trash during the investigation. *Tr.*, 1/26/11 at 18.
3. Investigator Shakoor discussed the parking situation near the establishment. There is minimal street parking on Prospect Street, N.W. *Tr.*, 1/26/11 at 18. A private parking lot owned by Doggett Parking, is located across from the establishment and the parking lot at the Georgetown Court is next door. *Tr.*, 1/26/11 at 19. During the evening and dinner hours, Thursday through Saturday, there is heavy traffic in the neighborhood. *Tr.*, 1/26/11 at 19. However, there is minimal traffic in the neighborhood when the establishment is closed. *Tr.*, 1/26/11 at 19.
4. The Board took administrative notice of the Petitioner's investigative history. *Tr.*, 1/26/11 at 122. According to the Metropolitan Crime Analysis Unit, two calls for service were made by MPD at the establishment's address. *Tr.*, 1/26/11 at 20. Furthermore, the Board ordered the Petitioner to pay a \$1,000 fine for violating the occupancy provisions of its Voluntary Agreement on September 18, 2009, and September 19, 2009. *ABRA Protest File No. 10-PRO-00130, Protest Report 11; Prospect Dining, LLC, t/a George*, Board Order No. 2010-339, 6-7 (D.C.A.B.C.B May 12, 2010) aff'd No. 10-AA-605 (D.C. 2011) (unpublished).
5. Investigator Shakoor described the establishment's location. The establishment is located in between Prospect Street, N.W., and N Street, N.W. *Tr.*, 1/26/11 at 28-29. There is an R-3

residential zone located on N Street, N.W., with a number of residential buildings. *Tr.*, 1/26/11 at 29.

6. Investigator Shakoor observed a line outside the establishment. *Tr.*, 1/26/11 at 29. He also observed that no other establishment in the neighborhood had lines outside their premises. *Tr.*, 1/26/11 at 30-31.

7. Investigator Shakoor described the establishment's kitchen. The kitchen contains a dishwasher, microwave, three sink compartments, serving utensils, and other materials for staff. *Tr.*, 1/26/11 at 46.

8. Andrew Riguzzi testified that he lives in the same complex as the establishment and serves as the President of his condominium association. *Tr.*, 1/26/11 at 48. He resides at 3251 Prospect Street, N.W., and his residence is located in the front of the building. *Tr.*, 1/26/11 at 47-48. Mr. Riguzzi has lived in his current residence for three years. *Tr.*, 1/26/11 at 49. A center courtyard separates his residence from the establishment. *Tr.*, 1/26/11 at 48. Finally, his window faces Prospect Street, N.W., but not the courtyard where the establishment is located. *Tr.*, 1/26/11 at 54-55.

9. Mr. Riguzzi discussed his experiences with the establishment. Mr. Riguzzi has experienced problems with noise coming from the establishment in the past. *Tr.*, 1/26/11 at 50. Mr. Riguzzi can hear music from the establishment in his apartment when the establishment's door is open. *Tr.*, 1/26/11 at 58. Nevertheless, the Petitioner has addressed Mr. Riguzzi's complaints regarding noise. *Tr.*, 1/26/11 at 50.

10. Lee Hefner lives at 3251 Prospect Street, N.W., and lives in the same complex as George. *Tr.*, 1/26/11 at 61. He has lived there since July of 2007. *Tr.*, 1/26/11 at 62. Mr. Hefner's residence faces the same courtyard as the establishment. *Tr.*, 1/26/11 at 61, 67. Mr. Hefner has never been disturbed by the establishment. *Tr.*, 1/26/11 at 63.

11. Rona Leff works for the owner of 3251 Prospect Street, N.W., which leases space to George. *Tr.*, 1/26/11 at 75, 85. Her employer is also the developer that built the condominiums at 3251 Prospect Street, N.W. *Tr.*, 1/26/11 at 75-76. The residential management company for the condominiums at 3251 Prospect Street, N.W., received complaints regarding noise coming from George when the establishment first opened. *Tr.*, 1/26/11 at 77. Ms. Leff's employer discloses to buyers that the property is located in a commercial area in a "mixed-use project located in an urban setting that may be subject to certain street and neighborhood noises, light sources and odors." *Tr.*, 1/26/11 at 79; *ABRA Protest File No. 10-PRO-00130, Petitioner's Exhibit No. 1.*

12. David Chung is a managing partner of the establishment. *Tr.*, 1/26/11 at 89. He has been involved in George since the establishment opened for business. *Tr.*, 1/26/11 at 89. Mr. Chung operates a number of establishments but comes into George regularly to check on the management of the establishment. *Tr.*, 1/26/11 at 90. The establishment usually opens Monday

through Thursday for private events. *Tr.*, 1/26/11 at 89. The establishment provides a happy hour Wednesday through Saturday. *Tr.*, 1/26/11 at 90.

13. Mr. Chung described the food service at George. The establishment has dinner service available until one hour before closing. *Tr.*, 1/26/11 at 90. The establishment usually opens at 6:00 p.m. for dinner and is open to the public whenever the establishment does not have a private event. *Tr.*, 1/26/11 at 130. The establishment only serves bar food and “prepared foods” and has five items on its menu. *Tr.*, 1/26/11 at 90, 130; *ABRA Protest File No. 10-PRO-00130, Protest Report Exhibit No. 41*. Specifically, the establishment’s staff only microwaves food and prepares cold platters in the kitchen. *Tr.*, 1/26/11 at 171. The establishment uses a caterer for “expensive food service.” *Tr.*, 1/26/11 at 90, 169. Mr. Chung stated that the establishment is open to the public as a restaurant on Thursdays. *Tr.*, 1/26/11 at 98. He noted that his establishment has 30 seats. *Tr.*, 1/26/11 at 133. However, as stated by Mr. Chung, the establishment does not “have an extensive kitchen.” *Tr.*, 1/26/11 at 90.

14. Mr. Chung described how he addressed various complaints received about George has received. First, the establishment ceased using the N Street, N.W., exit after receiving a complaint from ANC 2E Commissioner Bill Starrels. *Tr.*, 1/26/11 at 91. Second, the establishment hired the Metropolitan Police Department (MPD) reimbursable detail after receiving a request from a resident of the condominium. *Tr.*, 1/26/11 at 91. Third, Edward Emes once complained about noise generated by construction at the establishment, which was resolved once the construction was completed. *Tr.*, 1/26/11 at 96.

15. Mr. Chung described the establishment’s use of the MPD’s reimbursable detail. George has hired the MPD reimbursable detail every Friday and Saturday, and occasionally on Thursdays for over one year. *Tr.*, 1/26/11 at 93-94. The MPD reimbursable detail is hired from 11:30 p.m. to 3:30 a.m. on the weekends and from 10:30 p.m. to 2:30 a.m. on Thursdays. *Tr.*, 1/26/11 at 94.

16. Mr. Chung described his establishment’s use of the courtyard outside the establishment. The establishment does not have control of the courtyard area outside of the establishment. *Tr.*, 1/26/11 at 92-93. The establishment does not allow its patrons to smoke in the courtyard; instead, the establishment requires patrons to smoke on the public sidewalk. *Tr.*, 1/26/11 at 95.

17. Mr. Chung described the clients of his establishment. The establishment often only allows patrons to enter that are on the establishment’s list or with a person on the list. *Tr.*, 1/26/11 at 97. The establishment seeks to serve locals, especially people who went to private schools in the area and now work in Washington, D.C. *Tr.*, 1/26/11 at 97-98. The establishment seeks to attract young professionals as customers. *Tr.*, 1/26/11 at 98. The establishment also hosts private events for corporate clients, nonprofits, and businesses. *Tr.*, 1/26/11 at 163-64.

18. Mr. Chung described an event hosted by the establishment. George previously hosted an event for the Citizens Association of Georgetown (CAG). *Tr.*, 1/26/11 at 125. During the event, the establishment had 135 people inside the establishment, because Mr. Chung believed that the

establishment's occupancy was 200. *Tr.*, 1/26/11 at 126. The Board notes that this event, by Mr. Chung's own admission, violated the establishment's voluntary agreement, which limits the establishment's occupancy to 99 people. *ABRA Licensing File No. 078058, Voluntary Agreement; George*, Board Order No. 2010-339, 6-7.

19. Mr. Chung described his ability to use the courtyard if the Voluntary Agreement is terminated. If the Voluntary Agreement is terminated, the establishment will still need to obtain permission to utilize the courtyard. *Tr.*, 1/26/11 at 145. Specifically, the establishment will need to obtain the permission of the landlord and the Old Georgetown Board. *Tr.*, 1/26/11 at 145.

20. Mr. Chung stated that if the Voluntary Agreement is terminated, he would make a number of changes to his business. *Tr.*, 1/26/11 at 145-46. He testified that he plans to build a corridor and an enclosure for smokers in order to prevent noise. *Tr.*, 1/26/11 at 146. The establishment would also like to host live entertainment. *Tr.*, 1/26/11 at 148. Finally, the establishment would like to eliminate the occupancy provisions of the Voluntary Agreement and have a total of 30 seats and 130 for standing capacity. *Tr.*, 1/26/11 at 146, 158.

21. Kijun Sung is a member of the limited liability company that owns George. *Tr.*, February 9, 2011 at 6.

22. Mr. Sung discussed changes that have occurred in Georgetown since February of 2005. *Tr.*, 2/9/11 at 7. He noted that the economy has declined and the cost of business, including the cost of electricity and material goods, in Georgetown and Washington, D.C., has increased. *Tr.*, 2/9/11 at 7. The establishment's rent increased as well. *Tr.*, 2/9/11 at 24.

23. Mr. Sung discussed the results of a transportation survey conducted by the establishment. The establishment had its staff ask every patron how they traveled to George on January 7, 2011, and January 8, 2011. *Tr.*, 2/9/11 at 10, 12. On January 7, 2011, 111 patrons took a cab, 18 drove, and 79 walked to the establishment. *ABRA Protest File No. 10-PRO-00130, Licensee's Exhibit A*. On January 8, 2011, 130 patrons took a cab, 15 drove, and 92 walked to the establishment. *ABRA Protest File No. 10-PRO-00130, Licensee's Exhibit A*.

24. Mr. Sung also discussed the results of a parking survey conducted by the establishment on January 8, 2011. The establishment conducted the survey by having a manager count the parking spaces at the parking lot owned by Doggett Parking and at a parking garage located at 3251 Prospect Street, N.W. *Tr.*, 2/9/11 at 13. The survey found that between 10:00 p.m. and 3:00 p.m. on January 8, 2011, there were between 14 and 35 empty parking spaces at Doggett Parking and between 63 and 78 empty parking spaces at the parking garage located at 3251 Prospect Street, N.W. *ABRA Protest File No. 10-PRO-00130, Licensee's Exhibit B*.

25. Mr. Sung stated that the current Voluntary Agreement restricts the ability of the establishment to remain open later on holidays. *Tr.*, 2/9/11 at 38-39. If the Voluntary Agreement is terminated, the establishment will take advantage of the extended holiday hours offered under the ABC laws. *Tr.*, 2/9/11 at 38-39.

26. Mr. Sung described the establishment's food service. The establishment's most popular food items are quesadillas, tacos, and chicken pot pies. *Tr.*, 2/9/11 at 39. The establishment does not prepare its food from raw ingredients; rather, it buys pre-prepared food and heats it in a microwave. *Tr.*, 2/9/11 at 57-58. The establishment does not have an oven, stove top, or pots and pans. *Tr.*, 2/9/11 at 57. Finally, the establishment is not planning to serve more food if the Voluntary Agreement is terminated. *Tr.*, 2/9/11 at 45.

27. Mr. Sung described how the establishment utilizes caterers. Generally, the establishment only has a caterer come in once or twice per month; however, during the holidays the establishment has a caterer prepare and serve food a few times per week. *Tr.*, 2/9/11 at 40. Caterers often bring their own cooking equipment and food to George and occasionally prepare it at the establishment. *Tr.*, 2/9/11 at 40-41. Occasionally, the establishment has hired Boeymonger and Occasions to serve as caterers for the establishment. *Tr.*, 2/9/11 at 51. Typically, corporate clients pay for buffet meals and the establishment's staff will serve appetizers. *Tr.*, 2/9/11 at 59.

28. Mr. Sung described the establishment's business model. The establishment is open to the public at various times during the week. *Tr.*, 2/9/11 at 49. In addition, the establishment generally has private parties every Friday and Saturday during the late night hours. *Tr.*, 2/9/11 at 49-50. The establishment maintains an exclusive list, but list members may bring guests. *Tr.*, 2/9/11 at 72.

29. Edward Emes lives at 3226 N Street, N.W., and has lived there for 46 years. *Tr.*, 2/9/11 at 81. The rear and side of Mr. Emes's residence abuts the complex where George is located. *Tr.*, 2/9/11 at 82. The Board takes administrative notice that Mr. Emes lives in an R-3 zone.

30. As noted by Mr. Emes, the occupancy of the complex has increased over the past 10 years. *Tr.*, 2/9/11 at 83. Mr. Emes currently hears noise inside his home after 10:00 p.m approximately two to three times per week. *Tr.*, 2/9/11 at 109.

31. Mr. Emes discussed the traffic and parking situation in the neighborhood. The availability of parking has not increased in the neighborhood. *Tr.*, 2/9/11 at 83, 94. Therefore, it is very difficult to find parking in the neighborhood. *Tr.*, 2/9/11 at 87; see also Morton's of Chicago/Washington DC, t/a Morton's of Chicago, Board Order No. 2008-081, para. 29 (D.C. A.B.C.B. Feb. 13, 2008).

32. Mr. Emes discussed the protections offered by the Voluntary Agreement. The agreement prevents the Petitioner from using the outdoor patio, which is Mr. Emes's main concern. *Tr.*, 2/9/11 at 126. Furthermore, the 99 person limitation in the Voluntary Agreement prevents the neighborhood from becoming "overloaded" with patrons. *Tr.*, 2/9/11 at 126-27.

33. Rats from the complex where the Petitioner is located constantly enter Mr. Emes's property. *Tr.*, 2/9/11 at 127; see also Morton's of Chicago, Board Order No. 2008-081 at para. 28.

34. Commissioner Bill Starrels serves as the Vice-Chairperson of ANC 2E and is Co-Chair of the ANC's ABC Committee. *Tr.*, 2/9/11 at 140-41. As testified by Commissioner Starrels, the ANC had to contact the police in order to deal with crowds spilling out from the complex and disturbing the neighborhood when the establishment first opened. *Tr.*, 2/9/11 at 142. Further, restaurant owners whose businesses neighbor George have complained about patrons vomiting and being intoxicated late at night. *Tr.*, 2/9/11 at 142.

35. Commissioner Starrels testified that he has lived at 1045 31st Street, N.W., since 1988. *Tr.*, 2/9/11 at 140, 144. Commissioner Starrels can walk to the Georgetown Court from his home in about five to 10 minutes. *Tr.*, 2/9/11 at 144.

36. Commissioner Starrels discussed the ANC's efforts to control vermin in the neighborhood. The ANC started a rat abatement program with the Georgetown Court in order to deal with rats attracted by the waste produced by local restaurants. *Tr.*, 2/9/11 at 145. The program has been active for three years. *Tr.*, 2/9/11 at 145.

37. Commissioner Starrels described the parking situation in the neighborhood. On New Year's Eve, a line of patrons from George blocked the sidewalk and prevented patrons from using the north and south sides of the courtyard. *Tr.*, 2/9/11 at 146.

38. Finally, the Board emphasizes that any fact that does not appear in the Findings of Fact is deemed by the Board to be irrelevant, unreliable, or unsubstantiated.

### CONCLUSIONS OF LAW

39. Pursuant to D.C. Code § 25-446(d)(4), a Petitioner must demonstrate to the Board's satisfaction that the establishment for which a Petition to Terminate a Voluntary Agreement is appropriate for the neighborhood in which it is located and does not adversely impact the peace, order, quiet, residential parking, vehicular and pedestrian safety, and property values in the neighborhood under D.C. Code § 25-313 (2001). The Board finds that the Petition is inappropriate based on the Petitioner's previous and current failures to comply with the ABC laws, which demonstrates that granting the Petition would adversely impact the peace, order, and quiet of the neighborhood. Therefore, the Petition is denied.

40. 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 2E recommended that the Board deny the Petition because, in the ANC's words, "A termination

cannot be justified by circumstances beyond the control of the applicant or by a change in the neighborhood, and a termination would have an adverse impact on the neighborhood.” The Board agrees with ANC 2E that the Petition will have an adverse impact on the neighborhood. The Board addresses the ANC’s issues and concerns below.

41. The Board denies the Petition because the Petitioner could not demonstrate that removing the Voluntary Agreement will not adversely impact the peace, order, and quiet of the Petitioner’s neighborhood. The Board finds that revoking the Voluntary Agreement will lead to an increase in capacity at the establishment that will adversely impact the peace, order, and quiet of the neighborhood because the establishment has demonstrated that it is unwilling or unable to respect the law, as evidenced by its repeated violations of the Voluntary Agreement, and because the establishment does not appear to focus on food sales as required by D.C. Code § 25-101(43) (Supp. 2010).

42. The Board is tasked with ensuring that the consumption of alcoholic beverages does not harm the health, safety, and welfare of the residents of the District of Columbia; peace, order, and quiet being one aspect of health, safety, and welfare. Likewise, compliance with the ABC laws in an important aspect of peace, order, and quiet because the laws ensure that the consumption of alcohol will not detrimentally impact an establishment’s neighbors. Consequently, repeated violations of the ABC laws strongly indicate to the Board that a licensee will not or is incapable of respecting the law and that the licensee will adversely impact its neighbors.

43. Here, the Petitioner has an ongoing obligation to comply with its Voluntary Agreement while it is in effect. George’s Voluntary Agreement specifically states in Section 1 that: “The establishment shall have a maximum capacity of ninety-nine persons. This limit . . . shall not be exceeded.” *ABRA Protest File No. 10-PRO-00130, Voluntary Agreement, 5*. As affirmed by the District of Columbia Court of Appeals, the Voluntary Agreement “unambiguously” requires the Petitioner to have no more than 99 people in its establishment at any one time. Prospect Dining, LLC, t/a George, No. 10-AA-605, 2 (D.C. 2011) (unpublished). The failure to comply with this requirement is a serious violation that can lead to the suspension or revocation of the Petitioner’s license. D.C. Code § 25-823(6) (Supp. 2010).

44. The evidence presented to the Board demonstrates that the Petitioner has a history of violating its Voluntary Agreement. First, on September 18, 2009, and September 19, 2009, the Petitioner violated its occupancy limitations. Supra, at para. 4; see also Prospect Dining, LLC, t/a George, Board Order No. 2010-339, 6-7 (D.C.A.B.C.B May 12, 2010) aff’d No. 10-AA-605 (D.C. 2011). Second, Mr. Chung, one of the Petitioner’s managing members, admitted that his establishment violated its Voluntary Agreement’s occupancy requirements on another occasion while holding a party for CAG. Supra, at para. 18.

45. Based on these facts, the Board is entitled to infer that the Petitioner has been regularly incompliant with its Voluntary Agreement and, thus, consistently violating the law. Given this history, it would be a disservice to the Petitioner’s neighbors to terminate the Voluntary

Agreement when the Board has grave doubts about the Petitioner's willingness and ability to comply with the ABC laws.

46. The facts elicited during the Protest Hearing also indicate that the Petitioner may not be compliant with the definition of a restaurant contained in D.C. Code § 25-101(43). The Board intends to further investigate this matter.

47. Section 25-101(43) requires an establishment to meet one of two definitions to be considered a restaurant. Under the first definition, among other requirements, to be considered a restaurant, an establishment must "[b]e regularly ready, willing, and able to prepare and serve food, have a kitchen which shall be regularly open, have a menu in use, have sufficient food on hand to serve the patrons from the menu, and have proper staff present to prepare and serve the food. D.C. Code § 25-101(43)(A)(i)-(x) (Supp. 2010). Alternatively, under the second definition, among other requirements, an establishment must have "adequate kitchen and dining facilities" to be considered a restaurant. D.C. Code § 25-101(43)(B)(i)-(vi) (Supp. 2010).

48. The Board finds that the Council of the District of Columbia (Council) adopted a strict test to determine whether an establishment is a restaurant. The Board notes that the Restaurant Amendment Act of 2003 was not significantly changed when the Council incorporated it into the final version of the Omnibus Alcoholic Beverage Amendment Act of 2004. Compare Council of the District of Columbia, Restaurant Amendment Act of 2003 § (2)(c), Council Period 15, Bill 15-516 (D.C. Oct. 20, 2008) with Omnibus Alcoholic Beverage Amendment Act of 2004, § 301(b)(4), D.C. Law 15-187 (D.C. 2004). During hearings over the legislation, Chairperson Ambrose spoke favorably of adopting a definition for a restaurant based on the "duck test" or a definition without any parameters or factors instead of the test contained in the Restaurant Amendment Act. COUNCIL OF THE DISTRICT OF COLUMBIA, REPORT ON BILL 15-516, THE "OMNIBUS ALCOHOLIC BEVERAGE AMENDMENT ACT OF 2004," COMMITTEE ON CONSUMER AND REGULATORY AFFAIRS, 23 (Mar. 9, 2004) (Chairperson Ambrose said "perhaps the Duck test may be a good alternative because one can walk into a place and know what kind of place it is by simply looking at menus, tables, and the kitchen."). However, this proposal was criticized by Councilmember Graham who stated: "if you had a duck test, a microwave alone could qualify a place as restaurant, and thus it is too subjective." Id. Based on the legislative record, it is apparent that the Council decided in favor of adopting a strict test with specific parameters to determine whether an establishment is a restaurant and specifically, disapproved of establishments acting as restaurants in name only.

49. Indeed, based on the Council's disapproval of an establishment solely utilizing a microwave to prepare food, the Board is also convinced that the Council would also disapprove of a restaurant relying totally or mostly on prepared foods and caterers to create the food it serves to its customers. To conclude otherwise would undermine the strict test imposed by the Council.

50. In the instant matter, the evidence produced during the Protest Hearing has indicated to the Board that the Petitioner may be a restaurant in name only and may not meet either definition of a restaurant contained in § 25-101(43).

51. First, the establishment may not meet the first definition of a restaurant because it is not “regularly ready, willing, and able to prepare and serve food” and does not “have proper staff present to prepare and serve the food.” § 25-101(43)(A). As Mr. Chung and Mr. Sung noted, the establishment does not have any ovens, stove tops, or even pots and pans and relies extensively on caterers to provide food and kitchen equipment. Supra, at para. 13, para. 26, para. 27. Further, no evidence was presented during the hearing that the establishment has a chef or any staff experienced or educated in the culinary arts. Finally, as Mr. Chung and Mr. Sung testified, the establishment only has five items on its menu; all of which are pre-prepared, which indicates that the Petitioner is unable to prepare its own food. Supra, at para. 13, para. 26. Based on these facts, it is doubtful that the establishment is ready, willing, or able to prepare and serve food or have proper staff to prepare food, when the law specifically disapproves of restaurants relying extensively on microwaves, prepared foods, and caterers.

52. Second, the establishment may not meet the second definition of a restaurant because it does not have an “adequate kitchen.” The establishment’s almost total reliance on a microwave, prepared foods, and caterers to supply the establishment’s food and cooking equipment is evidence that the establishment may not have an adequate kitchen. Supra, at para. 13, para. 26, para. 27. Therefore, based on Petitioner’s lack of equipment and proper staff, the Petitioner may not have an adequate kitchen, as indicated, in compliance with § 25-101(43)(B).

53. Finally, the Board notes that it would have reached the same conclusion had the evidence only shown that the Petitioner repeatedly violated its Voluntary Agreement or that the Petitioner may not be in compliance with § 25-101(43) because both grounds indicate an adverse impact on peace, order, and quiet if the Petition was approved.

54. For these reasons, the Petition is denied.

55. The Board also reaffirms its decision in Hank’s Oyster Bar, which held that the termination of a voluntary agreement only requires a petitioner to demonstrate that termination will not have an adverse impact under § 25-446(d)(4)(C). Leeds the Way, LLC, t/a Hank’s Oyster Bar, Board Order No. 2010-533, para 49 (D.C.A.B.C.B Nov. 3, 2010).

56. The Protestants’ arguments that the Board cannot terminate the Voluntary Agreement solely under § 25-446(d)(4)(C) under principles of contract law have no basis in the law. Although the court in N.L.P.N.A. stated that voluntary agreements should be interpreted as if they were contracts, the court there did not in any way imply that a voluntary agreement can overrule the termination provisions contained in § 25-446(d)(4). N.L.P.N.A. v. D.C. Alcoholic Bev. Control Bd., 727 A.2d 872 (D.C. 1999). Title 25 of the District of Columbia Code cannot be overruled by private agreements between licensees and members of the public.

57. In addition, the Protestants and ANC 2E’s textual arguments that the Board must apply § 25-446(d)(4)(A) and § 25-446(d)(4)(B) are incorrect. The Board’s decision to only apply § 25-446(d)(4)(C) to petitions to terminate voluntary agreements, and not the other subsections, is

based on the plain meaning of the statute. Don Juan Restaurant, Inc., t/a Don Juan Restaurant & Carryout, Board Order No. 2011-166, para. 70 (D.C.A.B.C.B. Mar. 23, 2011). Specifically, the Board has stated previously that because §§ 25-446(d)(4)(A)(i)-(ii) and 25-446(d)(4)(B) only reference petitioners seeking to amend their voluntary agreements, these subsections do not apply to petitioners seeking to terminate their voluntary agreements. Id. In conclusion, in order to find in favor of the Protestants' argument, the Board would have to ignore the specific language chosen by the Council of the District of Columbia. Id.

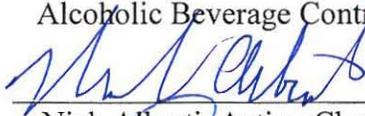
58. As such, the Board rejects the Protestants and ANC 2E's statutory arguments regarding § 25-446(d)(4).

59. On a final note, the Board notes that this case emphasizes the Board's conclusions in Don Jaime. In Don Jaime, the Board noted that the Board's newly announced interpretation of D.C. Code § 25-446(d)(4), did not nullify §§ 25-446(d)(4)(A) and 25-446(d)(B). Jaime T. Carrillo, t/a Don Jaime, Board Order No. 2011-165, 3, 5 (D.C.A.B.C.B. Mar. 23, 2011). Specifically, in its decision, the Board wrote: "petitioners who could not terminate their voluntary agreements either due to accumulated ABC violations or who cannot prove appropriateness, will choose to amend their voluntary agreements in order to alter or delete those provisions that especially hurt their businesses, while retaining additional protections for their neighborhoods." Id. at 5. In that vein, based on the Board's concerns regarding appropriateness and the Petitioner's history of violations in this matter, the Petitioner may have benefited had it requested an amendment instead of termination, because the legal burden of proof in such a case is much lower; where the impact on the neighborhood will be less severe because portions of the Voluntary Agreement will remain in force if the petition to amend is granted.

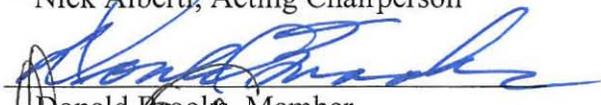
## ORDER

Therefore, this 4th day of May 2011, it is hereby **ORDERED** that the Petition to Terminate a Voluntary Agreement submitted by Prospect Dining, LLC, t/a George, at premises 3251 Prospect Street, N.W., Washington, D.C., is hereby **DENIED**. Copies of this order shall be sent to the Petitioner and the Protestants.

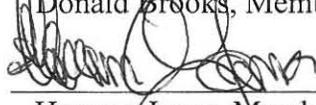
District of Columbia  
Alcoholic Beverage Control Board



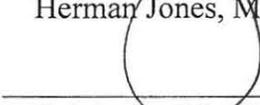
Nick Alberti, Acting Chairperson



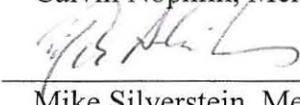
Donald Brooks, Member



Herman Jones, Member



Calvin Nophlin, Member



Mike Silverstein, Member

Pursuant to 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, 500 Indiana Avenue, N.W., Washington, D.C. 20001. 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).