THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:	)	
Leeds the Way, LLC t/a Hank's Oyster Bar	) License Number: 071913) Case Number: 10-PRO-00094) Order No.: 2010-533	
Petition to Terminate a Voluntary Agreement	)	
at premises 1624 Q Street, N.W. Washington, D.C. 20009	)	

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

ALSO PRESENT: Leeds the Way, LLC, t/a Hank's Oyster Bar, Petitioner

Andrew Kline, on behalf of the Petitioner

David Mallof and Alexis Rieffel, on behalf of A Group of Three or More Individuals, Protestants

Michael K. Hibey, Esq., on behalf of the Protestants

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Leeds the Way, LLC, t/a Hank's Oyster Bar (Petitioner), which holds a Retailer's Class CR License, at premises 1624 Q Street, N.W., Washington, D.C., filed a Petition to Terminate a Voluntary Agreement (Petition). The Petition came before the Alcoholic Beverage Control

Board (Board) for a Roll Call Hearing on July 19, 2010, and a Status Hearing on August 18, 2010.

On June 28, 2010, a protest against the Petition was timely filed by A Group of Three or More Individuals represented by David Mallof and Alexis Rieffel (Protestants). In addition, the DCCA, on June 28, 2010, filed a timely protest against the Petitioner, through its representative President Robin Diener.

As a preliminary matter, the Petitioner submitted a Motion to Dismiss the Protest of the Petition to Terminate its Voluntary Agreement (Licensee's Motion to Dismiss). The Licensee's Motion to Dismiss argues that in order to protest the termination of a Voluntary Agreement, a protestant must state an appropriate ground under D.C. Code § 25-313 (2004) and D.C. Code § 25-314 (2007). According to the Petitioner, neither DCCA nor the Protestants stated an appropriate ground and, therefore, should be dismissed from the protest.

In response, the Protestants filed an Opposition to Motion to Dismiss the Protest of the Petition to Terminate the Voluntary Agreement (Opposition). The Opposition asserts that the requirements to protest the Petition to Terminate a Voluntary Agreement are not the same as those found in § 25-313. Furthermore, the Protestants assert that D.C. Code § 25-446 (2004) requires the Board to make different findings than those found in §§ 25-313 and 25-314 when terminating a Voluntary Agreement.

The Protestants also filed a Motion to Dismiss Licensee's Petition to Terminate its Voluntary Agreement (Protestants' Motion to Dismiss), which argued that the Petitioner failed to submit a sworn affidavit under D.C. Code § 25-446(d)(4)(ii) to fulfill the good faith requirement. In response to the Protestants' arguments, the Petitioner argues that under § 25-446 the Petitioner was not obligated to try and reach agreement with the Protestants before filing a Petition to Terminate, despite its efforts to do so.

The Board decided the parties' respective motions before the Protest Hearing. The Board found that both the DCCA and the Protestants were obligated to challenge the appropriateness of the Petition to Terminate under §§ 25-313 and 25-314 because both statutes are specifically referred to in § 25-446(d)(4)(C). *See* § 25-446(d)(4)(C). As such, the Board granted the Licensee's Motion to Dismiss the DCCA because the DCCA failed to state appropriate grounds to challenge the Petition to Terminate. *Transcript (Tr.), October 13, 2010* at 90-91. However, with a vote of 3-3, the Board did not dismiss the Protestants because the Board believed the Protestants' initial filing adequately stated the basis of their protest under the appropriateness standards found in §§ 25-313 and 25-314. *Tr.*, 10/13/10 at 91-92. Lastly, the Board denied the Protestants' Motion to Dismiss because the Petitioner is not obligated to negotiate in good faith if it seeks to terminate its Voluntary Agreement because § 25-446(d)(4)(ii) only applies when an amendment is sought. *Tr.*, at 10/13/10 at 92-93.

No amendment to the Voluntary Agreement was reached between the Petitioner and the Protestants before the Protest Hearing. The Protest Hearing was held on October 13, 2010.

Pursuant to D.C. Official Code § 25-602(a) (2009), the protest issues are whether the Petition will adversely impact the peace, order, and quiet, residential parking and vehicular and pedestrian safety, and property values in the neighborhood.

FINDINGS OF FACT

1. The Petitioner seeks to terminate its Voluntary Agreement, dated May 4, 2005. *See Board Order No. 2005-75.* The original signatories to the Voluntary Agreement are Jamie Leeds, David J. Mallof, Alexis Rieffel, Ralph N. Johnson, Susan Meehan, Michael Fasano, and Patricia E. Steele. *See Board Order No. 2005-75.* The Board takes administrative notice that the Petition was submitted during the Petitioner's renewal period and more than four years after the current Voluntary Agreement was approved by the Board. *ABRA Licensing File No. 071913; see also ABRA Protest File No. 10-PRO-00094, Petition to Amend or Terminate Voluntary Agreement, 1.* The Board takes administrative notice that the notice provisions under §§ 25-421 through 25-423 were satisfied in this matter. *See ABRA Protest File No. 10-PRO-00094.*

2. The Board called Investigator David Bailey to testify. *Tr.*, at 10/13/10 at 98. He testified that there are 22 ABC establishments within 1200 feet of the Petitioner. *Tr.*, at 10/13/10 at 96. In Investigator Bailey's Protest Report, he notes that "[o]ne establishment holds a Class CX License; one holds a Class B License; two hold a Class CH License; two hold a Class A License; two hold a Class CT License; two hold a Class DR License; and the remaining 12 hold a Class CR License." *ABRA Protest File No. 10-PRO-00094, Protest Report, 2.* He further testified that there are no schools, recreation centers, public libraries, or daycare centers within 400 feet of the Petitioner. *Tr.*, at 10/13/10 at 98.

3. Investigator Bailey noted that both the 1600 block and 1700 block of Q Street, N.W., have two hour parking available from 7:00 a.m. to 8:30 a.m., Monday through Friday. *Tr.*, at 10/13/10 at 99. He also noted that one hour parking is available on the 1600 block of Q Street, N.W., as well. *Tr.*, at 10/13/10 at 99. The 1500 block of 17th Street, N.W., has one hour parking between 7:30 a.m. to 6:30 p.m., Monday through Friday. *Tr.*, at 10/13/10 at 99. Investigator Bailey testified that a parking garage at 1616 P Street, N.W., has about 200 spaces available and is open until 11:00 p.m., Sunday through Thursday, and open until 12:00 a.m. on Friday and Saturday. *Tr.*, at 10/13/10 at 99. The Restaurant is located in a C-2-A zone. *ABRA Protest File No. 10-PRO-00094, Protest Report 1.*

4. Investigator Bailey stated that the establishment has not had any major ABRA violations. *Tr.*, at 10/13/10 at 100. According to the Petitioner's file, Ms. Leeds settled a Voluntary Agreement violation that occurred on February 25, 2010, for $500. *ABRA Protest File No. 10-PRO-00094, Protest Report 7.* The establishment also paid a fine for not properly submitting a quarterly statement on November 11, 2008, and February 1, 2007. *ABRA Protest File No. 10-PRO-00094, Protest Report 7.* Finally, the establishment paid a $500 fine for not having an ABC manager at the establishment on September 16, 2008. *ABRA Protest File No. 10-PRO-00094, Protest Report 7.*

5. Investigator Bailey testified that ABRA investigators visited the establishment at various times during the day on 29 separate occasions from August 24, 2010, to October 5, 2010. *Tr.*, at 10/13/10 at 100. During ABRA's visits, Investigators did not notice trash or noise. *Tr.*, at 10/13/10 at 101. He further noted that the visits revealed that there is no parking available on Q Street, N.W., but parking is available on 17th Street, N.W. *Tr.*, at 10/13/10 at 101. He also noted that spaces are available in the parking garage. *Tr.*, at 10/13/10 at 102. Investigator Bailey noted that establishments larger than the Petitioner's establishment may sell and serve alcohol later than the Petitioner. *Tr.*, at 10/13/10 at 110.

6. The Petitioner presented its case through the testimony of Mikala Brennan, Bill Zybach, and Jamie Leeds. *Tr.*, at 10/13/10 at 116, 127, 157.

7. The Petitioner first called Mikala Brennan to testify. *Tr.*, at 10/13/10 at 116. Ms. Brennan lives one and a half blocks from the Petitioner and has lived at the same address for 11 years. *Tr.*, at 10/13/10 at 117. She stated that she patronizes the establishment at least twice per month. *Tr.*, at 10/13/10 at 117. She stated that the establishment is known in the neighborhood as a restaurant, and not as a place to drink, because of the high quality food that the establishment serves. *Tr.*, at 10/13/10 at 118.

8. Ms. Brennan stated that the restaurant has benefited the neighborhood and increased the value of her property. *Tr.*, at 10/13/10 at 118. She noted that her home has quadrupled in value. *Tr.*, at 10/13/10 at 119. Ms. Brennan believes that the growth in businesses in the neighborhood has increased the value of her property. *Tr.*, at 10/13/10 at 119. She noted that before moving into the neighborhood, the area was considered unsafe and the block where the Petitioner is located did not have "much." *Tr.*, at 10/13/10 at 119. Ms. Brennan testified that she believes the establishment makes the neighborhood safer. *Tr.*, at 10/13/10 at 120. She noted that the restaurant attracts more affluent people to the neighborhood. *Tr.*, at 10/13/10 at 120.

9. Ms. Brennan does not believe the establishment impacts the peace, order, and quiet of the neighborhood. *Tr.*, at 10/13/10 at 121. She stated that she has never heard noise emanate from the establishment. *Tr.*, at 10/13/10 at 121. Further, she noted that the patrons of the establishment are not disorderly. *Tr.*, at 10/13/10 at 121-22. She also noted that the establishment does not create an undue burden on parking even though there are limited parking resources in the neighborhood. *Tr.*, at 10/13/10 at 122. Ms. Brennan admitted that she is not familiar with the Voluntary Agreement. *Tr.*, at 10/13/10 at 123. Ms. Brennan stated that she does not oppose the Petitioner remaining open past 1:00 a.m. on Friday and Saturday or operating its sidewalk café all year. *Tr.*, at 10/13/10 at 126.

10. The Petitioner then called Bill Zybach to testify. *Tr.*, at 10/13/10 at 127. He stated that he lives at and owns 1650 Q Street, N.W., which is directly across the street from the Petitioner. *Tr.*, at 10/13/10 at 127-28. Mr. Zybach stated that he has lived on Q Street, N.W., since 1998. *Tr.*, at 10/13/10 at 128. Mr. Zybach testified that residential property values in the neighborhood have increased and that his property has tripled in value. *Tr.*, at 10/13/10 at 128, 140. He

attributed the increase in residential property values to policies enacted by the Williams Administration and the attraction of the gay community to Dupont Circle. *Tr.*, at 10/13/10 at 129. Mr. Zybach does not believe the establishment negatively impacts peace, order, and quiet or creates an unsafe situation for vehicles and pedestrians. *Tr.*, at 10/13/10 at 139, 150-51.

11. Mr. Zybach stated that he patronizes the establishment frequently. *Tr.*, at 10/13/10 at 131. Mr. Zybach noted that the establishment is small and quiet. *Tr.*, at 10/13/10 at 132. Mr. Zybach noted that the actual bar of the restaurant only has four to five seats and the establishment serves primarily as a dining establishment. *Tr.*, at 10/13/10 at 132.

12. Mr. Zybach stated that many patrons use public transportation and bike to the establishment. *Tr.*, at 10/13/10 at 133. He noted that the neighborhood has bike racks. *Tr.*, at 10/13/10 at 133. Mr. Zybach testified that he does not believe that terminating the Voluntary Agreement will impact parking in the neighborhood. *Tr.*, at 10/13/10 at 152.

13. Mr. Zybach noted that many establishments in the neighborhood can sell and serve alcohol until 2:00 a.m. and 3:00 a.m. *Tr.*, at 10/13/10 at 134-36. Mr. Zybach supports the Petitioner being able to serve until after 12:00 a.m. or 1:00 a.m. because it would offer the neighborhood more late night dining options. *Tr.*, at 10/13/10 at 136. Mr. Zybach admitted that the establishments allowed to stay open until 2:00 a.m. and 3:00 a.m. are louder at that time because those businesses are bars. *Tr.*, at 10/13/10 at 144, 153. He testified that terminating the Voluntary Agreement will not result in more noise given the Petitioner's business model. *Tr.*, at 10/13/10 at 154-55.

14. Mr. Zybach testified that he is unfamiliar with the Voluntary Agreement. *Tr.*, at 10/13/10 at 143. He stated that he supports terminating the Voluntary Agreement because it is unfair that the Petitioner has to close earlier than other establishments. *Tr.*, at 10/13/10 at 147.

15. The Petitioner then called Ms. Jamie Leeds to testify. *Tr.*, at 10/13/10 at 157. Ms. Leeds has been the chef and owner of the establishment since May 2005. *Tr.*, at 10/13/10 at 157. She stated that the establishment is a "casual neighborhood restaurant" that serves New England style seafood. *Tr.*, at 10/13/10 at 158. She stated that the establishment has a five-seat bar and an ice bar where the establishment shucks oysters and where another bartender works. *Tr.*, at 10/13/10 at 159. Ms. Leeds further added that the establishment holds about 50 people and has a sidewalk café with 20 seats. *Tr.*, at 10/13/10 at 159-60. She noted that the establishment only has one floor. *Tr.*, at 10/13/10 at 173. She stated that if she expands her establishment, she will add an additional 20 seats to the sidewalk café and another 40 seats to the interior of the establishment. *Tr.*, at 10/13/10 at 174, 201.

16. Ms. Leeds stated that she has never received a complaint about noise emanating from her establishment. *Tr.*, at 10/13/10 at 160. If the establishment had to control noise, she suggested that the establishment could close its front doors. *Tr.*, at 10/13/10 at 162. She stated that expanding the hours her establishment could serve and sell alcohol will not create more noise because her clientele tends to be older and upscale and are attracted to her establishment because

of the food. *Tr.*, at 10/13/10 at 163, 168. She noted that her establishment does not play live music or amplified music and only provides background music for customers. *Tr.*, at 10/13/10 at 173.

17. Ms. Leeds noted that the establishment closes at 10:00 p.m. during the week and 11:00 p.m. during the weekend. *Tr.*, at 10/13/10 at 181. During the weekends, she stated that the establishment does a late night oyster hour from 11:00 p.m. to 12:00 a.m. *Tr.*, at 10/13/10 at 181. Ms. Leeds commented that her business winds down around 11:00 p.m. and she generally has about 15 customers at that time of night. *Tr.*, at 10/13/10 at 185.

18. She stated that her establishment recommends that people park in the parking garage on P Street, N.W. *Tr.*, at 10/13/10 at 161. She further noted that her establishment offered valet parking in the past but customers did not utilize it. *Tr.*, at 10/13/10 at 161.

19. Ms. Leeds testified that she desires to expand her establishment into the space next to her current establishment. *Tr.*, at 10/13/10 at 164. She noted that the rent for the neighboring space is more expensive than her current rent. *Tr.*, at 10/13/10 at 164. Ms. Leeds testified that the establishment is smaller than many of the other ABC establishments near her establishment. *Tr.*, at 10/13/10 at 167. She noted that Trio, which is next to the Petitioner, can operate its sidewalk café until 2:00 a.m. or 3:00 a.m., depending on the evening. *Tr.*, at 10/13/10 at 186.

20. Ms. Leeds noted that alcohol sales make up 18 percent of her total sales. *Tr.*, at 10/13/10 at 174.

21. Ms. Leeds, when asked why she agreed to the current Voluntary Agreement, stated that "I wanted to get open and felt like I had to." *Tr.*, at 10/13/10 at 164. She stated that she signed the Voluntary Agreement due to financial concerns. *Tr.*, at 10/13/10 at 170. She stated that she wants to terminate the current Voluntary Agreement because it limits her seating, hours, and use of the establishment's sidewalk café. *Tr.*, at 10/13/10 at 165. She stated that if she is freed from the Voluntary Agreement she will be responsive to her neighbor's concerns. *Tr.*, at 10/13/10 at 166.

22. Ms. Leeds stated that she was represented by an attorney when the Voluntary Agreement was executed. *Tr.*, at 10/13/10 at 170. Ms. Leeds stated that she has not analyzed the impact of more seats or additional hours at her establishment. *Tr.*, at 10/13/10 at 172. Ms. Leeds stated that she knows that the Voluntary Agreement allows her to serve food until 2:00 a.m. or 3:00 a.m. depending on the day but wants the option to serve alcohol until closing time. *Tr.*, at 10/13/10 at 180. She stated that the current Voluntary Agreement also prevents her from operating her sidewalk café after 11:00 p.m., Sunday through Thursday, and after midnight on Friday and Saturday. *Tr.*, at 10/13/10 at 183. Ms. Leeds stated that if the Voluntary Agreement is terminated she may not continue to close her doors and windows after 9:00 p.m. *Tr.*, at 10/13/10 at 184-85. She further stated that she will not utilize outdoor music if the Voluntary Agreement no longer applies to her establishment. *Tr.*, at 10/13/10 at 188.

23. Ms. Leeds stated that she has never received a complaint regarding how she stores the chairs she utilizes in her sidewalk café. *Tr.*, at 10/13/10 at 187. Ms. Leeds noted that the trash company picks up trash every day. *Tr.*, at 10/13/10 at 187.

24. Ms. Leeds commented that it is ridiculous that the Voluntary Agreement mandates that her umbrellas can only read Hank's on them. *Tr.*, at 10/13/10 at 189.

25. Ms. Leeds admitted that the Voluntary Agreement allows her to have 65 seats inside the establishment. *Tr.*, at 10/13/10 at 194. She also stated that the Voluntary Agreement allows her to utilize her sidewalk café from April 1 to November 30. *Tr.*, at 10/13/10 at 195.

26. The Protestants presented their case through the testimony of Jim McGrath, Mary Latka, Abdi Poozesh, David Mallof, and Robin Diener. *Tr.*, at 10/13/10 at 209, 220, 231, 249, 334.

27. The Protestants called Jim McGrath to testify. *Tr.*, at 10/13/10 at 209. Mr. McGrath stated that he is the head of the D.C. Tenant's Advocacy Coalition. *Tr.*, at 10/13/10 at 210. Mr. McGrath testified that he is familiar with the Voluntary Agreement. *Tr.*, at 10/13/10 at 215. Mr. McGrath asserted that terminating the Voluntary Agreement would adversely impact the neighborhood because there are many residents in the neighborhood and the public has an interest in protecting public space. *Tr.*, at 10/13/10 at 219.

28. The Protestants called Mary Latka to testify. *Tr.*, at 10/13/10 at 220. She lives at 1701 Massachusetts Avenue, N.W., which is three blocks from the Petitioner. *Tr.*, at 10/13/10 at 229, 223. Ms. Latka stated that she is familiar with the Voluntary Agreement. *Tr.*, at 10/13/10 at 223.

29. She stated that she has never had a problem with noise emanating from the establishment because she "live[s] too far away." *Tr.*, at 10/13/10 at 223, 227. Ms. Latka stated that if the Voluntary Agreement is terminated she fears that there will be noise and it will affect peace, order, and quiet. *Tr.*, at 10/13/10 at 224. Ms. Latka admitted that terminating the Voluntary Agreement will not personally affect her. *Tr.*, at 10/13/10 at 230.

30. The Protestants then called Mr. Abdi Poozesh to testify. *Tr.*, at 10/13/10 at 231. He stated that he lives at and owns 1620 Q Street, N.W., which is next door to the Petitioner's establishment and is a single-family home. *Tr.*, at 10/13/10 at 231, 247. He noted that the establishment is separated from his residence by one property but the Petitioner's property and his will border if the Applicant purchases the neighboring property. *Tr.*, at 10/13/10 at 232. He stated that he has lived at his present address with his family since 2003. *Tr.*, at 10/13/10 at 232-33.

31. Mr. Poozesh stated that the Voluntary Agreement offers protections. *Tr.*, at 10/13/10 at 232. He stated that the Voluntary Agreement limits the establishment's hours and prevents noise and trash. *Tr.*, at 10/13/10 at 232.

32. Mr. Poozesh testified that he hears noise from the establishment in his living room. *Tr.*, at 10/13/10 at 233. He stated that if the establishment expands to the neighboring property it will share a wall with his residence. *Tr.*, at 10/13/10 at 235. Mr. Poozesh stated that he has never previously had a problem with the establishment. *Tr.*, at 10/13/10 at 240. He stated that he is afraid that if the Voluntary Agreement is terminated he will hear noise in his home at 1:00 a.m. and 2:00 a.m. *Tr.*, at 10/13/10 at 247.

33. Mr. Poozesh noted that the building next to his residence was changed to a commercial zone two years ago and is currently a rowhouse. *Tr.*, at 10/13/10 at 241, 248.

34. The Protestants called Mr. David Mallof to testify. *Tr.*, at 10/13/10 at 249. Mr. Mallof stated that he lives at 1711 Q Street, N.W., which is approximately 280 feet from the Petitioner. *Tr.*, at 10/13/10 at 250. Mr. Mallof stated that he is a signatory to the Voluntary Agreement. *Tr.*, at 10/13/10 at 250.

35. Mr. Mallof testified that 17th Street, N.W., "is known as a place to party late at night." *Tr.*, at 10/13/10 at 254. He asserted that terminating the Voluntary Agreement will adversely impact peace, order, and quiet in the neighborhood. *Tr.*, at 10/13/10 at 274.

36. Mr. Mallof stated that Section 2 of the Voluntary Agreement protected his interests by limiting the Petitioner to 65 seats. *Tr.*, at 10/13/10 at 259. He stated that terminating the Voluntary Agreement will adversely impact him because he will not know how many seats in the sidewalk café the Petitioner will apply for. *Tr.*, at 10/13/10 at 259. He also stated that not allowing the Petitioner to stay open until the maximum hours allowed by law protects the neighborhood. *Tr.*, at 10/13/10 at 262. Mr. Mallof also stated that Section 3 of the Voluntary Agreement limits the Petitioner's hours to midnight or 1:00 a.m. during certain nights of the week. *Tr.*, at 10/13/10 at 260. He stated that if the Voluntary Agreement is terminated he will protest if the Petitioner seeks expanded hours. *Tr.*, at 10/13/10 at 260.

37. Mr. Mallof asserted that the Voluntary Agreement provides more protection than the District of Columbia's laws and regulations. *Tr.*, at 10/13/10 at 257, 261. He stated that he negotiated an agreement that only allowed the Petitioner to have only as many seats authorized by the District of Columbia Department of Transportation. *Tr.*, at 10/13/10 at 261-62. Mr. Mallof stated that "[i]t matters that permitting be consistent and congruent." *Tr.*, at 10/13/10 at 268.

38. Mr. Mallof stated that he does not know whether the establishment has ever disturbed him. *Tr.*, at 10/13/10 at 271, 307. He also does not have a problem with loitering outside the establishment, trash removal, and how the establishment maintains its exterior, which he attributed to the Voluntary Agreement. *Tr.*, at 10/13/10 at 281, 313.

39. Mr. Mallof approves of the provision in the Voluntary Agreement that prevents the Petitioner from playing music in the sidewalk café. *Tr.*, at 10/13/10 at 282. Mr. Mallof also approves of the provision in the Voluntary Agreement that prevents the Petitioner from serving

food and alcohol to patrons who are standing in the sidewalk café. *Tr.*, at 10/13/10 at 283. Mr. Mallof stated that this prevents the establishment from having large groups of people clustered in a residential neighborhood. *Tr.*, at 10/13/10 at 284. Mr. Mallof did admit that, regardless of whether the people were sitting or standing, the establishment will still have to meet the District of Columbia's minimum food sales requirements. *Tr.*, at 10/13/10 at 310. However, he asserted that standing outside would indicate that the establishment is having "CT-like" activity. *Tr.*, at 10/13/10 at 316.

40. Mr. Mallof stated that closing the sidewalk café at 11:00 p.m. and 12:00 a.m., rather than 2:00 a.m. or 3:00 a.m., saves the neighborhood from approximately three hours of disturbances every night. *Tr.*, at 10/13/10 at 292. Mr. Mallof stated that he is not concerned about the Petitioner's operations inside the establishment. *Tr.*, at 10/13/10 at 292. Furthermore, Mr. Mallof stated that he does not have a problem with the Petitioner operating its sidewalk café in March or being able to use different umbrellas. *Tr.*, at 10/13/10 at 315-16.

41. Mr. Mallof stated that he negotiated the original Voluntary Agreement because there was an "over-concentration" of ABC establishments in the neighborhood. *Tr.*, at 10/13/10 at 303. He stated that he currently has issues with other establishments in the neighborhood and is protesting the renewal of their ABC licenses. *Tr.*, at 10/13/10 at 303. Mr. Mallof admitted that he is protesting the license because of a "prospective fear that the [Petitioner] would disturb the neighborhood." *Tr.*, at 10/13/10 at 306.

42. Mr. Mallof stated that if the Voluntary Agreement is terminated it would reduce property values in the neighborhood. *Tr.*, at 10/13/10 at 318.

43. The Protestants called Ms. Robin Diener to testify. *Tr.*, at 10/13/10 at 334. Ms. Diener stated that she lives at 1612 Corcoran Street, N.W., which is one block away from the Petitioner. *Tr.*, at 10/13/10 at 335. She stated that she currently serves as the President of the Dupont Circle Citizens Association (DCCA). *Tr.*, at 10/13/10 at 335. She stated that the DCCA opposes the termination of the Voluntary Agreement. *Tr.*, at 10/13/10 at 336. Ms. Diener stated that her organization does not have formal procedures to decide when it gets involved in the protest process. *Tr.*, at 10/13/10 at 350.

44. Ms. Diener testified that the Petitioner is "very well managed and operated. . . . " *Tr.*, at 10/13/10 at 338.

45. The DCCA opposes terminating the Voluntary Agreement because it will "result in other [Voluntary Agreements] that are needed being much more easily terminated." *Tr.*, at 10/13/10 at 338. She fears that terminating the Voluntary Agreement will let licensees that are not well managed terminate their Voluntary Agreements. *Tr.*, at 10/13/10 at 339. She argued that the moratorium and Voluntary Agreements with licensees in the neighborhood have created a "wonderful[,] well-balanced[,] vibrant neighborhood." *Tr.*, at 10/13/10 at 340. She stated that the Voluntary Agreement provides "reassurance" to the community. *Tr.*, at 10/13/10 at 355.

46. Ms. Diener stated that she wants the Petitioner's hours to be limited to the hours in the guidelines set by Advisory Neighborhood Commission (ANC) 2B. *Tr.*, at 10/13/10 at 356. She stated that ANC 2B believes that licensees near residential areas should close their sidewalk café's around 11:00 p.m., Sunday through Thursday, and at midnight on Friday and Saturday. *Tr.*, at 10/13/10 at 370.

47. Ms. Diener stated that her organization does not oppose altering the terms. *Tr.*, at 10/13/10 at 357. She stated that in exchange for "allowing an establishment to expand or to open" she believes that something like the "contribution . . . of a nice black wrought fence to enhance the neighborhood" is an appropriate concession to include in Voluntary Agreement. *Tr.*, at 10/13/10 at 360. She stated that this type of concession is related to property values. *Tr.*, at 10/13/10 at 364. She also stated that she would like to see sound abatement included in the Voluntary Agreement. *Tr.*, at 10/13/10 at 361.

CONCLUSIONS OF LAW

48. Pursuant to D.C. Official Code § 25-446 (2004), in order to terminate a Voluntary Agreement, the Petitioner's "application to amend or terminate a voluntary agreement by fewer than all the parties" must occur during the licensee's "renewal period" and be at least "4 years from the date of the Board's decision initially approving the voluntary agreement." § 25-446(d)(2)(A)-(B). Further, notice of "an application to. . . terminate a voluntary agreement shall be given" in accordance with the notice provisions of §§ 25-421 through 25-423." § 25-446(d)(3). The Board also notes that if the request to terminate is from "fewer than all parties" the Petitioner must demonstrate "good cause" by showing that the "termination will not have an adverse impact on the neighborhood where the establishment is located as determined under § 25-313 or § 25-314, if applicable." § 25-446(d)(4)(C). The Board finds that the Petitioner has fulfilled the requirements of § 25-446 and demonstrated that terminating the Voluntary Agreement will not have an adverse impact on the neighborhood.

49. The Board notes that an agency's interpretation of its own regulations or the statute which it administers is generally entitled to great deference unless it is unreasonable. Takahashi v. D.C. Dep't of Human Servs., 952 A.2d 869, 874 (D.C. 2008). The Protestants have asserted that the Board must apply § 25-446(4)(A)(i)-(ii) and § 25-446(4)(B) even though the Petitioner has not applied for an amendment. The Board disagrees with the Protestants' interpretation because § 25-446 distinguishes between a party that seeks to amend a Voluntary Agreement versus a party that seeks to termination. Indeed, this point is emphasized by the fact that neither § 25-446(d)(4)(A)(i)-(ii) or § 25-446(d)(4)(B) mention the word "terminate" or "termination" while § 25-446(4)(C) does. The arguments laid out by the Protestants simply do not explain how the Board's interpretation is unreasonable or why the Board should deviate from the plain language of the statute. Therefore, the Board finds that the Licensee does not have to satisfy § 25-446(4)(A)(i)-(ii) or § 25-446(4)(B) in order to terminate its Voluntary Agreement.

50. As indicated in the Findings of Fact above, the Petitioner properly applied for termination of its Voluntary Agreement after four years from the date its Voluntary Agreement was

originally approved by the Board and during its renewal period. The Board also notes, as indicated above, that the notice requirements were properly satisfied. As such, the Board finds that the Petitioner has satisfied § 25-446(d)(2)(A)-(B) and § 25-446(d)(3).

51. Only § 25-313 applies to the present matter because § 25-314 does not apply to the Petitioner's request to terminate its Voluntary Agreement. *Compare* D.C Code § 25-313 (2004) *with* D.C. Code § 25-314(a) (2007). As such, the Board will determine whether the Petitioner's establishment, without the Voluntary Agreement, is appropriate for the neighborhood where it is located. § 25-313; § 25 25-446(d)(4)(C). Thus, the Board will consider, among other things, whether terminating the Voluntary Agreement will have an adverse impact on real property values, peace, order, and quiet, including noise and litter, and residential parking needs, and vehicular and pedestrian safety. § 25-313(b)(1)-(4).

52. The Board finds that the Petitioner has demonstrated that there will be no adverse impact to the neighborhood if the Voluntary Agreement is terminated. As Mr. Mallof stated, the neighborhood "is known as a place to party late at night" and the many ABC establishments in the area prove this statement true. Given the presence of many Retailer's Class CR and Retailer's Class CT Licenses in the neighborhood, many whom operate and sell and serve alcohol later in the evening than the Petitioner, there is no reason to believe that terminating the Voluntary Agreement will alter the character of the neighborhood or significantly impact residents. Further, the Board notes that the Petitioner has no serious ABC violations that suggest that the establishment will impact its neighbors. In addition, the Petitioner's witnesses indicated that their property values have increased in the past few years. Finally, given the fact that the Petitioner has to comply with the minimum food sales requirements as a Retailer's Class CR Licensee, it is hard to fathom how the Petitioner could transform into a tavern or nightclub if released from its Voluntary Agreement. As such, the Board finds that the Petitioner has demonstrated that there is good cause to terminate the Voluntary Agreement.

53. The Board also notes that the Protestants have not demonstrated that the Petitioner has failed to meet its burden. Indeed, the Protestants case appeared entirely focused on irrelevant and abstract policy concerns rather than the specific effects of the Petitioner's establishment on the neighborhood. Simply put, the Petitioner has demonstrated that allowing the establishment to remain open for another two to three hours will not change the litter, noise, or parking situation in the neighborhood. Further, many of the Protestants' complaints, such as the fear of the Petitioner's expansion plans, are more properly addressed in a proceeding that deals with a proposed substantial change on the part of the Petitioner; not this proceeding, which only deals with termination of the Voluntary Agreement. In addition, provisions that order the Petitioner to maintain a fence around its tree box or limit the types of umbrellas the Petitioner may use have no relation to the relevant grounds that determine appropriateness. Finally, the Board notes that the Protestants could not point to one specific complaint or negative impact the Petitioner has had on the neighborhood. The Board also notes that Mr. Poozesh mentioned that he can hear noise in his living room but, because the Protestants did not adequately describe the sound, the Board is unwilling to attribute it to the Petitioner. As such, the Board finds in favor of the Petitioner and grants its Petition.

ORDER

Therefore, this 3rd day of November 2010, it is hereby **ORDERED** that the Petition to Terminate a Voluntary Agreement requested by Leeds the Way, LLC, t/a Hank's Oyster Bar, at premises 1624 Q Street, N.W., Washington, D.C., is hereby **GRANTED**. Copies of this order shall be sent to the Petitioner and the Protestants.

District of Columbia
Alcoholic Beverage Control Board

Chuck Brodsky, Chairperson

Donald Brooks, Member

Herman Jones, Member

Calvin Nophlin, Member

We dissent from the position taken by the majority of the Board and write separately to note the following:

1. We conclude from the evidence presented that the operations of the sidewalk café late into the evening are likely to have an adverse impact on peace, order, and quiet. Pursuant to D.C. Official Code § 25-313(b)(2), the Board must consider the effect of the establishment on peace, order, and quiet of the community, including the noise and § 25-725 when determining the appropriateness of an establishment. First, Hank's Oyster Bar at 1624 Q Street, N.W., is located adjacent to an R-B-5 Zoning District, which permits matter-of-right moderate development of general residential uses. The Petitioner lies approximately twenty feet west of its nearest residential neighbor. Nearby residents testified that voices from the current sidewalk cafe of the establishment can routinely be heard inside their residences. Further, residents also testified that they can routinely hear voices from the sidewalk café of Trio Restaurant/Fox&Hounds Lounge. Trio Restaurant, which holds a Class CR licensed, is located immediately to the east of Hank's Oyster Bar and slightly farther from the nearby residential district. Second, Board Order 2006-253 in Case 427-06/029P restricts the hours of operation for Trio Restaurant's sidewalk café to 11:00 p.m., Sunday through Thursday, and midnight on Friday and Saturday. This Order establishes the appropriateness of the hours of operation for sidewalk cafes in the vicinity of Hank's Oyster Bar for the purpose of mitigating adverse impact on peace, order and quiet. Third, the current Voluntary Agreement between Hank's Oyster Bar and the Dupont Circle Citizens Association allows alcoholic beverage service until midnight, Sunday through Thursday, and 1:00 a.m. on Friday and Saturday.

2. It is for these reasons that we dissent from the majority decision to terminate the current Voluntary Agreement without implementation of any restrictions on the hours of alcohol service for the sidewalk cafe. Additionally, we recommend setting the approved hours of alcohol service for the sidewalk café of Hank's Oyster Bar to no later than midnight on Sunday through Thursday, and 1:00 a.m. on Friday and Saturday.

Mital M. Gandhi, Member

Nick Alberti, Member

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 the service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (April 2004) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b).