THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:	)	
2461 Corporation, LLC t/a Madam's Organ Holder of a Retailer's Class CT License	)	Case No.: 14-CMP-00325 License No.: ABRA-025273 Order No.: 2015-360
at premises 2461 18th Street, NW Washington, D.C. 20009	)	

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

ALSO PRESENT: Richard Bianco, Esq. on behalf of 2461 Corporation, LLC t/a Madam's Organ (Respondent)

Fernando Rivero, Assistant Attorney General, on behalf of the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING MOTION FOR RECONSIDERATION

INTRODUCTION

During a Show Cause Hearing on April 8, 2015, the Government presented credible and compelling evidence that 2461 Corporation, LLC, t/a Madam's Organ, (hereinafter "Respondent" or "Madam's Organ") had a window open after 1:00 a.m. while live music was playing inside the establishment in violation of § 4(b) of its settlement agreement on June 22, 2014. *In re 2461 Corporation, LLC, t/a Madam's Organ*, Case No. 14-CMP-00325, Board Order No. 2015-293, ¶ 16 (D.C.A.B.C.B. Jun. 17, 2015). In response, during the Respondent's case-in-chief, Madam's Organ's main witnesses blew their credibility by giving contradictory

and incompatible testimony related to the incident on June 22. *Compare Transcript* (*Tr.*) April 8, 2015 at 77, 86 (Madam's Organ's general manager testifies that he closed the window after speaking to the investigator) *with id.* 90, 94-96 (Ezell Jones indicates that he closed the window, which is inconsistent with the testimony provided by the general manager). Based on this factual record, the Alcoholic Beverage Control Board (Board) imposed a $500 fine on the Respondent for the violation. *In re 2461 Corporation, LLC, t/a Madam's Organ*, Board Order No. 2015-293, at 5.

The Board further emphasizes that this is a fair result based on (1) the long history of noise problems in Adams Morgan; (2) the negative impact this type of violation has on nearby residents; and (3) the unfairness to the other party to the Settlement Agreement if the Board ignores the violation. First, a warning is not appropriate in this case, because Madam's Organ's violation contributed to late night noise in the Adams Morgan community, which has been recognized as an issue of concern in that neighborhood. *In re Colin Unlimited, LLC, t/a Saki*, Case No. 10-PRO-00180, Board Order No. 2011-447, ¶ 23 (D.C.A.B.C.B. Oct. 19, 2011) (recognizing that Adams Morgan suffers from "significant problems . . . with respect to . . . noise . . . during late evening hours.").[1] Second, violations that relate to late night noise have a detrimental impact on the community, because loud noises interfere with the ability of residents to enjoy the privacy of their homes and engage in common late-night activities, like sleep. *In re T.L.*, 996 A.2d 805, 812-13 (D.C. 2010) *citing City of Marietta v. Grams*, 531 N.E.2d 1331, 1336 (O.H. 1987).[2] And third, it would be unjust to ignore the settlement agreement violation in this case, when the other party to the agreement totally ". . . relinquished their rights to protest and have their voices heard at a hearing" based on the Respondent's promise to comply with the agreement. *Mallof v. D.C. Alcoholic Beverage Control Bd.*, 43 A.3d 916, 921 (D.C. 2012); D.C. Official Code § 25-446(e).

Motion for Reconsideration

In response to the Board's decision, the Board received a motion for reconsideration from the Respondent arguing that the Board misinterpreted the Settlement Agreement.

The Settlement Agreement provides in § 4(b) that "[e]xcept when persons are in the act of using the door for ingress to or egress from the premises, the doors and windows of the establishment will remain closed from 12:30 a.m. until closing when live music is being played

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[1] *See also* District of Columbia Register, *Notice of Emergency and Proposed Rules*, Notice ID: 5063417, Vol. 61/36, 2 (Aug. 29, 2014) (during the most recent Adams Morgan moratorium rulemaking, the local Advisory Neighborhood Commission indicated that the noise problems identified in 2009 still exist); *In re The Popal Group, LLC, t/a Napoleon*, Case No. 14-PRO-00097, Board Order No. 2014, 343, ¶ 37 (D.C.A.B.C.B. Oct. 1, 2014) (finding that Napoleon's amplified music was being ". . . heard in a residence on a regular basis" and that establishment failed to keep its door closed when playing music inside the establishment); *In re Columbia Station, Inc., t/a Columbia Station*, Case No. 10-CMP-00644, Board Order No. 2011-181, ¶¶ 14-15 (D.C.A.B.C.B. May 4, 2011) (saying that on two occasions the establishment failed to keep its door closed while music was playing inside the establishment).

[2] It could also be argued that when an establishment allows noise to leek outside the premises, this encourages patrons outside the establishment to speak louder or yell in order to be heard, which increases the noise experienced by the community and makes it harder for the police to engage in crowd control.

. . . ." *In re 2461 Corporation t/a Madam's Organ Restaurant*, Case No. 35287-07/025P, Board Order No. 2008-202 (D.C.A.B.C.B. May 21, 2008), *Cooperative Agreement Concerning Substantial Change of License for Sale of Alcoholic Beverages*, § 4(b) (Feb. 6, 2008) [*Settlement Agreement*].

Counsel for the Respondent argues that the Settlement Agreement contemplates the temporary opening of a window for reasons other than the ingress or egress of patrons. *Petition for Reconsideration*, 2. Counsel posits that under a holistic reading of the agreement, the Respondent may open of the window to serve food and drink, allow communication among staff, or—to put it succinctly—to fart. *Id.* at 3. Therefore, he urges that the Board reverse itself on this ground. *Id.* at 4.

In contrast, the Government finds the argument "bloated" and full of hot air. *Opposition*, 2. The Government notes that the plain language of the agreement clearly supports the charge and makes no allowances for other exceptions. *Id.* Further, ". . . no evidence [demonstrates] that the parties to the Settlement Agreement contemplated the gastrointestinal challenges of employees, the controversies inherent in any culinary selections, or . . . any concern for . . . olfactory assaults on . . . patrons . . . ." *Id.* Finally, the Government states that if the Respondent required the use of the windows, ". . . it should have negotiated those exceptions to their closure in the same manner it negotiated explicit exceptions to allow doors to open for patron ingress and egress." *Id.* at 2-3.[3]

DISCUSSION

The Board is persuaded by the reasoning presented by the Government and denies the Respondent's motion.

The Respondent's Settlement Agreement is akin to a contract; therefore, the Board relies on the principles of contract law to interpret it. *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). Accordingly, 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). This general rule is set aside only when "the written language is not susceptible of a clear and definite undertaking . . . ." *District of Columbia v. Young*, 39 A.3d 36, 40 (D.C. 2012).

The Respondent cites the court's ruling in *1010 Potomac Associates* for the principle that contracts should be interpreted as a ". . . whole, giving a reasonable, lawful, and effective meaning to all its terms." *1010 Potomac Associates v. Grocery Manufacturers of Am., Inc.*, 485

[3] The Government also questions the timeliness of the motion as well. *Opposition*, at 1 n.1. Based on ABRA's records, Board Order No. 2015-293 was delivered to the parties by mail and email on July 18, 2015; therefore, the motion for reconsideration appears to have been timely filed under the three day extension provided by 23 DCMR § 1702.1 (West Supp. 2015). Therefore, the Board accepts the motion as timely filed.

A.2d 199, 205 (D.C. 1984). Nevertheless, the Respondent leaves out the very next sentence, which states "[i]f the document is facially unambiguous, its language should be relied upon as providing the best objective manifestation of the parties' intent." *Id.*

In this case, the agreement unambiguously speaks for itself. The doors and windows to the establishment must "remain closed" after 12:30 a.m. if live music is provided at the establishment. *Settlement Agreement*, § 4(b). The express language of the agreement then provides one exception related to the use of the Respondent's door for ingress or egress. *Id.* The plain language of the agreement could not be clearer or more definitive; therefore, there are no grounds for the Board to insert new exceptions into the agreement, as advocated by the Respondent. *N. Lincoln Park Neighborhood Ass'n, v. D.C. Alcoholic Beverage Control Bd.*, 727 A.2d 872, 875 (D.C. 1999) ("Once entered, the agreement between the parties becomes the law of the case, and its terms may not be enlarged or diminished by the court, for to do so would be to create a new stipulation to which the parties have not agreed.").

In closing, it appears that the Respondent believes that reading the Settlement Agreement as a "whole" is a license to add provisions to the agreement that were not negotiated or agreed upon by the parties. This is not acceptable; especially, when the Respondent does not highlight any plain language in the text that support its position; does not point to any ambiguities, conflicts, or other provisions that alter the common understanding of the words used in § 4(b); does not demonstrate a need to resort to extrinsic evidence; or otherwise present credible evidence that both parties agreed to the interpretation advanced by the Respondent. Therefore, adopting the Respondent's proposed interpretation would not be reading the agreement as a *whole*; but rather, just adopting an interpretation with a lot of *holes*.

ORDER

Therefore, based on the foregoing findings of fact and conclusions of law, the Board, on this 29th day of July 2015, hereby **DENIES** the motion for reconsideration. The ABRA shall deliver copies of this Order to the Government and the Respondent.

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 that the motion for reconsideration is unpersuasive with respect to reversing the Board's finding of Madam's Organ's liability, particularly in light of the inconsistent testimony presented by the Establishment in its case. However, I dissent with the majority's determination that a warning is not appropriate. The majority fails to cite evidence in the record for its conclusion that "Madam's Organ's" violation contributed to late night noise in the Adams Morgan community." In light of the lack of such real evidence in this case, the majority justifies its penalty by citing the long history of noise problems, in general, in Adams Morgan and the negative impact that "this type of violation has on nearby residents." Order at 2. Punishing Madam's Organ for Adams Morgan's problems, in general, is what I find inappropriate.

I concur with Madam's Organ that reasonableness must be read into the Settlement Agreement and into settlement agreements, in general. We have no testimony from the other party to the Settlement Agreement in this case. Based on the evidence in the record, including the Settlement Agreement, and Madam's Organ's long record of compliance, and the reasons set forth in my dissent in the prior Order, it is my view that a warning would be fair to the other party to the Settlement Agreement and is the appropriate enforcement action in this case.

Ruthanne Miller, Chairperson

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, 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).