

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

_____)
In the Matter of:)
)
NHV Corporation, Inc.) License Number: 024663)
t/a Haydee's Restaurant) Case Number: 10-PRO-00113)
) Order No.: 2011-132)
Petition to Terminate a))
Voluntary Agreement))
))
at premises))
3102 Mount Pleasant Street, N.W.))
Washington, D.C. 20010))
_____)

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

ALSO PRESENT: NHV Corporation, Inc., t/a Haydee's Restaurant, Petitioner

Robert P. Waldeck, Esq., on behalf of the Petitioner

Sam Broeksmit, on behalf of the Mount Pleasant Neighborhood Alliance (MPNA), Protestant

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

NHV Corporation, Inc., t/a Haydee's Restaurant (Petitioner), filed a Petition to Terminate a Voluntary Agreement (Petition) in order to terminate the Mount Pleasant Neighborhood Alliance (MPNA) Voluntary Agreement and have the establishment's entertainment hours correspond with its hours of sale and service of alcoholic beverages. Both the MPNA and Hear Mount Pleasant have executed Voluntary Agreements with the Petitioner that are currently in effect. The MPNA Voluntary Agreement was signed on May 14, 1997, while the Hear Mount Pleasant Voluntary Agreement was executed by Board Order No. 2008-189. The Petition

initially came before the Alcoholic Beverage Regulation Administration (ABRA) for a Roll Call Hearing on August 16, 2010, and a Status Hearing was held on September 22, 2010.

Protests against the Petition were timely filed by the MPNA by letter dated August 2, 2010, and August 16, 2010, respectively. MPNA also passed a resolution opposing the Petition on July 23, 2010. *See ABRA Protest File 10-PRO-00113, Mount Pleasant Neighborhood Alliance Resolution.*

A Mediation between the parties was held on September 8, 2010. The Petitioner and the Protestant could not agree on a revised Voluntary Agreement before the Protest Hearing. The Protest Hearing was held on November 17, 2010. The Board notes that Advisory Neighborhood Commission (ANC) 1D timely submitted a recommendation under D.C. Code § 25-609 (2001).

Both parties submitted Proposed Findings of Fact and Conclusions of Law. The record was closed on January 5, 2011. The Petitioner moved to strike portions of the MPNA's Proposed Findings of Fact and Conclusions of Law. In the interest of administrative efficiency, the Board will not accept the Petitioner's Motion. The Board remains aware of its prior rulings regarding the evidence submitted during the Protest Hearing. If the Board relies on an inappropriate fact, an objection should be raised in a Motion for Reconsideration. Allowing motions after the record has closed and Proposed Findings of Fact and Conclusions of Law have been submitted but before a decision is rendered merely delays the process further to the benefit of no one.

Pursuant to D.C. Code §§ 25-602(a) and 25-446(d)(4)(C) (2001), the protest issues raised by the Protestant are whether the Petition would adversely impact the peace, order, and quiet and residential parking and pedestrian safety of the neighborhood. The Board, having considered the evidence, the testimony of witnesses, the arguments of counsel, and the documents comprising the Board's official file, makes the following:

FINDINGS OF FACT

1. The Petitioner is asking the Board to terminate its Voluntary Agreement with the MPNA and to have its entertainment hours correspond with the establishment's hours of sale and service of alcoholic beverage. *ABRA Protest File 10-PRO-00113, Notice of Public Hearing.* The MPNA Voluntary Agreement, dated May 14, 1997, was signed by both the MPNA and the Petitioner. *ABRA Protest File 10-PRO-00113, MPNA Voluntary Agreement.* 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. 024663; see also ABRA Protest File No. 10-PRO-00113.* 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-00113.*
2. The Petitioner's establishment is located at 3102 Mount Pleasant Street, N.W. *ABRA Licensing File No. 024663.* It is located within a C-2-A zone. *ABRA Protest File 10-PRO-*

00113, *Protest Report*, 4. There are no schools, recreation centers, public libraries, or day care centers located within 400 feet of the establishment. *ABRA Protest File 10-PRO-00113, Protest Report*, 6. Finally, there are 15 ABC licensed establishments within 1200 feet of the Petitioner. *ABRA Protest File 10-PRO-00113, Protest Report*, 4.

3. The Petitioner's current hours of operation are from 11:00 a.m. to 2:00 a.m., Sunday through Thursday, and 11:00 a.m. to 3:00 a.m., Friday and Saturday. *ABRA Licensing File No. 024663*. The Petitioner's current hours to sell and serve alcohol are from 11:00 a.m. to 1:30 a.m., Sunday through Thursday, and 11:00 a.m. to 2:30 a.m., Friday and Saturday. *ABRA Licensing File No. 024663*. Finally, the Petitioner's hours of entertainment are 6:00 p.m. to 11:00 p.m., Sunday through Wednesday; 6:00 a.m. to 12:00 a.m. on Thursday; and 6:00 a.m. to 1:00 a.m., Friday and Saturday. *ABRA Licensing File No. 024663*. The Petitioner seeks to expand its entertainment hours to correspond with its hours of sale and service of alcoholic beverages. *ABRA Protest File 10-PRO-00113, Notice of Public Hearing*.

4. The Board takes administrative notice of Board Order No. 2008-189, which executed and amended the Hear Mount Pleasant Voluntary Agreement and the MPNA Voluntary Agreement. Board Order No. 2008-189 deleted the last sentence in Paragraph A and Paragraph F of the MPNA Voluntary Agreement, which prevented the Petitioner from having live entertainment at the establishment and put conditions on the Petitioner's ability to sell the establishment. *Board Order No. 2008-189*, 22. The Board Order also permitted entertainment until 11:00 p.m., Sunday through Wednesday; midnight on Thursday; and 1:00 a.m. on Friday and Saturday. *Board Order No. 2008-189*, 22. The Petitioner was also permitted to charge a cover charge. *Board Order No. 2008-189*, 22. The Board also deleted paragraphs 6 and 23 of the Hear Mount Pleasant Voluntary Agreement, which regulated the Petitioner's entertainment activities and tried to supersede the MPNA Voluntary Agreement. *Board Order No. 2008-189, Appendix*.

5. The Board took administrative notice of the Petitioner's prior history of ABC violations. *Tr.*, 11/17/10 at 26. The Petitioner was previously cited for failing to submit quarterly statements on August 1, 2010, and February 1, 2007. *ABRA Protest File 10-PRO-00113, Protest Report*, 9. The Petitioner paid the fines levied by the Board. *ABRA Protest File 10-PRO-00113, Protest Report*, 9.

6. The Board called Investigator Illeana Corrales, who prepared the Protest Investigation Report in this matter, as its witness. *Transcript*, 11/17/10 at 11. She testified that the Petitioner is bounded by Kenyon Street, N.W., to the north; Mount Pleasant Street, N.W., to the east; Irving Street North, N.W., to the south; and 17th Street, N.W., to the west. *Tr.*, 11/17/10 at 14-15. The establishment is located at the beginning of the Mount Pleasant Corridor. *Tr.*, 11/17/10 at 15.

7. Investigator Corrales described the interior of the establishment. *Tr.*, 11/17/10 at 15. The restaurant has a bar and dining area on the first floor, which could be used for entertainment. *Tr.*, 11/17/10 at 15. The establishment has a mezzanine with tables and booths. *Tr.*, 11/17/10 at 15. Finally, the establishment has a total occupancy of 99 patrons. *Tr.*, 11/17/10 at 15.

8. Investigator Corrales described the parking situation near the establishment. According to the Investigator, the restaurant is surrounded by off-street parking. *Tr.*, 11/17/10 at 15. There are also “leader spaces,” zoned residential parking, and paid parking spaces available in the neighborhood. *Tr.*, 11/17/10 at 15. Investigator Corrales stated that parking availability was limited but spaces were available on Mount Pleasant Street, N.W., during the day. *Tr.*, 11/17/10 at 17. She also noted that parking was available at night. *Tr.*, 11/17/10 at 17. According to Investigator Corrales, she observed that many of the establishment’s patrons walked to the establishment. *Tr.*, 11/17/10 at 17. She does not believe that the parking issues in Mount Pleasant have any relation to the Petitioner. *Tr.*, 11/17/10 at 17.

9. Investigator Corrales testified that the Metropolitan Police Department (MPD) Crime Analysis Unit provided her with a list of all the radio runs at 3102 Mount Pleasant Street, N.W, from November 2, 2009, to November 2, 2010. *Tr.*, 11/17/10 at 18. There were five calls for service at the address but none of the calls led to a violation of the ABC laws. *Tr.*, 11/17/10 at 18.

10. Investigator Corrales noted that from September 30, 2010, to November 2, 2010, she personally visited the establishment on 18 occasions. *Tr.*, 11/17/10 at 17. She noted that neither she nor the other investigators who visited the establishment observed trash, litter, or noise. *Tr.*, 11/17/10 at 17.

11. The Petitioner made its case through the testimony of four witnesses, Ms. Claudia Schlosberg, Ms. Nimia Haydee Vanegas, Mr. Mario Alas, and Commissioner Gregg Edwards. *Tr.*, 11/17/10 at 32, 95-96, 113, 124.

12. The Petitioner called Ms. Claudia Schlosberg to testify. *Tr.*, 11/17/10 at 32. Ms. Scholsberg testified that she has lived in Mount Pleasant for 33 years. *Tr.*, 11/17/10 at 33. She stated that she currently works to minimize the impact of alcohol serving establishments on the community when alcohol is abused or not properly managed. *Tr.*, 11/17/10 at 34. Ms. Schlosberg is a member of the Hear Mount Pleasant organization and works closely with ANC 1D. *Tr.*, 11/17/10 at 34.

13. Ms. Scholsberg testified that she disagreed with the Voluntary Agreement that the Petitioner entered into with the Protestant. *Tr.*, 11/17/10 at 42. She testified that the original Voluntary Agreements prevented the neighborhood from having live entertainment. *Tr.*, 11/17/10 at 43. She believes that the original Voluntary Agreement was “overbearing” and suffered from selective enforcement by the Protestant. *Tr.*, 11/17/10 at 43, 54-57. She also stated that the Voluntary Agreement prevents economic development in the neighborhood. *Tr.*, 11/17/10 at 43. She also complained that the Protestant’s organization does not operate in a transparent manner and uses Voluntary Agreements as a “gotcha game.” *Tr.*, 11/17/10 at 44, 56.

14. Ms. Schlosberg noted that Marx Café, located at 3203 Mt Pleasant St., N.W., has live entertainment. *Tr.*, 11/17/10 at 44. She noted that Marx Café has “DJ sponsored dance parties”

that extend beyond 1:30 a.m. *Tr.*, 11/17/10 at 44. According to Ms. Schlosberg, the Protestant has never complained about Marx Café's entertainment. *Tr.*, 11/17/10 at 44.

15. Ms. Schlosberg testified that the area's demographics have changed since she began living in the neighborhood in 1978. *Tr.*, 11/17/10 at 45. She noted that the neighborhood is stratified. *Tr.*, 11/17/10 at 46. According to Ms. Schlosberg, the area near the commercial district is lower income, younger, and has many renters. *Tr.*, 11/17/10 at 46. She noted that more affluent residents lived farther away from the commercial district and lived in single family homes, which have appreciated in value. *Tr.*, 11/17/10 at 46.

16. Ms. Schlosberg believes that the Petitioner should be granted greater entertainment hours than the MPNA Voluntary Agreement allows. *Tr.*, 11/17/10 at 52. According to Ms. Schlosberg, the Petitioner has not had any "noise leakage" from her establishment and the Petitioner has managed entertainment at the establishment in a responsible manner. *Tr.*, 11/17/10 at 52. She believes that the Petitioner should receive greater entertainment privileges based on the neighborhood's positive experience over the past two years. *Tr.*, 11/17/10 at 53.

17. Ms. Schlosberg testified that her group, Hear Mount Pleasant, entered into a Voluntary Agreement with the Petitioner. *Tr.*, 11/17/10 at 58. She stated that her group entered into the Hear Mount Pleasant Voluntary Agreement in order to allow for live entertainment and because live entertainment was a major change for the neighborhood. *Tr.*, 11/17/10 at 58. As a result, her group wanted to provide for some "structure" by entering into a Voluntary Agreement with the Petitioner. *Tr.*, 11/17/10 at 58. She noted that a sound engineer the group consulted with concluded that live music would not adversely impact the neighborhood. *Tr.*, 11/17/10 at 59.

18. Ms. Scholsberg believes that the MPNA Voluntary Agreement is "redundant and unnecessary." *Tr.*, 11/17/10 at 61. She believes that the Hear Mount Pleasant Voluntary Agreement is simply more comprehensive than the MPNA Voluntary Agreement. *Tr.*, 11/17/10 at 61. Ms. Schlosberg objected to Item C in the MPNA Voluntary Agreement because it presumed the Petitioner was creating a disturbance when the business was not disruptive to the neighborhood. *Tr.*, 11/17/10 at 65. Ms. Schlosberg believes that the establishment should be allowed to stay open as long as the law allows and not have its hours restricted by a Voluntary Agreement. *Tr.*, 11/17/10 at 68-69. She stated that she objects to Item D because she believes that the clause is meaningless. *Tr.*, 11/17/10 at 69. She further stated that she objects to the clause in the MPNA Voluntary Agreement that compels the Petitioner to take a leadership role in keeping the community clean because such clauses are inappropriate for such agreements. *Tr.*, 11/17/10 at 69. She also believes that Item F and Item I are not appropriate for voluntary agreements. *Tr.*, 11/17/10 at 69. Ms. Schlosberg also objects to the clause that requires the Petitioner to keep its public spaces clear of debris because the Petitioner already does that and the requirement is unnecessary. *Tr.*, 11/17/10 at 70. She also believes that the prohibition against loitering in the MPNA Voluntary Agreement is unenforceable and not a problem in front of the Petitioner's establishment. *Tr.*, 11/17/10 at 70. She believes it is unnecessary for the Voluntary Agreement to require the Petitioner to provide off-street parking. *Tr.*, 11/17/10 at 71. Ms. Schlosberg does not object to the provision regarding the posting of signs but does not

believe it should be a condition of the Petitioner's license. *Tr.*, 11/17/10 at 71. She further believes that references to an agreement with ANC 1D in the Voluntary Agreement should be removed because that agreement was rescinded by the ANC. *Tr.*, 11/17/10 at 71-72. She also stated that the MPNA Voluntary Agreement unnecessarily forbade the Petitioner from selling alcohol to intoxicated individuals because it is already prohibited by law. *Tr.*, 11/17/10 at 72-73. She further added that Item 4 in the Voluntary Agreement does not apply to the Petitioner's license. *Tr.*, 11/17/10 at 72. She also objects to the Voluntary Agreement mandating that the Petitioner participate in alcoholic beverage service training because the Petitioner does more than the normal training. *Tr.*, 11/17/10 at 73. Ms. Schlosberg also believes that Item 7, which prohibits pitchers and specials on alcoholic beverages, is unfair because other establishments in the neighborhood are able to engage in such activities. *Tr.*, 11/17/10 at 73, 91.

19. Ms. Schlosberg testified that she does not approve of the MPNA's activities in the neighborhood. *Tr.*, 11/17/10 at 81. She stated that the MPNA's activities have hurt businesses in the Mount Pleasant neighborhood. *Tr.*, 11/17/10 at 81.

20. Ms. Schlosberg testified that the Hear Mount Pleasant Voluntary Agreement does not restrict the Petitioner's hours. *Tr.*, 11/17/10 at 85. She noted that her organization's Voluntary Agreement with the Petitioner restricted the Petitioner's entertainment hours and included provisions regarding noise abatement. *Tr.*, 11/17/10 at 85. Finally, Ms. Schlosberg testified that she does not oppose the Board vacating the Hear Mount Pleasant Voluntary Agreement. *Tr.*, 11/17/10 at 76-77, 92.

21. Ms. Schlosberg testified that she attempted to join the MPNA and was refused by the organization. *Tr.*, 11/17/10 at 90. According to Ms. Schlosberg, she and her husband mailed a check to the MPNA. *Tr.*, 11/17/10 at 90. However, the letter was "hand returned" by the organization to Ms. Schlosberg's mailbox. *Tr.*, 11/17/10 at 90. She specifically noted that someone other than the United States Postal Service returned the check to her mailbox. *Tr.*, 11/17/10 at 90. Ms. Schlosberg testified that Steve Millar, the President of the MPNA at that time, told her that she and her husband could not join because they did not agree with the MPNA's position regarding music and entertainment on Mount Pleasant Street, N.W. *Tr.*, 11/17/10 at 90.

22. Ms. Schlosberg also testified that she sent another check to MPNA after the Hear Mount Pleasant group was created. *Tr.*, 11/17/10 at 90. She stated that the organization cashed her check but the President of the organization, Ms. Collins, told her she could not work on voluntary agreement issues as she requested. *Tr.*, 11/17/10 at 91.

23. The Petitioner called Ms. Nimia Haydee Vanegas to testify. *Tr.*, 11/17/10 at 95-96. She stated that she has lived in Mount Pleasant for the past 23 years and is the owner of Haydee's Restaurant. *Tr.*, 11/17/10 at 97-98. Ms. Vanegas wants to terminate her Voluntary Agreement with the MPNA because she wants to be able to offer a happy hour at her establishment and take advantage of the extra holiday hours offered under the law. *Tr.*, 11/17/10 at 99. She also noted

that many of the provisions in the MPNA Voluntary Agreement are already covered by the ABC laws. *Tr.*, 11/17/10 at 98.

24. Ms. Vanegas stated that she wants to change many portions of the MPNA Voluntary Agreement. *Tr.*, 11/17/10 at 98. She wants to get rid of Item 7, which limits drink specials and pitchers, because other establishments in Mount Pleasant do not have such restrictions. *Tr.*, 11/17/10 at 98-99. She noted that Marx Café has had dance parties for the past six years. *Tr.*, 11/17/10 at 99. She further noted that the signs required by the Voluntary Agreement confuse her customers because her establishment is the only one that has such signs posted. *Tr.*, 11/17/10 at 102.

25. Ms. Vanegas testified that she engaged in negotiations with the MPNA regarding the MPNA Voluntary Agreement. *Tr.*, 11/17/10 at 101. She stated she attempted to negotiate with the MPNA. *Tr.*, 11/17/10 at 101. She noted that she attended a meeting with the MPNA before they voted to protest the case in order to discuss obtaining a nightclub license and terminating the Voluntary Agreement. *Tr.*, 11/17/10 at 102, 105. According to Ms. Vanegas, the MPNA indicated that it did not want to negotiate a new voluntary agreement. *Tr.*, 11/17/10 at 102.

26. Ms. Vanegas testified that she wants to extend her hours of entertainment. *Tr.*, 11/17/10 at 102-03. She believes that her business will generate more revenue if it is allowed to extend its entertainment hours. *Tr.*, 11/17/10 at 103.

27. Ms. Vanegas believes that the MPNA's position regarding the MPNA Voluntary Agreement is unacceptable. *Tr.*, 11/17/10 at 111. She testified that the MPNA would only allow her to have a happy hour until 7:00 p.m., which is useless because her customers are still working at that time. *Tr.*, 11/17/10 at 111. Ms. Vanegas was aware that the MPNA now supported the use of pitchers at her establishment. *Tr.*, 11/17/10 at 111-12.

28. The Petitioner called Mr. Mario Alas to testify. *Tr.*, 11/17/10 at 113. He stated that he is currently negotiating a Voluntary Agreement with the local ANC. *Tr.*, 11/17/10 at 114. According to Mr. Alas, he attempted to negotiate a Voluntary Agreement with the MPNA that covered all aspects of the Petitioner's desires. *Tr.*, 11/17/10 at 115. However, Mr. Alas claimed that the MPNA was not willing to change its positions. *Tr.*, 11/17/10 at 115. Mr. Alas stated that the ANC meeting he attended discussed the Petitioner's desire for a nightclub license. *Tr.*, 11/17/10 at 116.

29. Mr. Alas stated that he wanted to enter into a Voluntary Agreement with Hear Mount Pleasant and not the MPNA. *Tr.*, 11/17/10 at 120. According to Mr. Alas, the MPNA Voluntary Agreement violated his constitutional rights to play music in his establishment. *Tr.*, 11/17/10 at 121. He stated that the MPNA does not understand how to manage a business and is not familiar with his business. *Tr.*, 11/17/10 at 123.

30. The Petitioner called ANC Commissioner Gregg Edwards to testify. *Tr.*, 11/17/10 at 124. Commissioner Edwards has lived in Mount Pleasant for 36 years. *Tr.*, 11/17/10 at 125. He stated that he is currently the chair of ANC 1D. *Tr.*, 11/17/10 at 125. Commissioner Edwards stated that his ANC has passed at least 40 resolutions regarding MPNA's Voluntary Agreements. *Tr.*, 11/17/10 at 126. He noted that his ANC passed a resolution calling for the abolition of the MPNA Voluntary Agreement on June 15, 2010. *Tr.*, 11/17/10 at 126.

31. Commissioner Edwards testified that the Petition would not have an adverse impact on parking and traffic in Mount Pleasant. *Tr.*, 11/17/10 at 126-27. He stated that less than one half of the households in Mount Pleasant have a car. *Tr.*, 11/17/10 at 127. He estimated that car ownership in Mount Pleasant has declined by 10 percent in the past two years. *Tr.*, 11/17/10 at 128. According to Commissioner Edwards, there are about 4,000 vehicles in the neighborhood. *Tr.*, 11/17/10 at 132. He stated that approximately 2,200 vehicles are parked on private land and 1,800 vehicles utilize street parking. *Tr.*, 11/17/10 at 132. He noted that studies undertaken by the District of Columbia Office of Planning indicated that parking is available until about 6:00 p.m. to 8:00 p.m. and noted that only 40 percent of the parking spots near the rowhouses in the neighborhood are taken. *Tr.*, 11/17/10 at 133. Commissioner Edwards admitted that it is harder to find parking around midnight in Mount Pleasant but that parking may be found if people drive around to find a parking spot. *Tr.*, 11/17/10 at 133. However, Commissioner Edwards stressed that if the Petition is approved, the Petitioner's customers would likely use public transportation and not overburden the community's parking and traffic resources. *Tr.*, 11/17/10 at 138.

32. Commissioner Edwards testified that he believes that the Petition will not adversely impact the peace, order, and quiet of Mount Pleasant. *Tr.*, 11/17/10 at 128. He testified that the traffic created by expanding the Petitioner's entertainment hours will improve the commercial strip's economic viability and discourage gangs from operating in the neighborhood. *Tr.*, 11/17/10 at 128.

33. Commissioner Edwards noted that the demographics of the neighborhood have changed since 1997. *Tr.*, 11/17/10 at 128. According to Commissioner Edwards, there has been a substantial increase in Latino and hobby-oriented businesses. *Tr.*, 11/17/10 at 129. He also noted that the population of the African-American community in Mount Pleasant has decreased significantly and the Mount Pleasant Latino community has begun to decrease. *Tr.*, 11/17/10 at 130. He stated that the population of young professionals, ages 25 to 35, have increased. *Tr.*, 11/17/10 at 130. Finally, he noted that there are approximately 850 single family dwellings in Mount Pleasant and three quarters of the population live in apartments and mostly rent. *Tr.*, 11/17/10 at 130.

34. Commissioner Edwards testified that the meeting that both the Petitioner and the MPNA attended had no formal agenda. *Tr.*, 11/17/10 at 140. He stated that the meeting was informal and meant to provide a forum to discuss topics of interest to the neighborhood with experts. *Tr.*, 11/17/10 at 140.

35. Commissioner Edwards believes that the MPNA did not negotiate with the Petitioner in good faith regarding the MPNA Voluntary Agreement. *Tr.*, 11/17/10 at 145. He believes that the MPNA unreasonably refused to compromise with the Petitioner and took advantage of its position of power. *Tr.*, 11/17/10 at 145-46.

36. The Protestant presented its case through the testimony of one witness, Sam Broeksmit. *Tr.*, 11/17/10 at 148. Mr. Broeksmit is a board member of the MPNA. *Tr.*, 11/17/10 at 148. He noted that the MPNA supports granting the Petitioner another hour of entertainment and supports allowing the Petitioner to utilize pitchers. *Tr.*, 11/17/10 at 151. As a result, Mr. Broeksmit believes that the Petitioner did not negotiate in good faith and simply wants to terminate the Voluntary Agreement. *Tr.*, 11/17/10 at 151. He also contended that the Petitioner did not show that conditions in the neighborhood have changed to such an extent that it warrants terminating the MPNA Voluntary Agreement. *Tr.*, 11/17/10 at 153. Mr. Broeksmit asserted that the Hear Mount Pleasant Voluntary Agreement does not protect against all adverse impacts. *Tr.*, 11/17/10 at 153. Finally, Mr. Broeksmit further argues that the Petitioner has not demonstrated that its Petition is appropriate. *Tr.*, 11/17/10 at 160. He noted that all the Petitioner has demonstrated is that some people desire “loud music until closing time.” *Tr.*, 11/17/10 at 160. Finally, Mr. Broeksmit noted that the Petitioner’s establishment is located in a commercial strip surrounded by residences. *Tr.*, 11/17/10 at 162.

37. The Board took administrative notice of an analysis done in 2009 by PES/Retail Compass on behalf of the District of Columbia Office of Planning, titled: “Mt. Pleasant Market Analysis.” *Tr.*, 11/17/10 at 174-75. The report stated that “Mt. Pleasant Street does not have the dimensions or the capacity to support destination-oriented traffic.” *Mt. Pleasant Market Analysis*, pg. 20. The report further noted that the neighborhood has parking concerns and there is limited space for new parking construction. *Mt. Pleasant Market Analysis*, pg 20. The report concluded that “resources [in Mt. Pleasant] will be better allocated to enhancing and improving the neighborhood-serving elements of this retail district.” *Mt. Pleasant Market Analysis*, pg 20.

38. The Board took administrative notice of a report written in 2009 by Daniel Consultants, Inc., for the District Department of Transportation (DDOT), titled: “Mt. Pleasant Transportation Study.” *Tr.*, 11/17/10 at 163. The report projected that the delays at the intersection of 16th Street, N.W., and Irving Street, N.W., and the intersection of 16th Street, N.W., and Lamont Street, N.W., will degrade to between 55 seconds and 80 seconds per vehicle over the next 10 years during the morning peak traffic period and over the next 20 years during the afternoon peak traffic period. *Mt. Pleasant Transportation Study*, I-53.

39. The Board took administrative notice of a report written in 2008 by The Urban Institute for the District of Columbia Office of Planning, titled: “State of Washington, D.C.’s Neighborhoods.” *Tr.*, 11/17/10 at 171. The report notes that Mount Pleasant, defined as Cluster 2 in Ward 1, has the third highest concentration of public school and public charter school students in the District of Columbia. *State of Washington, D.C.’s Neighborhoods*, pg. 48. The report also noted that 11.5 percent of Mount Pleasant’s married couples had children and that 21.8 percent of the population of Mount Pleasant was comprised of children in 2000. *State of*

Washington, D.C.'s Neighborhoods, A-39, A-42. The report also stated that 49.8 percent of the households in Mt. Pleasant are nonfamily households. *State of Washington, D.C.'s Neighborhoods, A-41.* Finally, the report noted that the birthrate in Washington, D.C., in 2005 was 13.9 percent but the birthrate in Mount Pleasant was 17.6 percent, approximately 26 percent higher than the city's average birthrate. *State of Washington, D.C.'s Neighborhoods, A-78.* The Board also took administrative notice of the Mount Pleasant Street Commercial Revitalization Strategy. *Tr.*, 11/17/10 at 176.

40. Mr. Broeksmit summarized the MPNA's position regarding the MPNA Voluntary Agreement entered into with the Petitioner. *Tr.*, 11/17/10 at 183. MPNA believes that granting the Petitioner the maximum entertainment hours permitted by law is inappropriate for Mount Pleasant. *Tr.*, 11/17/10 at 183. The MPNA supports the hours of entertainment in the Hear Mount Pleasant Voluntary Agreement. *Tr.*, 11/17/10 at 183, 185. The MPNA also believes that the Petitioner should now be allowed to utilize pitchers and a happy hour of "moderate duration." *Tr.*, 11/17/10 at 184. The MPNA also supports the removal of minor provisions and supports clarifying the Voluntary Agreement further. *Tr.*, 11/17/10 at 184. The MPNA also supported eliminating Item D, which mandated that the Petitioner support community organizations, because it is unenforceable. *Tr.*, 11/17/10 at 187. The MPNA further believes that Item E, which instructs the Petitioner to "[u]ndertake a leadership role in the . . . business community" is unenforceable and should be eliminated from the MPNA Voluntary Agreement. *Tr.*, 11/17/10 at 188. The MPNA also believes that Item G, which instructs the Petitioner to keep the restaurant free of debris, could be clarified further. *Tr.*, 11/17/10 at 188. The MPNA also believes that Item H could be modified to say that "loitering should be discouraged in front of the establishment" and should instruct the licensee to place a sign that discourages loitering in the establishment's window. *Tr.*, 11/17/10 at 189-90.

41. Mr. Broeksmit testified that the Board of Directors is currently running the MPNA. *Tr.*, 11/17/10 at 197. The position of President in the organization is currently vacant. *Tr.*, 11/17/10 at 196.

42. Mr. Broeksmit testified that the MPNA never refused to negotiate with the Petitioner regarding amending the MPNA Voluntary Agreement at a previous ANC meeting. *Tr.*, 11/17/10 at 200. He stated that at the ANC meeting he was asked whether he would negotiate a new agreement that would attach to a nightclub license. *Tr.*, 11/17/10 at 200. According to Mr. Broeksmit, because MPNA believes that nightclubs are totally inappropriate for Mount Pleasant, he rejected such a Voluntary Agreement. *Tr.*, 11/17/10 at 200. He stated that the MPNA would support revising the MPNA Voluntary Agreement if the Petitioner applied for a tavern license. *Tr.*, 11/17/10 at 202.

43. Mr. Broeksmit testified that he has lived in Mount Pleasant since 2002. *Tr.*, 11/17/10 at 202. He currently lives on Irving Street, N.W. *Tr.*, 11/17/10 at 203. He told the Board that he currently has off-street parking. *Tr.*, 11/17/10 at 203. He noted that some of his neighbors have off-street parking and others do not. *Tr.*, 11/17/10 at 203.

CONCLUSIONS OF LAW

44. Pursuant to D.C. Official Code §§ 25-313(a) (2001), 23 DCMR § 400.1(a) (2008), and 25-446(d)(4)(C) (Supp. 2010), a Petitioner must demonstrate to the Board's satisfaction that the establishment for which a Petition to Terminate a Voluntary Agreement and request to extend an establishment's entertainment hours has been filed are appropriate for the neighborhood in which it is located. The Protestant challenged the Petition under §§ 25-602(a) and 25-446, arguing that the Petition would adversely impact the peace, order, and quiet and residential parking and pedestrian safety of the neighborhood. The Board concludes that the Petitioner has demonstrated that both of its requests are appropriate and approves the Petition.

45. The Board clarifies its ruling regarding the MPNA's submission of documentary evidence. The Board notes that it has taken administrative notice of the documents submitted by the MPNA during the Protest Hearing, which are discussed in paragraphs 38 through 40 of this Order. The Board had rejected the MPNA's submission of documents on the record because the MPNA's description of them in the Protest Information Form was too vague to provide notice to the Board. Nevertheless, because the documents that the MPNA wished to submit are a matter of public record, the Board takes administrative notice of their contents. As such, the records submitted by the MPNA are entered into evidence and have been fully considered by the Board.

46. The Board also recognizes that pursuant to D.C. Official Code § 1-309.10(d) (Supp. 2010) and D.C. Official Code § 25-609 (2001), 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. In order to comply with the great weight requirements, the Board must address ANC 1D's resolution passed on June 15, 2010, which argues that the Board should terminate the MPNA Voluntary Agreement because: ANC 1D wants to enter into voluntary agreements that encourage conflict resolution and "responsible hospitality" principles; the MPNA Voluntary Agreement is obsolete based on demographic and income changes to the neighborhood; and the MPNA Voluntary Agreement merely repeats restrictions already contained in the ABC laws. *See ABRA Protest File 10-PRO-00113*. The Board agrees with ANC 1D and for the reasons stated below, grants the Petition in its entirety.

47. The procedures to terminate a voluntary agreement are described in D.C. Code § 25-446 (2001). In order to terminate a voluntary agreement, a party'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 amend or terminate a voluntary agreement shall be given" in accordance with the notice provisions of §§ 25-421 through 25-423." § 25-446(d)(3). A party seeking to amend a voluntary agreement must make "a diligent effort to locate all other parties to the voluntary agreement" or, if located and the party is the Petitioner, the party must negotiate an amendment in "good faith." § 25-446(d)(4)(A)(i). A party seeking an amendment must also show that the amendment is

needed because there exist “circumstances beyond the control of the Petitioner or is due to a change in the neighborhood where the Petitioner’s establishment is located.” § 25-446(d)(4)(B). Finally, “[t]he Board may approve a request by fewer than all parties to amend or terminate a voluntary agreement for good cause shown” if the party seeking “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).

48. The Protestant has 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 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. Consequently, the Board finds that the Petitioner does not have to satisfy § 25-446(4)(A)(i)-(ii) or § 25-446(4)(B) in order to terminate the MPNA Voluntary Agreement. Arguments regarding whether the parties engaged in good faith negotiations or changing circumstances in the neighborhood are irrelevant to this proceeding.

49. As indicated in the Findings of Fact above, the Petitioner properly applied for the termination of the MPNA Voluntary Agreement after four years from the date the Voluntary Agreement was originally approved by the Board and during its renewal period. The Board also notes 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).

50. The Board further finds that terminating the MPNA Voluntary Agreement will not have an adverse impact on Mount Pleasant, especially when the Petitioner will still be bound by the Hear Mount Pleasant Voluntary Agreement. As indicated by the Petitioner, other establishments in the neighborhood are allowed to offer drink discounts, happy hours, and entertainment. The Board agrees with the Petitioner that there is no indication that these activities are having a negative impact on Mount Pleasant. Further, the Board finds that Items H and J, which prohibit loitering and require the Petitioner to post signs, are vague and lack clear enforcement guidelines. Further, the ABC laws already regulate trash and litter, making Item G unnecessary. D.C. Code 25-726 (2001). As such, in light of the Petitioner’s history of only minor recordkeeping related violations, the Board is convinced that the Petitioner can offer happy hours, drink specials, and entertainment and forgo putting up signs, without adversely impacting the peace, order, and quiet and residential parking and pedestrian safety of the neighborhood.

51. The Protest Hearing emphasized to the Board that the additional protection afforded to the community by the MPNA Voluntary Agreement is highly dubious. During the Protest Hearing, the MPNA proffered that portions of the MPNA Voluntary Agreement could be eliminated and that other portions should be clarified. Taking into account this lukewarm defense of the MPNA Voluntary Agreement, coupled with the fact that the majority of the provisions are vague and merely repeat the law, the Board is hard pressed to justify keeping it in

place when the MPNA Voluntary Agreement will only be replaced by the Hear Mount Pleasant Voluntary Agreement and the Petitioner has the support of ANC 1D.

52. Indeed, the only major difference between the MPNA Voluntary Agreement and the Hear Mount Pleasant Voluntary Agreement is that the Hear Mount Pleasant Voluntary Agreement allows the Petitioner to apply for greater entertainment hours. Based on the testimony and documentary evidence provided by the MPNA, the Board recognizes that Mount Pleasant is a highly residential neighborhood. Nevertheless, the Board has a clear precedent of allowing ABC establishments to operate near residential zones. *See, e.g., Board Order No. 2010-548 amended by Board Order 2010-603; Board Order No. 2010-595.* Certainly, the Board is concerned about the impact of the establishment on its residential neighbors. But, here, where residents are protected by the noise provisions of D.C. Code § 25-725, residents have little to fear from entertainment at the Petitioner's establishment. If noise from the Petitioner's establishment is heard in nearby residences, this would result in a violation and lead to remedial action by the Board. *See D.C. Code § 25-725 (2001).*

53. Finally, the Board is not convinced that granting the Petition will adversely impact residential parking and pedestrian safety in Mount Pleasant. Although Mount Pleasant has issues with residential parking, there is no evidence that the Petitioner will contribute to this problem. The Petitioner is already open for business and the current hours of operation and the hours in which it sells, serves, or permits the consumption of alcoholic beverages on its premises will not be changed. As a result, there is no reason to believe that terminating the MPNA Voluntary Agreement will further exacerbate residential parking and traffic safety issues in Mount Pleasant.

54. Based on the above, the Board is convinced that terminating the MPNA Voluntary Agreement will have no impact on peace, order, and quiet or residential parking and pedestrian safety in the neighborhood.

55. For the same reasons that the Board terminated the MPNA Voluntary Agreement, the Board also grants the Petitioner's request to extend its entertainment hours to correspond with its hours of sale and service of alcoholic beverages. The Board finds that granting the Petition will not have an adverse impact on peace, order, and quiet or residential parking and pedestrian safety in the neighborhood. First, even though Mount Pleasant is a highly residential area, as stated above, D.C. Code § 25-725, which prohibits licensees from generating noise that can be heard inside residentially zoned buildings, provides sufficient protection. § 25-725. Second, the community can still rely on the Hear Mount Pleasant Voluntary Agreement, which is still in effect even though the MPNA Voluntary Agreement will no longer be in force. Third, other ABC establishments in Mount Pleasant offer entertainment late into the night and have not had an adverse effect on the community; making it unlikely that the Petitioner, if it follows the ABC laws, will have a negative impact on the community. Finally, it is hard to imagine the Petitioner having an impact on residential parking and traffic safety in the neighborhood when the Petitioner has already been open for business for many years and is maintaining its current hours of operation and the hours in which it sells, serves, or permits the consumption of alcoholic beverages on its premises. Thus, increasing the Petitioner's hours of entertainment is not a

significant change. Therefore, pursuant to §§ 25-313(a), 25-446(d)(4)(C), and 23 DCMR § 400.1(a), the Board grants the Petition.

ORDER

Therefore, it is hereby **ORDERED** on this 17th day of February 2011, that the Petition to Terminate a Voluntary Agreement filed by NHV Corporation, Inc., t/a Haydee's Restaurant (Petitioner), at premises 3102 Mount Pleasant Street, N.W., Washington, D.C., is hereby **GRANTED**.

- (1) The Petitioner's hours of entertainment will now be from 11:00 a.m. to 1:30 a.m., Sunday through Thursday, and 11:00 a.m. to 2:30 a.m., Friday and Saturday.
- (2) Copies of this Order shall be sent to the Petitioner and the Mount Pleasant Neighborhood Alliance.

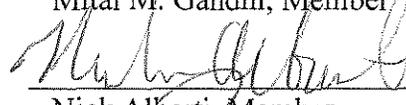
District of Columbia
Alcoholic Beverage Control Board



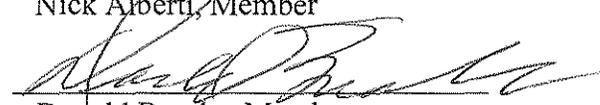
Charles Brodsky, Chairperson



Mitjal M. Gandhi, Member



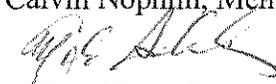
Nick Alberti, Member



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, 1250 U Street, N.W., 3rd Floor, 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).