THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

LMW, LLC t/a Little Miss Whiskey's Golden Dollar	Case Number: License Number:	14-PRO-00003 79090
	Order Number:	2014-442
Petition to Terminate a Settlement Agreement		
at premises 1104 H Street, N.W. Washington, D.C. 20002		

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Mike Silverstein, Member
Hector Rodriguez, Member
James Short, Member

ALSO PRESENT: LMW, LLC, t/a Little Miss Whiskey's Golden Dollar, Petitioner

Matthew LeFande, Counsel, on behalf of the Petitioner

Jay Williams, Commissioner, on behalf of Advisory Neighborhood Commission (ANC) 6A, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER GRANTING ANC 6A'S MOTION FOR JUDGEMENT AS A MATTER OF LAW

INTRODUCTION

The Alcoholic Beverage Control Board (Board) denies the Petition to Terminate a Settlement Agreement filed by LMW, LLC, t/a Little Miss Whiskey's Golden Dollar, (hereinafter "Petitioner" or "LMW") for failing to make a prima facie case that it satisfies District of Columbia (D.C.) Official Code §§ 25-446(d)(4)(B) and 25-446(d)(4)(C). The record in this matter shows that LMW has not provided sufficient evidence to justify the extreme

remedy of stripping ANC 6A of all of its rights under the Settlement Agreement. Therefore, the Petition is denied.

Procedural Background

LMW filed a timely Petition to Terminate a Settlement Agreement (Petition) requesting that the Board terminate its Settlement Agreement entered into with Advisory Neighborhood Commission (ANC) 6A. In its Petition, LMW argues that it satisfies the criteria for termination for the following reasons:

1. LMW argues that it contacted ANC 6A, but the ANC refused to meet, *Petition* (Questions 13-16);

2. LMW argues that a change in circumstances beyond its control occurred, because (a) the ANC is in material breach of the settlement agreements by giving an unfair competitive advantage to other establishments, and (b) the agreement is redundant and results in the establishment being charged twice for the same offense, *Petition* (Question 17);

3. LWM argues that terminating the agreement will not adversely impact the community, because (a) the agreement merely repeats the law; (b) the establishment does not have an adverse impact on the community; (c) the agreement unfairly limits LMW; and (d) the agreement results in LMW being charged twice for the same offense; *Petition* (Question 18).

The Board found that the Petition satisfied D.C. Official Code § 25-446(d)(2), because it was filed during the Petitioner's renewal period and after four years from the date the Board originally approved the Settlement Agreement at issue in this matter. The Petition also contained the affidavit required by § 25-446(d)(5). The Alcoholic Beverage Regulation Administration (ABRA) then provided notice to the parties to the settlement agreement and the public in accordance with District of Columbia (D.C.) Official Code § 25-446(d)(3).

Subsequently, a protest against the Petition was filed in accordance with District of Columbia (D.C.) Official Code §§ 25-601(1) and 25-602. *ABRA Protest File No. 14-PRO-00003*. According to the Petition, ANC 6A opposes the Petition on the grounds of peace, order, and quiet of the surrounding neighborhood. *Letter from David Holmes, Chair, Advisory Neighborhood Commission (ANC) 6A*, 1 (Dec. 14, 2014).

The parties came before the Board's Agent for a Roll Call Hearing on February 24, 2014, and the Protestants were granted standing to protest the Petition. The parties then came before the Board for a Protest Status Hearing on May 1, 2014. The Protest Hearing in this matter occurred on October 1, 2014.

Based on the initial protest letter, the Board may only grant the Petition if the Board finds that the request will not have a negative impact on peace, order, and quiet in the area located within 1,200 feet of the establishment and otherwise satisfies D.C. Official Code § 25-446.

Letter from David Holmes, Chair, Advisory Neighborhood Commission (ANC) 6A, 1 (Dec. 14, 2014); *Mallof v. D.C. Alcoholic Beverage Control Bd.*, 43 A.3d 916, 919 (D.C. 2012).

FINDINGS OF FACT

The Board, having considered the evidence, the testimony of the witnesses, the arguments of the parties, and all documents comprising the Board's official file, makes the following findings:

I. Protest Hearing

1. Only Alcoholic Beverage Regulation Administration (ABRA) Investigator Mark Brashears testified during the hearing. *Transcript* (*Tr.*), October 1, 2014 at 21. At the end of the investigator's presentation, LMW declined to present witnesses or exhibits as part of its case-in-chief. *Id.* at 45.

II. Background

2. LMW is located at 1104 H Street, N.W., Washington D.C. *ABRA Licensing File No. 79090*. The Board approved the settlement agreement executed by LMW and ANC 6A on July 31, 2008. *In re LMW, LLC, t/a Little Miss Whiskey's Golden Dollar*, Board Order No. 2008-240 (D.C.A.B.C.B. Jul. 31, 2008) (Order on Voluntary Agreement).

III. Settlement Agreement

3. The Preamble of the Settlement Agreement states,

> ANC 6A acknowledges that this Cooperative Agreement shall be presented to all Class CT applicants within the boundaries of ANC 6A. The community and merchants have agreed that it is in all the parties best interests to standardize the requirements for the operations of [on premise licensees] within the boundaries of ANC 6A. To the greatest extent possible, the ANC will not insist upon or allow any significant changes to this Cooperative Agreement that will unfairly benefit . . . any [other] individual applicant or establishment within the ANC . . . ."

Id. at 1 (Preamble).

Further, § 4(d) states,

> If residents have no noise complaints for a three month period following opening of the establishment and the licensee has a record of good conduct during this time period, the hours for service on the patio may be extended to be consistent with the licensee's normal business hours.

Id. at § 4(d).

4. The Settlement Agreement contains no express clause converting the Preamble or recitals into operative provisions of the agreement. *See generally In re LMW, LLC, t/a Little Miss Whiskey's Golden Dollar*, Board Order No. 2008-240.

5. The agreement provides the following affirmative obligations on LMW beyond the minimum requirements of Title 25 of the D.C. Official Code: (1) LMW must clean the exterior portion of the establishment before business hours and between 5:00 p.m. and 8:00 p.m., *id.* at § 1(a); (2) LMW must hire a trash removal service, *id.* at § 1(b); (3) LMW must utilize "rodent-proof dumpsters" and ensure that its bins remain fully closed, *id.* at § 1(c); (4) LMW must remove graffiti from the establishment promptly, *id.* at § 1(e);[1] (5) LMW cannot allow patrons to bring their own alcohol into the establishment,[2] *id.* at § 3(c); (6) LMW cannot participate in pub crawls,[3] *id.* at § 3(d); (7) LMW must ensure that all license holders and employees attend an ". . . alcoholic beverage server training course/seminar,"[4] *id.*, at § 3(f); (8) LMW must post notices advising patrons not to engage in littering, loitering, noisy behavior, or contribute to panhandlers, *id.* at § 3(g)(iii),[5] (iv); (9) LMW must maintain an incident log of all police calls made by the establishment,[6] *id.* at § 3(h)(ii); (10) LMW shall ". . . maintain high-intensity flood-lights on the exterior of its premises [in order to light the] . . . abutting alleyway from dusk until dawn," *id.* at § 3(k); (11) LMW may not offer live or recorded music on the patio,[7] *id.* at § 4(c)(2); (12) LMW must enclose the patio with a seven foot high fence, *id.* at § 4(c)(3); (13) LMW must post two signs reminding guests to speak normally, *id.* at § 4(c)(4); (14) LMW must incorporate framing and trellises that may be covered with ". . . sound-baffling awning and solid screens," *id.* at § 4(c)(6); and (15) the patio shall tightly plant trees near the rear fence, use potted plants, and install no less than two fountains in the patio, *id.* at §§ 4(c)(7)-(9).

6. LMW did not submit or attempt to submit extrinsic evidence related to the interpretation of the Settlement Agreement. Therefore, extrinsic evidence that could guide the Board's interpretation of the agreement is absent from the record.

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[1] Items (1) through (4) of this list have more extensive and specific requirements than D.C. Official Code § 25-726.

[2] Without this provision, LMW could accommodate patrons wishing to engage in bring-your-own-alcohol (BYOB) service, which is authorized by 23 DCMR § 717 (West Supp. 2014).

[3] Without this provision, LMW could participate in pub crawls, which are authorized by 23 DCMR § 712 (West Supp. 2014).

[4] Without this provision, only LMW's licensed managers would be subject to mandatory training pursuant D.C. Official Code § 25-120(d).

[5] This requirement goes beyond the posting requirement of D.C. Official Code § 25-711.

[6] This provision is more specific than the incident log requirement described in D.C. Official Code § 25-402(d)(3)(E).

[7] Establishments may generally play recorded music as a matter of right. D.C. Official Code § 25-101(21A); 23 DCMR § 1001 (West Supp. 2014).

IV. Testimony of ABRA Investigator Mark Brashears

7. Alcoholic Beverage Regulation (ABRA) Investigator Mark Brashears drafted the Protest Report submitted into the record. *Protest Report*, at 1. The premises occupied by LMW are zoned C-2-A. *Id.* at 3.

8. The report indicates that 23 licensed establishments are located within 1,200 feet of LMW. *Id.* at 4. Sixteen of these establishments have entered into settlement agreements, while 8 of the 16 have summer garden endorsements. *Protest Report*, at 4-5. Eleven of 16 licensees hold a Retailer's Class CT License. *Id.* Eight of the 11 tavern license holders have a settlement agreement. *Id.* Five of the 8 tavern license holders with settlement agreements have summer garden endorsements. *Id.* Two of the 5 tavern license holders with settlement agreements have the same summer garden hours as LMW; one has a summer garden permit that ends earlier than LMW; one establishment has no hours listed in the settlement agreement; however, the establishment's summer garden hours end earlier than LMW, while one establishment—Twelve—has greater summer garden hours. *Id.* at 5.

9. The Biergartenhause and Red Rocks cited by the owner in his conversation with Investigator Brashears are not located in the geographic area covered by the protest. *Id.* at 2, 4-5.

10. The Protest Report discusses the establishment's investigative history. *Id.* at 9. Ten calls for police service occurred at the establishment's address between November 19, 2013, and May 6, 2014. *Id.* The establishment also paid a $500 fine for violating its settlement agreement in 2012 and received a warning in 2014 for failing to have proper window lettering. *Id.*

11. During his investigation, the investigator monitored the establishment. *Transcript* (*Tr.*), October 1, 2014 at 26. No violations were observed during this time. *Id.*

12. Investigator Brashears has only been employed by ABRA for one year. *Id.* at 30. He did not discuss the nature or character of the neighborhood at the time the parties executed the agreement. Thus, the record is devoid of evidence on this point.

V. Good Faith Negotiations

13. The owner of LMW made diligent efforts to contact ANC 6A in order to negotiate an amendment or termination of the agreement. *Protest Report*, at Exhibit 1, Page 2. The owner contacted an ANC 6A Commissioner J. Omar Mahmud to request negotiations, as well as the Chair of ANC 6A and ANC Commissioner Jay Williams. *Id.* The owner did not receive a response; therefore, the ANC refused to meet or negotiate a new agreement. *Id.* The ANC does not dispute LMW's contention that it complied with D.C. Official Code § 25-446(d)(4)(A)(i) and (ii). *Tr.*, 10/1/14 at 47.

VI. Change in Circumstances

14. LMW did not submit evidence showing that the ANC 6A materially breached the agreement or otherwise engaged in bad faith. Therefore, the record is devoid of evidence on this point.

15. LMW did not submit evidence indicating how many establishments are and are not subject to the conditions described in Paragraph 5. *Supra*, at ¶ 5. Therefore, the record is devoid of evidence on this point.

16. LMW did not submit any other evidence related to circumstances beyond the control of LMW since the execution of the Settlement Agreement.

17. LMW did not submit evidence related to the state or character of the neighborhood at the time the agreement was executed by the Board. Therefore, the record is devoid of evidence on this point.

18. LMW did not submit evidence that it provided written notice to ANC 6A indicating that it believed the ANC was in violation of the agreement in accordance with § 8(a) of the agreement. *In re LMW, LLC, t/a Little Miss Whiskey's Golden Dollar*, Board Order No. 2008-240 at § 8(a).

19. LMW did not cite any current laws that conflict with the terms of the Settlement Agreement. LMW also did not cite any laws that the Settlement Agreement merely repeats.

VII. Adverse Impacts

20. LMW did not submit evidence regarding its efforts to soundproof the interior and exterior portions of the establishment; therefore, the record is devoid of evidence on this point.

21. LMW did not submit evidence related to the proximity of residents and residential zones to the establishment; therefore, the record is devoid of evidence on this point.

22. LMW did not submit evidence related to how it intends to operate the establishment in the future; therefore, the record is devoid of evidence on this point.

CONCLUSIONS OF LAW

23. At the close of LMW's case, the Board granted ANC 6A's motion for judgment as a matter of law in its favor. *Tr.*, 10/1/2014 at 47.

Standard of Review

24. A motion for judgment as a matter of law requires the Board to determine that ". . . no genuine issue of material fact exists . . . ." *Urban Dev. Solutions, LLC v. D.C.*, 992 A.2d 1255, 1266 (D.C. 2010). The Board may grant the motion when all evidence and inferences ". . .

viewed in the light most favorable to the non-moving party, support but one reasonable conclusion favorable to the moving party . . . ." *Id.* In describing this standard, the court has stated that the non-moving party cannot rely on conclusory allegations, metaphysical doubt as to the material facts, or a mere scintilla of evidence to protect itself from dismissal. *Id.* Consequently, when presented with a motion for judgment as a matter of law, the Board must grant the motion when an applicant fails to establish a prima facie case. *Id.*

Discussion

25. Under D.C. Official Code § 25-446(d)(1), "[u]nless a shorter term is agreed upon by the parties, a settlement agreement shall run for the term of a license, including renewal periods, unless it is terminated or amended in writing by the parties and the termination or amendment is approved by the Board. D.C. Official Code § 25-446(d)(1). Accordingly,

> [t]he Board may approve a request by fewer than all parties to amend or terminate a settlement agreement for good cause shown if it makes each of the following findings based upon sworn evidence:
>
> (A)(i) The applicant seeking the amendment has made a diligent effort to locate all other parties to the settlement agreement; or
>
> (ii) If non-applicant parties are located, the applicant has made a good-faith attempt to negotiate a mutually acceptable amendment to the settlement agreement;
>
> (B) The need for an amendment is either caused by circumstances beyond the control of the applicant or is due to a change in the neighborhood where the applicant's establishment is located; and
>
> (C) The amendment or 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.

D.C. Official Code § 25-446(d)(4)(A)-(C).

26. The key case interpreting § 25-446 is *Mallof.* There, the court stated that the Board cannot terminate a settlement agreement unless it makes all three findings required by subparagraphs (A) through (C) of § 25-446(d)(4). *Mallof v. D.C. Alcoholic Beverage Control Bd.*, 43 A.3d 916, 923 (D.C. 2012).

I. THE BURDEN OF PROOF IN THIS MATTER LIES WITH LMW, BECAUSE IT IS THE PROPONENT OF THE TERMINATION REQUEST.

27. At the outset, the Board rejects LMW's argument that the burden of proof lies with the ANC. *Tr.*, 10/1/14 at 5. According to the D.C. Administrative Procedure Act (DCAPA), "[i]n

contested cases, except as may otherwise be provided by law . . . the proponent of a rule or order shall have the burden of proof." D.C. Official Code § 2-509(b). The Board interprets the DCAPA as placing the ultimate burden of production and persuasion on the party that requests the termination of the settlement agreement. *Mallof v. D.C. Alcoholic Beverage Control Bd.*, 43 A.3d 916, 925 (D.C. 2012) (Schwelb, Senior J., concurring) (agreeing with the majority that the Board's interpretation was incorrect because, among other reasons, "[i]f [the court] were to adopt the Board's interpretation, the party seeking termination would not be required to present evidence to support *each* of the three findings . . . .") This interpretation is also consistent with the Board's administrative case law. *In re Multi-Management, Inc., t/a Habana Village*, Case Number 13-PRO-00094, Board Order No. 2014-033, ¶ 41 (D.C.A.B.C.B. Feb. 5, 2013) (saying that in a termination proceeding ". . . the burden is on the Petitioner . . . ."); *In re Park Place, Inc., t/a The Park Place at 14th*, Case Nos. 13-PRO-00153, 14-PRO-00005, Board Order No. 2014-250, ¶ 36 (D.C.A.B.C.B. Jul. 16, 2014).

28. Here, LMW requested termination of its settlement agreement; not the ANC. Therefore, LMW is the proponent and carries the burden of proof on all three factors outlined in § 25-446(d)(4). As such, LMW has the burden of making a prima facie case its termination request before it may shift the burden to the ANC.

II. LMW FAILED TO MAKE A PRIMA FACIE CASE THAT IT SATISFIED § 25-446(d)(4)(B).

29. The Board finds that LMW failed to demonstrate that it satisfies § 25-446(d)(4)(B) for four reasons. First, LMW has failed to show that the Preamble of the Settlement Agreement constitutes an operative portion of the agreement; therefore, ANC 6A cannot be held in breach of the agreement. Second, even if operative, ANC 6A is not in breach of the agreement based on the plain language of the Preamble. Third, even if it is presumed that LMW has a positive investigative history, this fact is not sufficient to satisfy § 25-446(d)(4)(B)'s requirement to show a change in circumstance, change in the neighborhood, or need. Fourth, § 25-446.01(10) authorizes the placement of conditions in agreements that merely repeat the law; as a result, the mere fact that LMW's agreement contains terms that repeat the law does not constitute sufficient grounds to terminate the agreement. And fifth, LMW failed to make a prima facie case that the Settlement Agreement causes it to suffer from unfair competition or other circumstances beyond its control.

a. The language Preamble of LMW's Settlement Agreement constitutes nonbinding recitals.

30. LMW is incorrect that the Preamble of the Settlement Agreement forms an operative and binding part of the agreement. *Petition* (Question 17).

31. LMW's settlement agreement must be interpreted according to the principles of contract law. *North Lincoln Park Neighborhood Ass'n v. District of Columbia Alcoholic Beverage Control Bd.*, 727 A.2d 872, 875 (D.C. 1999); *Letter from Peter J. Nickles, Attorney General, Office of the Attorney General of the District of Columbia, to Fred Moosally, General Counsel*, Alcoholic Beverage Regulation Administration, 3-4 (Dec. 18, 2008). While the Board could not

find a District of Columbia Court of Appeals case related to the interpretation of recitals, multiple authorities agree that "[p]reliminary recitals of an agreement do not become binding obligations unless so referred to in the operative portion of the instrument as to show a design they should form a part of it." *Illinois Hous. Dev. Auth. v. M-Z Const. Corp.*, 441 N.E.2d 1179, 1189 (Ill. App. Ct. Sept. 2, 1982) *citing Wall v. Chicago Park Dist.*, 378 Ill. 81, 92, 37 N.E.2d 752, 757-58 (Ill. 1941); *Grynberg v. F.E.R.C.*, 71 F.3d 413, 416 (D.C. Cir. 1995) *citing Abraham Zion Corp. v. Lebow,* 761 F.2d 93, 103 (2d Cir. 1985); *see also* § 8.02 WHEREAS CLAUSES, SAICD s 8.02 ("a recital or preamble is presumed to have no substantive effect on the instrument, but is merely intended by the drafter to be introductory or precatory").[8]

32. Here, the operative portion of the agreement contains no express language indicating that the Preamble or recitals should be deemed operative. *Supra*, at ¶ 4. Therefore, LMW cannot sustain the argument that the Preamble is operative, which means that ANC 6A cannot be held in material breach of the agreement.

b. Even if the Preamble were operative, LMW cannot establish that ANC 6A is in material breach of the Preamble.

33. Even if the Preamble, were deemed operative, the record does not demonstrate that ANC 6A is in material breach of the Settlement Agreement.

34. The Board generally construes a settlement agreement "within its four corners and generally . . . enforce[s] it as written." *Prince Const. Co., Inc. v. District of Columbia Contract Appeals Bd.*, 892 A.2d 380, 385 (D.C. 2006). "To prevail on a claim of breach of contract, a party must establish (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach. *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009).

35. The Preamble of the Settlement Agreement states, "*To the greatest extent possible*, the ANC will not insist upon or allow any significant changes to this Cooperative Agreement that will unfairly benefit . . . any [other] individual applicant or establishment within the ANC . . . ." *In re LMW, LLC, t/a Little Miss Whiskey's Golden Dollar*, Board Order No. 2008-240 at Preamble (emphasis added).

36. Even if it could be argued that the Preamble is operative, on its face, the Preamble does not require the ANC to enter into the same agreement with every licensee within in its boundaries. Instead, the language, "to the greatest extent possible" shows that the parties contemplated that (1) the ANC cannot control the behavior of other licensees; (2) other licensees could decline any settlement agreement offered by the ANC; and (3) that the ANC would have to engage in individual negotiations with licensees not bound by the agreement, which could create

[8] It has also been said that "[i]f the drafter wishes one or another of the recitals to be an enforceable term of the contract, this should in some fashion be reflected in an undertaking in the body of the contract." § 2.03[B] Recitals, CCSDN s 2.03[B]. "One common method is to include the following provision in the agreement: All terms of this Settlement Agreement are contractual and not a mere recital." *Id.*

differentiation among agreements. Consequently, at best, the Preamble merely requires the ANC to make a good faith effort to extend the terms of the agreement to other licensees.

37. With this understanding in mind, the mere fact that some licensees have different outdoor patio hours is not sufficient to demonstrate bad faith on the part of the ANC. Here, LMW pointed to three establishments with later hours in the ANC; yet, the record shows four other taverns with at least equal or earlier outdoor patio hours. *Supra*, at ¶ 8. Consequently, LMW's outdoor seating hours are comparable to several other taverns in the neighborhood. *Supra*, at ¶¶ 14, 18. The Board also notes that LMW has not presented any other evidence showing that the ANC has acted in bad faith or otherwise acted unreasonably in seeking settlement agreements with other establishments. *Id.* LMW has also not presented evidence demonstrating tangible harm. Thus, LMW cannot succeed on its breach of contract claim, because it has not provided substantial evidence or articulated a breach of a duty assigned to ANC 6A as a result of the agreement or provided substantial evidence of damages.

c. The mere fact that LMW does not have an extensive history of violations does not satisfy § 25-446(d)(4)(B).

38. The Board rejects that argument that an establishment can satisfy § 25-446(d)(4)(B) by solely demonstrating a history of compliance with the law. *Tr.*, 10/1/14 at 51.

39. Section 25-446(d)(4)(B) requires a showing that "[t]he need for an amendment is either caused by circumstances beyond the control of the applicant or is due to a change in the neighborhood where the applicant's establishment is located . . . ." § 25-446(d)(4)(B).

40. An establishment's history of compliance is not relevant to a determination under § 25-446(d)(4)(B), because it does not relate to a change of circumstance beyond the licensee's control, a change in the neighborhood or a need. First, the licensee, as the party responsible for superintending the establishment has full control over whether the establishment complies with the law. *See* D.C. Official Code §§ 25-301(a)(5), 25-446(d)(4)(B) ("beyond the control"), 25-797. Second, a licensee's history of compliance relates to the license holder's operations, and has nothing to do with changes to the neighborhood. § 25-446(d)(4)(B) ("change in the neighborhood"). Third, a licensee cannot qualify for licensure unless the applicant demonstrates that he or she possesses the character and ability to ensure that the establishment operates in compliance with the law; as a result, a legal expectation at the time of issuance and approval of the license cannot constitute a change in circumstance. *See* D.C. Official Code § 25-301(a), (a-1); *In re Shaw's Tavern, t/a Shaw's Tavern,* Case No. 11-CMP-00314, Board Order No. 2011-458, ¶ 30 (D.C.A.B.C.B. Nov. 2, 2011) (saying a licensee must have sufficient knowledge of the alcohol laws to ensure lawful operations as a qualification for licensure). Fourth, a history of compliance does not relate to "need." § 25-446(d)(4)(B) ("need for the amendment") Therefore, LMW's history of violations, even taken in the light most favorable to the Petitioner, is not sufficient on its face to satisfy § 25-446(d)(4)(B).

d. Section § 25-446.01(10) makes the mere repetition of the law in the settlement agreement insufficient to justify the termination.

41. In its Petition, LMW argues that the agreement should be terminated, because it merely repeats the law. *Tr.*, 10/1/14 at 11. As shown in Paragraph 5 above, the agreement imposes at least fifteen requirements on the establishment beyond the minimum required by Title 25; therefore, this argument is factually incorrect. *Supra*, at ¶ 5.

42. Here, other than conclusory statements, LMW has not indicated those statements it deems repetitive. *Supra*, at ¶ 19. Nevertheless, even if this assertion were true, this is not a sufficient basis for justifying the termination of the agreement. The newly passed settlement agreement law states, "[a] settlement agreement enforceable by the Board . . . may include: . . . "[s]tipulations that the establishment will comply with existing District statutes and regulations, or will comply with privileges granted by ABRA or any other District agency." D.C. Official Code § 25-446.01(10). When the legislature has affirmatively approved of a specific settlement agreement condition, the Board cannot reasonably strike the condition without a compelling evidentiary and legal basis. Because LMW's presentation failed to provide such a basis, the Board cannot terminate the agreement on this ground or otherwise strike such provisions on an individual basis.

e. LMW failed to demonstrate a need for termination or amendment of the agreement, because it could not establish that it is subject to unfair competition or other grounds.

43. LMW failed to demonstrate sufficient need for the amendment, because it could not demonstrate that the agreement caused it to suffer from unfair competition or other harms. *Petition* (Question 17).

44. In *Mallof*, the court stated that the Petitioner must demonstrate sufficient "need" for the amendment or termination. *Mallof v. D.C. Alcoholic Beverage Control Bd.*, 43 A.3d 916, 920-921 (D.C. 2012)

45. While LMW cites unfair competition, the record shows that the establishment's outdoor seating hours are comparable to a number of taverns in the neighborhood. *Supra*, at ¶ 8. In addition, LMW fails to explain why it cannot extend its patio hours pursuant to § 4(d) of the agreement or why this provision is insufficient. *Supra*, at ¶ 3. Consequently, the Board is not convinced that LMW suffers from unfair competition or other changes in circumstance that merit termination of the agreement.

46. Moreover, this Settlement Agreement contains at least fifteen requirements that go beyond the minimum requirements of Title 25. *Supra*, at ¶ 5. LMW presented no evidence indicating whether other establishments are or are not subject to these requirements. *Supra*, at ¶ 15. Furthermore, the Petitioner has not provided any other potential circumstances that merit

terminating the entire agreement.[9] *Supra*, at ¶¶ 16-17. Therefore, the Board finds that LMW failed to present sufficient evidence demonstrating that the Petition satisfies § 25-446(d)(4)(B).

III. LMW FAILED TO MAKE A PRIMA FACIE CASE THAT IT SATISFIED § 25-446(d)(4)(C).

47. The Board finds that LMW failed to demonstrate that it satisfies § 25-446(d)(4)(C). As a matter of law, the appropriateness test considers more than just compliance with the law. Even presuming that LMW has a sterling record, by itself, this fact cannot satisfy § 25-446(d)(4)(C). Consequently, based on LMW's failure to submit additional evidence related to peace, order, and quiet, the Board is not in a position to determine whether LMW's future operations without the Settlement Agreement will or will not negatively impact peace, order, and quiet.

48. Under § 25-446(d)(4)(C), the Board shall consider whether "[t]he amendment or termination will . . . 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). Because § 25-446(d)(4)(C) adopts the appropriateness test as part of the analysis, the Board must consider whether the establishment will have a negative impact on the neighborhood. D.C. Official Code § 25-313(b)(2).

49. Yet, the appropriateness test has never been limited to mere compliance with the law. *See Panutat, LLC v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 269, 277 n. 12 (D.C. 2013) ("However, in mandating consideration of the effect on peace, order, and quiet, § 25–313(b)(2) does not limit the Board's consideration to the types of noises described in § 25–725."). It has been said, that each location where an establishment is located is "unique," which requires the Board to evaluate each establishment ". . . according to the particular circumstances involved." *Le Jimmy, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 433 A.2d 1090, 1093 (D.C. 1981). Under this test, the Board must consider the "prospective" effect of the establishment on the neighborhood." *Id.* Among other considerations, this may include the petitioner's efforts to mitigate or alleviate operational concerns,[10] the "character of the neighborhood,"[11] the character of the establishment,[12] and the license holder's future plans.[13] In this case, LMW has presented the Board with no evidence regarding its particular circumstances; therefore, the Board cannot make the necessary findings required for termination. *Supra*, at ¶¶ 20-22.

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[9] For example, a change in the law or zoning designation after the agreement was executed. *In re Multi-Management, Inc., t/a Habana Village*, Board Order No. 2014-033 at ¶ 38.

[10] *Donnelly v. District of Columbia Alcoholic Beverage Control Board*, 452 A.2d 364, 369 (D.C. 1982) (saying that the Board could rely on testimony related to the licensee's "past and future efforts" to control negative impacts of the operation); *Upper Georgia Ave. Planning Comm. v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 992 (D.C. 1985) (saying the Board may consider an applicant's efforts to "alleviate" operational concerns).

[11] *Citizens Ass'n of Georgetown, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 410 A.2d 197, 200 (D.C. 1979).

[12] *Gerber v. D.C. Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1196 (D.C. 1985); *Sophia's Inc. v. Alcoholic Beverage Control Bd.*, 268 A.2d 799, 801 (D.C. 1970).

[13] *Sophia's Inc.*, 268 A.2d at 800.

50. In *Sophia's*, the Board was entitled to find an application inappropriate when it lacked "vital" details, such as plans regarding "music, dancing, seating capacity, and parking." *Sophia's Inc. v. Alcoholic Beverage Control Bd.*, 268 A.2d 799, 800 (D.C. 1970); *see also Haight v. D.C. Alcoholic Beverage Control Bd.*, 439 A.2d 487, 494 (D.C. 1981) (saying the Board should avoid statements indicating that it solely relies on the protestant's failure to present evidence, because this type of phraseology gives the appearance that the burden has been inappropriately shifted to the protestants).

51. Here, the record provides the Board with insufficient evidence related to LMW's future plans or operations, the character of the establishment, the character of the neighborhood, LMW's efforts to mitigate operational concerns, whether LMW intends to operate in a manner currently prohibited by the Settlement Agreement, or anything else that could possibly relate to peace, order, and quiet. *Supra*, at ¶¶ 5, 20-22. As a result, similar to *Sophia's*, the Board must find against LMW, because the record in this case lacks too many vital details to render a decision in LMW's favor.

IV. CONCLUSION

52. At its heart, the LMW's request for termination is asking the Board to allow LMW to obtain "full benefits," while stripping ANC 6A of all of the benefits it gained by relinquishing its right to protest the application. *Mallof v. D.C. Alcoholic Beverage Control Bd.*, 43 A.3d at 921 (saying that a settlement agreement gives the applicant the benefit of a speedy licensing process and avoiding a hearing, while the protestants give up their right to a hearing). In light of this unequal result, the court has explicitly warned the Board that terminating an agreement ". . . without first attempting to salvage [it through amendment]" is "unfair." *Id.* at 920-921 ("the Board must first consider whether amending the voluntary agreement is feasible."). Indeed, the court explained that the Board should not create "a lower threshold for terminations than for amendments," because this ". . . creates a perverse incentive for establishments to terminate rather than amend agreements they voluntarily entered into." *Id.* at 922. Based on the paltry evidentiary showing in this case, approving LMW's Petition would undermine the purpose of the settlement agreement law, inflict manifest injustice on the rights of ANC 6A, and run the Board afoul of the *Mallof* decision. *Id.*

ORDER

Therefore, the Board, on this 12th day of November 2014, hereby **GRANTS** ANC 6A's motion for judgment as a matter of law. The Petition filed by LMW, LLC, t/a Little Miss Whiskey's Golden Dollar is hereby **DENIED**.

IT IS FURTHER ORDERED, that because the Board granted the relief sought by ANC 6A, there is no need to further address the ANC's issues and concerns under the great weight requirement.

ABRA shall provide copies of this Order to the Petitioner and ANC 6A.

District of Columbia
Alcoholic Beverage Control Board

Ruthanne Miller, Chairperson

Donald Brooks, Member

Herman Jones, Member

Mike Silverstein, Member

Hector Rodriguez, Member

James Short, Member

I recuse myself from this matter.

Nick Alberti, Member

Under 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, under 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 under 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).