

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

In the Matter of:)
)
2461 Corporation)
t/a Madam's Organ)
)
Petition to Terminate a)
Settlement agreement)
for a Retailer's Class CT License)
)
at premises)
2461 18th Street N.W.)
Washington, D.C. 20009)
)

Case Number: 14-PRO-00007
License Number: ABRA-025273
Order Number: 2015-005

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

ALSO PRESENT: 2461 Corporation, t/a Madam's Organ, Petitioner

William Duggan, Owner, on behalf of Petitioner

Richard Bianco, Esq., Counsel for Petitioner

William Simpson, Chairperson, Advisory Neighborhood Commission
(ANC) 1C, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

INTRODUCTION

The Alcoholic Beverage Control Board (Board) finds good cause to amend the Settlement agreement attached to the Retailer's Class CT License held by 2461 Corporation, t/a Madam's Organ, (hereinafter "Petitioner" or "Madam's Organ"). The Board's reasoning and changes are described below.

Procedural Background

On September 24, 2013, Madam's Organ filed a timely Petition to Terminate a Settlement agreement ("Petition") requesting that the Board terminate its settlement agreement entered into with the ANC 1C ("Protestant"). The settlement agreement was originally approved by the Board on May 21, 2008. 2461 Corporation, t/a Madam's Organ, Application No. 35287-07/025P, 12 (D.C.A.B.C.B. May 21, 2008) [*Settlement agreement*].

The Board reviewed the Petition and 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 to the public in accordance with District of Columbia (D.C.) Official Code § 25-446(d)(3).

ABRA provided public notice of the Petition on January 10, 2014. Notice of Public Hearing 14-PRO-00007 (January 10, 2014). The notice indicated that the last day to file objections against the Petition was February 24, 2014. *Id.* Subsequently, a protest against the Petition was timely filed by ANC 1C in accordance with District of Columbia (D.C.) Official Code §§ 25-601(1) and 25-602. *ABRA Protest File No. 14-PRO-00007.*

The parties came before the Board's Agent for a Roll Call Hearing on March 10, 2014 and the Protestant was granted standing to protest the Petition. The parties then came before the Board for a Protest Status Hearing on May 21, 2014. The Protest Hearing in this matter occurred on October 8, 2014, where the parties argued their respective cases.

Based on the Protestant's 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 § 25-446. D.C. Official Code §§ 25-446(d)(4), 25-602; Letter from Billy Simpson, Chairperson for ANC 1C to Ruthanne Miller, Chairperson, Alcoholic Beverage Control (ABC) Board (February 6, 2014) [ANC 1C Protest Letter].

Issues Under Consideration

The Board must determine whether the Applicant's settlement agreement merits termination in accordance with D.C. Official Code § 25-446.

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. Background

1. Madam's Organ holds a Retailer's Class CT License and has an existing settlement agreement attached to its license. *ABRA Protest File No. 14-PRO-00007*, Notice of Public Hearing. The Board approved the settlement agreement on May 21, 2008. *ABRA Licensing File No. ABRA-025273*. The agreement is between the Applicant and ANC 1C.
2. The official records of the Board reflect that on June 6, 2012, the Board granted the Petition to Terminate a Settlement agreement filed by Madam's Organ, which resulted in the termination of a different settlement agreement, dated January 15, 2003. 2461 Corporation, t/a Madam's Organ, Case Number 11-PRO-00016, Board Order No. 2012-250, 3 (D.C.A.B.C.B. Jun. 6, 2012).
3. Subsequently, on October 17, 2012, the Board denied a Motion for Reconsideration filed by the Petitioner in which it requested that the Board also terminate the Petitioner's 2008 Settlement agreement. 2461 Corporation, t/a Madam's Organ, Case Number 11-PRO-00016, Board Order No. 2012-406, 3 (D.C.A.B.C.B. Oct. 17, 2012).
4. Under the existing 2008 settlement agreement, Madam's Organ's hours of operation for inside and the summer garden are as follows: Sunday through Thursday 9:00 a.m. – 2:00 a.m., and Friday and Saturday 9:00 a.m. – 3:00 a.m. See *ABRA Licensing File No. ABRA-025273*. Madam's Organ's hours of sales, service and consumption for inside and the summer garden are as follows: Sunday through Thursday 9:00 a.m. to 1:30 a.m. and Friday and Saturday 9:00 a.m. to 2:30 a.m. Id. Finally, the establishment's hours of entertainment are as follows: Sunday through Thursday, 6:00 p.m. to 1:30 a.m., Friday and Saturday 6:00 p.m. to 2:30 a.m. Id.

II. Testimony of ABRA Investigator Abyie Ghenene

5. ABRA Investigator Abyie Ghenene investigated the Petition and wrote the Protest Report submitted into the record. *Transcript (Tr.)*, October 8, 2014 at 12. *ABRA Protest File No. 14-PRO-00007*, Protest Report. Investigator Ghenene interviewed the Protestants, led by William Simpson, Chair of Advisory Neighborhood Commission (ANC) 1C. *Tr.* 10/08/14 at 12. Mr. Simpson informed Investigator Ghenene that the termination of the Settlement agreement would conflict with a compromise made in 2008 whereby the Applicant agreed to the terms of the settlement agreement in exchange for a license class change from CR (restaurant) to CT (tavern). *Tr.* 10/08/14 at 12.
6. The Adams Morgan neighborhood where the establishment is located is monitored by different ABRA investigators every night. *Tr.* 10/08/14 at 13. Investigator Ghenene monitors the area between nine and 15 times a week. *Tr.* 10/08/14 at 13. He cannot differentiate the noise

emitting from the establishment from any other noise in the neighborhood. *Tr.* 10/08/14 at 14, 22. He stated that the neighborhood is very busy and lively, and that he did not witness any excessive noise coming from the establishment. *Tr.* 10/08/14 at 14, 17. ABRA monitors the Adams Morgan neighborhood on a frequent basis due to the density of ABC licensed establishments. *Tr.* 10/08/14 at 27. There is also a large police presence in the neighborhood which has helped with the peace, order and quiet issues related to a lively nightlife. *Tr.* 10/08/14 at 27, 32.

7. As part of his investigation, Investigator Ghenene also interviewed Bill Duggan, owner of the establishment. *Tr.* 10/08/14 at 14. He informed Investigator Ghenene that his primary reason for seeking to terminate the settlement agreement is to be able to compete with other establishments in the neighborhood who have extended holiday hours privileges. *Tr.* 10/08/14 at 15. Mr. Duggan indicated to Investigator Ghenene that he has no plans to remove the kitchen or to stop selling food if the settlement agreement is terminated. *Tr.* 10/08/14 at 15.

8. Investigator Ghenene reviewed the establishment's investigative history and found no record of violations. *Tr.* 10/08/14 at 16. He reviewed ABRA's Noise Task Force complaint log and discovered two complaints. *Tr.* 10/08/14 at 16, 23. One of the complaints was not substantiated and the other has not been adjudicated. *Tr.* 10/08/14 at 16, 23.

III. Testimony of William Duggan

9. William Duggan is president of 2461 Corporation, trading as Madam's Organ. *Tr.* 10/08/14 at 41. He has operated the establishment for 24 years. *Tr.* 10/08/14 at 42. His venue hosts live music every night of the week. *Tr.* 10/08/14 at 43, 53. He attributes his successful business to the fact that the establishment has not changed much over the years. *Tr.* 10/08/14 at 43, 53.

10. Mr. Duggan has always served food, and he has no intention of changing or discontinuing food service. *Tr.* 10/08/14 at 44, 47; 121. In 2011, he was designated one of the best bars in DC by Playboy Magazine, and one of the rating factors was the food. *Tr.* 10/08/14 at 44. He also received the National Good Neighbor Restaurant Award in 2011 for his interaction with the neighborhood. *Tr.* 10/08/14 at 99. He is actively involved with the community, and he also works closely with the Metropolitan Police Department. *Tr.* 10/08/14 at 100, 103, 105. Mr. Duggan enjoys a good relationship with his neighbors and the neighborhood. *Tr.* 10/08/14 at 54.

11. The establishment was also recognized by the Washington Post in 2014 for their soul food. *Tr.* 10/08/14 at 46-47; Applicant's Exhibit No. 8. Mr. Duggan advertises his food service in WeAr Magazine and has done so for the last 12 years. *Tr.* 10/08/14 at 46. Selling food is part of his business model. *Tr.* 10/08/14 at 52.

12. The retailer class for the Madam's Organ license was converted from a CR (restaurant) license to a CT (tavern) license in 2008. *Tr.* 10/08/14 at 48, 142-143. Mr. Duggan entered into a new settlement agreement at that time. *Tr.* 10/08/14 at 48. One of the terms of the 2008 settlement agreement was the requirement to sell food. *Tr.* 10/08/14 at 49. It was never Mr. Duggan's understanding that every term in the 2008 Settlement agreement would live in

perpetuity. *Tr.* 10/08/14 at 51. Some of the other retail class conversions at the time were permitted to omit the food sales requirements from their settlement agreements. *Tr.* 10/08/14 at 51.

13. Mr. Duggan is seeking to terminate his settlement agreement due to changes in the law, the neighborhood, the ANC, and agreements between the ANC and other ABC-licensed establishments. *Tr.* 10/08/14 at 52, 108-109. He cites current restrictions on hours in his settlement agreement as an example of changes in the law that were not foreseen by establishments at the time that the agreements were drafted. *Tr.* 10/08/14 at 52.

14. Other ABC-licensed establishments in the neighborhood have less restrictive agreements with the ANC. *Tr.* 10/08/14 at 53. The Roofers Union is located across the street from Madam's Organ and they have no agreement at all. *Tr.* 10/08/14 at 53.

15. Mr. Duggan made a good faith effort to work with the ANC regarding his efforts to terminate the settlement agreement. *Tr.* 10/08/14 at 54. He met with the Chair of the ANC, William Simpson, at his establishment to negotiate the various issues related to the settlement agreement. *Tr.* 10/08/14 at 54, 87-88, 161. He testified that he negotiated with Mr. Simpson in good faith without reaching an agreement on new terms. *Tr.* 10/08/14 at 56, 87. Additionally, Mr. Duggan participated in a mediation session with Mr. Simpson, where he again, negotiated in good faith, to no avail. *Tr.* 10/08/14 at 56, 198. Mr. Duggan did not submit a proposal to the ANC because he did not think Mr. Simpson was amenable to it. *Tr.* 10/08/14 at 90.

16. Mr. Duggan informed Mr. Simpson that he thought the ANC should have initiated amending settlement agreements for all of the establishments whose terms restricted their hours and prohibited them from exercising the extended holiday hours privilege. *Tr.* 10/08/14 at 55, 113-115. He contacted ANC Commissioner Wilson Reynolds and suggested that as a policy matter the ANC should rid hour restrictions from all settlement agreements. *Tr.* 10/08/14 at 90-91, 94.

17. Mr. Duggan's efforts to terminate his settlement agreement were caused by circumstances beyond his control. *Tr.* 10/08/14 at 57, 126, 139. The City Council passed a law allowing ABC-licensed businesses to enjoy extended holiday hours. *Tr.* 10/08/14 at 57, 141. Mr. Duggan is not permitted that privilege due to restrictions in his 2008 settlement agreement. *Tr.* 10/08/14 at 57, 141.

18. He loses business to his neighboring establishments who are allowed to operate with later hours. *Tr.* 10/08/14 at 57-58, 110-111. Additionally he has 40 employees who are not earning wages when the establishment is not operating on extended hours. *Tr.* 10/08/14 at 59. The lost hours have translated into a tremendous amount of money over the years. *Tr.* 10/08/14 at 82.

19. The hours listed in Mr. Duggan's 2008 settlement agreement were the maximum legal statutory hours at the time. *Tr.* 10/08/14 at 58; Applicant's Exhibit No. 2. Mr. Duggan does not believe it was the ANC's intention in 2008 to limit the hours an establishment can operate. *Tr.* 10/08/14 at 59. In 2008, establishments were automatically permitted to open until 4:00 am on

New Year's Eve. *Tr.* 10/08/14 at 60, 107. Now licensees have to apply for the privilege. *Tr.* 10/08/14 at 60.

20. Mr. Duggan's settlement agreement also requires him to sell an amount of food, specifically \$1,300.00 per occupied seat. *Tr.* 10/08/14 at 60, 154. He is less concerned with the requirement than he is that some settlement agreements in his neighborhood are more restrictive than others, and thus, it creates an economic and competitive disadvantage. *Tr.* 10/08/14 at 61, 119, 122. He complies with all of the terms of his existing settlement agreement, and the operations of his establishment will not change without the settlement agreement. *Tr.* 10/08/14 at 95-97, 165.

21. The settlement agreement for Rendezvous Lounge does not require food sales. *Tr.* 10/08/14 at 62-63; Applicant's Exhibit No. 3. The settlement agreement for Town Tavern does not require food sales. *Tr.* 10/08/14 at 63-64; Applicant's Exhibit No. 4. The settlement agreement for DC Shenanigans requires that the licensee sell food four out of seven days. *Tr.* 10/08/14 at 66-67, 120; Applicant's Exhibit No. 5. There is no requirement that there be a certain amount of food sold. *Tr.* 10/08/14 at 67. The settlement agreement for Mellow Mushroom provides that there is no set food amount sales if the licensee has a kitchen, advertises food and promotes food sales. *Tr.* 10/08/14 at 68; Applicant's Exhibit No. 6. The settlement agreement for Pharmacy Bar does not require food sales. *Tr.* 10/08/14 at 69; Applicant's Exhibit no. 7. Roofer's Union has no settlement agreement at all. *Tr.* 10/08/14 at 70.

22. Mr. Duggan does not believe that termination of his settlement agreement will impact the peace, order and quiet of the neighborhood. *Tr.* 10/08/14 at 71-72. His operations have been the same since he opened 24 years earlier and nothing in his operations will change simply because there is no longer an agreement in place. *Tr.* 10/08/14 at 71-72. He has never incurred a violation with ABRA. *Tr.* 10/08/14 at 72, 104.

23. The Adams Morgan neighborhood has changed considerably since 2008, and for the better. *Tr.* 10/08/14 at 73, 95. The increased police presence has addressed a number of issues. *Tr.* 10/08/14 at 73-76. The restrictions on businesses have created a number of empty storefronts. *Tr.* 10/08/14 at 77, 131. Investors who want to do business in Adams Morgan find an adversarial atmosphere with the ANC. *Tr.* 10/08/14 at 77. Mr. Duggan finds it to be a hardship to follow all of the regulations. *Tr.* 10/08/14 at 77.

24. Mr. Duggan stated that there is no noise problem during the day because there aren't a lot of people out and about. *Tr.* 10/08/14 at 78. He served brunch to his customers for quite a while, but there just isn't much business during the day. *Tr.* 10/08/14 at 175. Additionally, his practice of closing the windows at 10:00 pm will not change if the settlement agreement is terminated because the law requires closure at 10:00 pm. *Tr.* 10/08/14 at 167-168.

25. Mr. Duggan believes that the purpose of settlement agreements is to address concerns, not anticipate them. *Tr.* 10/08/14 at 14, 163. Additionally, he cannot depend on the ANC to be pro-active in mutually amending old agreements when the laws change. *Tr.* 10/08/14 at 80-81. He also believes that every issue addressed by the terms of his settlement agreement is also a provision in the law or the regulations. *Tr.* 10/08/14 at 163. He initially signed the settlement

agreement because in 2008, parties rarely went to hearing yet one could not proceed with the application for a license without an agreement. *Tr.* 10/08/14 at 164-165.

IV. Testimony of ANC Commissioner William Simpson

26. ANC Chair William Simpson testified on behalf of the Protestant. *Tr.* 10/08/14 at 180. He was contacted by Mr. Duggan in the fall of 2013 to discuss the settlement agreement. *Tr.* 10/08/14 at 182-184. Commissioner Simpson responded immediately and agreed to meet with Mr. Duggan at the establishment. *Tr.* 10/08/14 at 184, 196. The meeting lasted for an hour or so. *Tr.* 10/08/14 at 184, 196, 259. The only issue raised by Mr. Duggan at the meeting was the matter concerning the hours of operation, sales and service. *Tr.* 10/08/14 at 184, 205. Mr. Duggan did not raise the issue regarding the food sales requirement. *Tr.* 10/08/14 at 184.

27. Commissioner Simpson repeatedly informed Mr. Duggan that if he wanted the ANC to address the hours, he should provide a proposal that Commissioner Simpson could present to the full Commission. *Tr.* 10/08/14 at 185, 190, 204-205, 259, 262. Mr. Duggan never submitted the proposal and Commissioner Simpson never heard from him again. *Tr.* 10/08/14 at 185, 236-237. Mr. Duggan made no effort to follow up after the initial meeting. *Tr.* 10/08/14 at 185.

28. Commissioner Simpson assumed that Mr. Duggan was not interested in arriving at a mutually acceptable amendment to the settlement agreement. *Tr.* 10/08/14 at 234. He did contact another ANC Commissioner, Wilson Reynolds, by telephone to discuss the issue regarding the hours limitations in the Settlement agreement. *Tr.* 10/08/14 at 185-186.

29. Commissioner Simpson believes that to satisfy the first prong regarding a good faith attempt to negotiate an amendment, parties must have an actual desire to resolve their differences. *Tr.* 10/08/14 at 196, 232-233. He interprets Mr. Duggan's position as one of ridding the settlement agreement altogether notwithstanding that he entered into it with the community. *Tr.* 10/08/14 at 197, 230. He does not consider Mr. Duggan to have acted in good faith, and that his bargaining position is inconsistent with the requirements of the statute. *Tr.* 10/08/14 at 197.

30. Commissioner Simpson testified that there was no substantive discussion regarding the settlement agreement at the mediation because Mr. Duggan was not interested. *Tr.* 10/08/14 at 199. He believes it would be highly problematic to reward the licensee by granting the termination of the settlement agreement when he has made no effort to negotiate. *Tr.* 10/08/14 at 243.

31. With regard to the second prong of the termination test, Commissioner Simpson believes that any changed circumstances in the Adams Morgan neighborhood have actually favored licensed establishments. *Tr.* 10/08/14 at 190-191, 194. Examples of this are the new streetscape, the growth of new businesses, and the construction of new residence buildings. *Tr.* 10/08/14 at 191. He has lived in Adams Morgan since 2005 and he has witnessed a lot of positive growth. *Tr.* 10/08/14 at 193.

32. There are 50 establishments in the Adams Morgan neighborhood that are subject to food sales requirements. *Tr.* 10/08/14 at 191. Circumstances have not changed that would make the

requirement less applicable or less relevant. *Tr.* 10/08/14 at 192. Commissioner Simpson acknowledged that the change in law regarding extended hours was a circumstance beyond the establishment's control. *Tr.* 10/08/14 at 204. He offered to negotiate an amendment to the Settlement agreement to address the hours restriction. *Tr.* 10/08/14 at 204, 208, 219, 233, 261.

33. The ANC has regularly adopted a resolution for the ABC Board's consideration to waive hours restrictions for New Year's Eve for all of its affected licensees. *Tr.* 10/08/14 at 220-221. The ANC is very considerate of the business community and wants to reach cooperative agreements whenever possible. *Tr.* 10/08/14 at 229.

34. With regard to the third prong, Commissioner Simpson believes that the termination of the Settlement agreement would have an adverse impact on peace, order and quiet. *Tr.* 10/08/14 at 192. This can be expected anytime the percentage of food sales declines relative to the alcohol sales. *Tr.* 10/08/14 at 192, 210. Elimination of the food sales requirement would adversely impact the neighborhood. *Tr.* 10/08/14 at 193. Without a requirement to sell food, the neighborhood risks establishments slipping toward an alcohol-only service. *Tr.* 10/08/14 at 209, 245-246.

35. The ANC Commission has been very clear with tavern licensees regarding their desire to have food sales requirements. *Tr.* 10/08/14 at 210. The ANC is committed to creating a robust dining scene for the neighborhood. *Tr.* 10/08/14 at 210. Commissioner Simpson acknowledged that there are other Adams Morgan taverns do not have a settlement agreement or a requirement to sell food. *Tr.* 10/08/14 at 211-214, 225.

36. Commissioner Simpson believes that licensees should be able to adapt their business models to changed circumstances within the parameters of the law and their existing settlement agreements. *Tr.* 10/08/14 at 195. He acknowledged that settlement agreements restrict change and that is intentional in order to curtail the business interest in favor of the interests of the residents. *Tr.* 10/08/14 at 195. He is not aware of any licensee who has been granted extended hours for all of the 16 days permitted under the law. *Tr.* 10/08/14 at 221-222.

37. The ANC does expect the terms of the settlement agreement such as food sales requirements, and provisions regarding vermin, trash, and pub crawls to be honored. *Tr.* 10/08/14 at 236. Commissioner Simpson is not certain he could support the termination of a settlement agreement because each of them contains useful provisions and are a valuable tool for the community. *Tr.* 10/08/14 at 238.

CONCLUSIONS OF LAW

38. Under D.C. Official Code § 25-446(d)(1), "Unless 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,

The 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).

39. The Board amends the settlement agreement as follows, based on the Board's determination that such amendments satisfy § 25-446. However, the Board concludes that Madams Organ did not meet its burden of proof to support the termination of all the provisions of the settlement agreement.

I. MADAM'S ORGAN SATISFIED § 25-446(D)(4)(A) BY ATTEMPTING TO NEGOTIATE AN AMENDED SETTLEMENT AGREEMENT IN GOOD FAITH WITH THE ANC 1C.

40. The Board finds that Madam's Organ satisfied § 25-446(D)(4)(A) through its efforts to negotiate with the Protestant when it met with the Protestant for over an hour in the fall of 2013. Under § 25-446(d)(4)(A), in order to terminate or amend a settlement agreement when the other signatories have been located, it must be shown that "the applicant has made a good-faith attempt to negotiate a mutually acceptable amendment to the settlement agreement." D.C. Official Code § 25-446(d)(4)(A)(i)-(ii).

41. Accordingly, the Board finds that Madam's Organ negotiated in good faith and therefore has satisfied § 25-446(D)(4)(A).

II. MADAM'S ORGAN DID NOT MAKE A SUFFICIENT SHOWING THAT THE SETTLEMENT AGREEMENT SHOULD BE TERMINATED IN ITS ENTIRETY; BUT RATHER IT DEMONSTRATED THAT ONE OF THE PROVISIONS MERITS AMENDMENT UNDER § 25-446(D)(4)(B) BASED ON A CHANGE IN THE NEIGHBORHOOD AND CIRCUMSTANCES BEYOND THE CONTROL OF THE PETITIONER, AND THAT SUCH AMENDMENT WILL NOT HAVE AN ADVERSE IMPACT ON THE NEIGHBORHOOD.

42. The Board determines that Madams Organ did not make a sufficient showing that every provision in the 2008 settlement agreement met the statutory requirement for termination based upon circumstances beyond the control of the Applicant, or upon a change in the neighborhood where the applicant's establishment is located. D.C. Official Code § 25-446(d)(4)(B). Accordingly, the Board finds that the settlement agreement should not be terminated in its entirety.

43. However, Madams Organ has provided sufficient evidence to demonstrate that an amendment is warranted. Under § 25-446(d)(4)(B), in order to terminate or amend a settlement agreement, a licensee must show "[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). The Board previously stated in Hank's Oyster Bar that a change to the liquor law, which has a nexus to the settlement agreement attached to an applicant's license, satisfies § 25-446(d)(4)(B). In re Leeds the Way, LLC t/a Hank's Oyster Bar, Board Order No. 2012-319, at ¶¶ 57-63.

44. The Board approved the Madams Organ's settlement agreement in 2008. *Supra*, at ¶ 1. As of May 1, 2013, the Council of the District of Columbia amended D.C. Official Code § 25-723 for the purpose of extending the legal hours of operation for all on-premise retail license holders on holidays and to place limits on settlement agreements, among other changes. D.C. Official Code §§ 25-446.01-25-446.02, 25-723; see generally Council of the District of Columbia, Omnibus Alcoholic Beverage Regulation Amendment Act of 2012, § 2 (effective May 1, 2013, D.C. Law 19-3210). Under the new law, settlement agreements may not (1) require the approval of third parties before a licensee may engage in an ownership change, § 25-446.02(1)(A); (2) require notice to third parties regarding the intent to transfer ownership, § 25-446.02(1)(B); (3) require the creation of restrictions that prevent a licensee from applying for changes to its operation, including changing its hours, § 25-446.02(1)(E); (4) require the creation of new administrative procedures beyond those required by ABRA or another D.C. agency, § 25-446.02(2); (5) require a licensee to attend meetings, § 25-446.02(3); and (6) require the licensee to submit documents to third parties. D.C. Official Code § 25-446.02(5).

45. Consequently, the Board finds that Madams Organ merits an amendment to its agreement that aligns the agreement with current law.

46. Specifically, the Board finds that Madams Organ merits an amendment to Paragraph 2 (Hours). Paragraph 2, as written, conflicts with the change in the District of Columbia's alcohol law in 2013 that extends the legal hours of operation for all on-premise retail license holders on various holidays.

47. In order to grant an amendment to this provision, the Board must also find that "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." § 25-446(d)(4)(C). The Board has determined that amendments to a settlement agreement that align the agreement with current law shall generally be deemed not to have an adverse impact on the neighborhood. To do otherwise, would require the Board to act contrary to the intent of the Council of the District of Columbia when it amended Title 25 in 2013. Therefore, the Board

finds that the amendments to the agreement, which the Board will describe in its Order below, shall not have an adverse impact on the neighborhood.

III. THE PETITIONER SATISFIED ALL REMAINING REQUIREMENTS REQUIRED TO AMEND THE SETTLEMENT AGREEMENTS.

48. Finally, the Board is only required to produce findings of fact and conclusions of law related to those matters raised by the Protestant in their initial protest. See Craig v. District of Columbia Alcoholic Beverage Control Bd., 721 A.2d 584, 590 (D.C. 1998) (“The Board's regulations require findings only on contested issues of fact.”); 23 DCMR § 1718.2. Accordingly, based on the Board’s review of the Petition and the record, Madam’s Organ has satisfied all remaining requirements imposed by Title 25 and Title 23 to merit the amendment of its settlement agreement by the Board in accordance with this Order.

ORDER

Therefore, the Board, on this 14th day of January 2015, hereby **DENIES** the Petition to Terminate the Settlement agreement filed by 2461 Corporation, Inc., t/a Madams Organ.

IT IS FURTHER ORDERED that the settlement agreement entered into by Madam’s Organ and ANC 1C shall be **AMENDED** as follows:

1. The Board strikes all of section 2 (Hours) except for the last paragraph. The portion that is stricken states:

The approved hours of operation are:

Sunday: 9:00 a.m. – 2:00 a.m.

Monday through Thursday: 9:00 a.m. – 2:00 a.m.

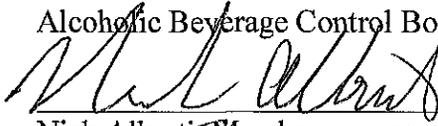
Friday & Saturday: 9:00 a.m. – 3:00 a.m.

The parties agree that the Applicant may open, at the Applicant’s discretion, at any time between 9:00 a.m. and 6: 00 p.m., but under no circumstances will be open to the public later than 6:00 p.m. each day of operation with the exception of all federal holidays, the day after and Christmas Eve, New Year’s Eve and Easter when the establishment may open at 7 p.m.

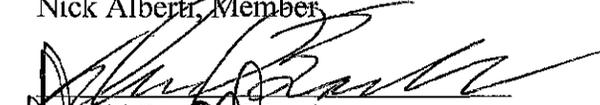
IT IS FURTHER ORDERED that all other provisions of the 2008 settlement agreement shall remain in full force and effect.

ABRA shall provide copies of this Order to the Petitioner and ANC 1C.

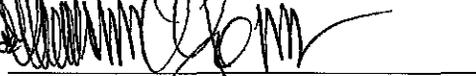
District of Columbia
Alcoholic Beverage Control Board



Nick Alberti, Member



Donald Brooks, Member



Herman Jones, Member

Mike Silverstein, Member



Hector Rodriguez, Member



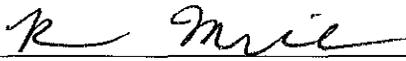
James Short, Member

I concur with the Majority's decision to strike Paragraph 2 of the Settlement Agreement - Hours - as indicated above. However, I would also strike Paragraph 1 (Operation) (3) and (4) – to delete the provisions regarding a food sales requirement and maintaining books and records for food sales. With respect to these requirements, Applicant produced evidence that the need for the amendment is caused by circumstances beyond the control of the applicant and is due to a change in the neighborhood. That evidence was in the form of settlement agreements entered into by the ANC and other similarly licensed establishments subsequent to Applicant's settlement agreement that did not have these requirements, as well as similarly licensed establishments that were not subject to settlement agreements at all. Supra, at ¶¶ 13, 14. In addition, the record keeping required by these requirements places an administrative burden on the Applicant contrary to law enacted after the parties entered the settlement agreement, D.C. Official Code § 25-446.02(2). That statute states that the Board shall not enforce the following provisions in settlement agreements: (2) Statements that require the creation of new administrative procedures beyond those required by ABRA or another D.C. agency. The Applicant is licensed as a tavern and as such, should not have to bear the additional responsibilities of a licensed restaurant, including administrative burdens of filing food reports and maintaining books and records. Accordingly, these provisions also require an amendment to align with current law.

Applicant also submitted compelling evidence that termination of these provisions will not have an adverse impact on the neighborhood. The record shows that Applicant is committed to maintaining its kitchen and serving food even without the requirement in the existing settlement agreement to do so. He has a record of 24 years of food service (many before the settlement agreement). Selling food is part of his business model. Supra, at ¶11. Moreover, there, are in fact,

four (4) other provisions in the settlement agreement under 1. Operation that impose requirements upon the Applicant related to serving food.

Finally, Applicant's good record and service to his community provide additional equitable reasons that he should not be subject to a life sentence to these two provisions where there is no evidence that elimination of those provisions will result in any adverse impacts to the neighborhood, particularly in light of the other four provisions that address the same concern.


Ruthanne Miller, Chairperson

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, 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, 430 E Street, N.W., Washington, D.C. 20001; (202/879-1010). 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).