

GOVERNMENT OF THE DISTRICT OF COLUMBIA
 ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
 ALCOHOLIC BEVERAGE CONTROL BOARD

X

IN THE MATTER OF: :

Spo-dee-o-dee, LLC: Case #16-PRO-00038

t/a The Showtime :

113 Rhode Island Ave. NW :

License #89186 :

Retailer CT :

ANC 5E :

Settlement agreement :

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Wednesday, September 14, 2016

Whereupon, the aboverefereced matter
 came on for hearing at the Alcoholic Beverage
 Control Board, Reeves Center, 2000 14th Street,
 N.W., Suite 400S, Washington, D.C. 20009.

OLENDER REPORTING, INC.
 1100 Connecticut Avenue N.W., #810, Washington, D.C. 20036
 Washington: 2028981108 • Baltimore: 4107523376
 Toll Free: 8884453376

BOARD MEMBERS PRESENT

NICK ALBERTI, BOARD MEMBER

JAMES SHORT, BOARD MEMBER

MIKE SILVERSTEIN, BOARD MEMBER

RUTHANNE MILLER, BOARD MEMBER

ALSO PRESENT:

ANDREW KLINE

PAUL VIVARI

PAUL COLLINS

LYLE BLANCHARD

P R O C E E D I N G S

FACT FINDING HEARING

CHAIRPERSON ANDERSON: Before our recess, we have another fact finding hearing in Case #16-CMP-00038, The Showtime, license 89186. Will the parties please approach and identify themselves for the record, please?

Is there someone from ANC 5E? I would like for everyone to identify themselves for the record and there is a sign-in sheet that I would like you to sign in on the sign-in sheet and so please identify yourself for the record, please.

MR. KLINE: Good morning, Andrew Kline on behalf of the applicant.

MR. VIVARI: Paul Vivari for the applicant.

CHAIRPERSON ANDERSON: All right, the point of this hearing is that there was a settlement agreement that was submitted and the board has some concerns regarding the settlement agreement because there are provisions in the settlement agreement that would -- are you here for this

case, sir?

MR. BLANCHARD: Yes.

CHAIRPERSON ANDERSON: The Showtime?

MR. BLANCHARD: Yes.

CHAIRPERSON ANDERSON: Can you pull up a chair and identify yourself for the record, please?

MR. BLANCHARD: Good morning, I'm Lyle Blanchard. B-L-A-N-C-H-A-R-D.

CHAIRPERSON ANDERSON: And who is Mr. Blanchard?

MR. BLANCHARD: The representative of the group of five protestants.

CHAIRPERSON ANDERSON: You have, sir, your name again, sir? What's your name again, sir?

DR. COLLINS: Excuse me?

CHAIRPERSON ANDERSON: Your name again, please.

DR. COLLINS: Dr. Paul Collins.

CHAIRPERSON ANDERSON: Were you about to say something? Do you have a question?

DR. COLLINS: I'm the abutting property

owner.

CHAIRPERSON ANDERSON: Yeah, I know, I'm just saying did you -- it looked like when I was asking Mr. Blanchard who you were I thought you were about to say something.

DR. COLLINS: No.

CHAIRPERSON ANDERSON: Okay. All right, so it's my understanding that the settlement agreement that was provided by the parties for the board to review, there is a smoking provision in the settlement agreement concerning smoking on the patio and it's my understanding that in the previous hearing that was a major issue in the hearing and the board issued a board order as I understand it prohibiting smoking on the patio, and this settlement agreement appears to allow smoking in that area.

So, the board is trying to find out if this is the intent of the parties in the settlement agreement or was it an oversight? So, that is the purpose of why the board had recommended this fact finding so it's clear to all parties exactly

what it is, what is the intent of the settlement agreement that the board is asked to sign off on? Is everyone clear?

MR. KLINE: The applicant's clear.

DR. COLLINS: No, sir.

CHAIRPERSON ANDERSON: What is it you're not clear on Mr?

DR. COLLINS: I'm not clear, sir, because the applicant has never been, has never been in compliance with the board order not to have smoking, and this proposed agreement does not address that issue. The conditions still remain as were before and there is an agreement currently been placed between the applicant and myself as the abutting property owner, and under the orders which were made by this board he was not only told that there would be no smoking within 25 feet of the establishment, but he never -- he has never complied with that nor has he complied with the fact that you told us also further on his appeal for clarification it was made clear that there was to be no smoking in the

sidewalk café that he currently has. The agreement which has been submitted I did not receive it until the morning after it had been submitted and --

CHAIRPERSON ANDERSON: Let me ask you --

DR. COLLINS: -- didn't get to review --

CHAIRPERSON ANDERSON: I'm sorry to interrupt you again, what's your name again, sir?

DR. COLLINS: Dr. Paul Collins.

CHAIRPERSON ANDERSON: Okay, so are you speaking as -- are you speaking as an abutting property owner or as a member of the group?

DR. COLLINS: I'm appealing as an abutting property owner. I have no representative here. As a matter of fact, the attorney for the applicant said he was not representing the abutting property owner, and in his e-mail suggested that I would probably be getting my own attorney.

CHAIRPERSON ANDERSON: It's my understanding that you only have standing in this matter as a member of the group but not a member of -- but

not as an abutting property owner because you did not protest the substantial change application.

DR. COLLINS: Well, I came here on my own. I came here on my own. The original protest --

CHAIRPERSON ANDERSON: I'm talking about the protest that where the settlement agreement was signed off were you granted standing as an abutting, and it's my understanding that you were not granted standing as an abutting property owner in this current protest of the settlement agreement.

DR. COLLINS: In the original -- in the original protest which was submitted before this board it was not only me but the civic association --

CHAIRPERSON ANDERSON: Are you talking about the protest from what year?

DR. COLLINS: The current one, sir.

CHAIRPERSON ANDERSON: No, you were not granted standing as an abutting property owner in this case, in this protest case. I know that you were here, I'm looking at the board order that

was signed, that the board order -- do you have a copy that was signed in September?

MR. ALBERTI: Can I ask a question?

CHAIRPERSON ANDERSON: Go ahead.

MR. ALBERTI: Do we have anyone here from the group -- do we have anyone representing the group of five here?

MR. BLANCHARD: Yes.

MR. ALBERTI: Mr. Blanchard?

MR. BLANCHARD: Yes.

MR. ALBERTI: Okay --

MR. BLANCHARD: Dr. Collins is correct. When I corresponded with the ABRA staff I made it clear that I am only representing the group of five --

MR. ALBERTI: Okay, so --

MR. BLANCHARD: -- and not the abutting property owner.

MR. ALBERTI: -- so the situation is that this group of five, which I'm not sure whether Dr. Collins is a member or not, but that's not really that relevant here, but we have this group

of five that has this signed settlement agreement, all right? We have an old order, previous order that contradicts one of the terms in the settlement agreement --

MR. BLANCHARD: True.

MR. ALBERTI: -- with respect to smoking in the outdoor café. We have Dr. Collins who continues -- is it correct, Dr. Collins, that you are continuing to oppose lifting that restriction?

DR. COLLINS: Yes sir.

MR. ALBERTI: Okay. All right.

DR. COLLINS: May I present my side to the board? At the original -- our original meeting here, the persons who were represented by a person, the five, the group of five, they were represented by that person simply because those persons could not be here. They became lumped together as a group of five. But I was here at the beginning and at every other point to represent my own interests.

MR. ALBERTI: Okay, thank you for that.

MR. KLINE: Can I be heard?

MR. ALBERTI: One moment, please. I want to speak with the chair just one moment.

CHAIRPERSON ANDERSON: Go ahead, Mr. Kline.

MR. KLINE: Yes, my understanding of the history of this situation is as follows: There was an application, there was an initial settlement agreement that was entered into by the applicant with Dr. Collins -- it did not relate to the smoking issue. There was subsequently a hearing where the board did talk quite a bit -- or there was a lot of testimony taken and a lot of evidence taken -- with respect to the smoking issue. The board entered an order which has been mentioned here, and then there was a request for approval of the substantial change. It's my further understanding that Dr. Collins is part of -- and I think it actually was initially more than a group of five, I think it was almost ten, initially. Those were all residents on the street with the exception of Dr. Collins who is a property owner, not a resident, that the

substantial change was noticed to the public. That was the only group that came forward. Dr. Collins was part of that group. It's my further understanding that he was kept abreast by e-mail. We weren't not involved, as that's my understanding, is that he was kept abreast during the course of the negotiations, and we agree with board member Alberti's conclusion that, yes, the settlement agreement -- I'll go even further -- contradicts the board's order. And I think that there are two issues with respect to that. The first issue is can the settlement agreement contradict the board order and what does the board do with that? And I think the answer to that is well, of course, the board always retains revisory power over its own orders, and it's up to the board as to whether the board's previous order should be overruled. So, that brings us to the second question which is, well should the board, based upon this settlement agreement, overrule its previous order, and I will tell you -- I think this was inquired also was this an

oversight, did people focus on this? -- and Mr. Blanchard can certainly speak to this also -- this smoking issue -- this was not an oversight, this was central to the discussions that were had between the parties and we would suggest that Dr. Collins had a full opportunity: Number one, to lodge a separate protest as an adjacent property owner; number two, to participate with the group of five or more, of which he was a member. He chose not to participate from what we understand and, again, we were not involved with protestants, but that's our understanding, and it was not until after two months of negotiations that we finally came to an agreement that all of the residents who live on the block agreed with, that Dr. Collins objected and said no, no, no, he wouldn't sign off. All the other residents, it's my understanding, did sign off, and that's why we are here today. That's my understanding of the history.

CHAIRPERSON ANDERSON: Go ahead, Mr. Short.

MR. SHORT: I just have a question [inaudible]

2:12] would indicate this is the history that the agency has gotten down. Prior to, and I think it had a lot to do with my decision in the courtroom, so I am not the attorney, but before this business was given permission to use a sidewalk café they did -- before they were given permission to do anything because of a lot of the rules with the sidewalk café which they did not get permission from anybody concerned, they just operated that way, and I would like for the record to reflect the day of this hearing that this business hasn't always been community friendly, that they have not complied with all the laws and rules, so I just want that in the record. I'll get to the rest of the hearing but I as a board member want that on the record today that the investigative history of this business is not a good one and it's not community friendly. That's just my observation as a board member.

MR. KLINE: We -- I mean -- if I may comment.

CHAIRPERSON ANDERSON: Mr. Kline, I don't

want a rather extensive conversation on that issue, I mean that's Mr. Short's opinion. If you want to address it briefly, but I do not -- it's not necessary for us to have an extensive conversation on the history of this.

MR. KLINE: The only thing I wanted to say is that I agree that this business perhaps got off to an uneven start with the neighborhood, but I believe, based on what I've seen, that that relationship has very much been repaired and frankly I believe that this process in terms of bringing the parties together to discuss the substantial change has aided in strengthening that relationship and facilitating communication between the parties and I think it's much better than it was before. And that's all I'm saying.

MR. SHORT: We can agree to disagree. Thank you very much.

MR. KLINE: Thank you.

CHAIRPERSON ANDERSON: Anyone else have?
Yes, Mr. Blanchard?

MR. BLANCHARD: Yes, Chairperson Anderson, so

just to give a few words of more background I think that there was an original letter filed -- there was a letter filed by -- before maybe eight people, and then some more people showed up at the roll call. I did not participate in the roll call hearing. I did not participate in the status hearing or the mediation, but I was retained by some of the property owners in mid June, and Mr. Kline is correct at that point there had been a draft settlement agreement proposed by his client and was circulating among the property owners and their tenants. So, I did not circulate myself because my clients were cross conscious, so they took it upon themselves to circulate a lot of e-mails back and forth with Mr. Vivari on all of the issues involved in the proposed settlement agreement which were the usual ones plus noise and, most predominantly, smoking. And so, Mr. Collins was copied on those e-mails -- Dr. Collins, I'm sorry. I did not communicate with Dr. Collins directly, my clients did, and after several e-mails Dr. Collins wasn't

responding and so when we got down to the very end before the -- one week before the time to file, I don't know if Mr. Collins saw the last draft of the settlement agreement or not. So, my point is, of those eight people, five of them did sign the settlement agreement. You'll have to ask Dr. Collins why he did what he did, I'm not representing him. And the other two people who were adjoining property owners didn't sign either because by the date of the status hearing they had sold their properties and so they no longer had an interest in the protest, so I just wanted to get that fact before the board to help them flesh out why those other two persons who had signature lines on the agreement did not sign.

MR. ALBERTI: Okay, thank you.

MR. KLINE: The point is, though --

MR. ALBERTI: Please wait for the Chair.

MR. KLINE: Oh, I'm sorry. I apologize.

CHAIRPERSON ANDERSON: I apologize. Mr. Kline, go ahead.

MR. KLINE: I was just going to follow up by

saying that the smoking language appeared in drafts way early in the process, this was not something that was put in at the last minute, so whether the last version in the agreement was seen or not, it was clear throughout the process that the issue restrictions on smoking were viewed differently by the residents on the street than what was contained in the board order, and that there was going to be an effort to change that, so this, I do not believe, was a surprise that was sprung on Dr. Collins at the last minute, it was in the agreement throughout the negotiation process I understand.

CHAIRPERSON ANDERSON: Yes, Mr. Silverstein.

MR. SILVERSTEIN: You said that the settlement agreement and board order are in conflict and I would add that it's not at all uncommon for settlement agreements and board orders and other legal documents to not be symmetrical. And a settlement agreement can allow certain things or the group would not object, but if another order is more restrictive,

the restrictive order, the restrictive language on all of these things governs, do you agree to that?

MR. KLINE: I agree.

MR. SILVERSTEIN: So, then explain to me, help me out, as to why you believe this is not that type of case, where just because other people don't object to something doesn't necessarily mean that we have to abide by it.

MR. KLINE: Because it's not that one is more restrictive, the language is directly contradictory, the issue, just to join the issue in all three, is where people should be allowed to smoke. Dr. Collins does not want them smoking in front of the establishment in the sidewalk café area. The residents, people who live there, prefer that than people wandering up and down the street smoking because under the -- in the area, the operator has a better opportunity and a better chance to police their behavior and make sure that they are not having a negative effect on people on the block, so to return to your

initial question, they're directly contradictory, so it's not as if we can take the less restrictive one, or more restrictive one, and say that's what governs because it is simply contradictory. They're directly in conflict.

MR. SILVERSTEIN: The board order governs until rewritten.

MR. KLINE: We understand that, but we're suggesting is that this --

MR. SILVERSTEIN: That we should.

MR. KLINE: -- that you should based on the settlement agreement.

MR. SILVERSTEIN: You're right. Thank you, sir.

CHAIRPERSON ANDERSON: Do you want to say something, sir?

MR. JACKSON: I am here on behalf of Dr. Collins as a property manager of a property that's adjacent to Showtime, 111 Rhode Island Avenue. I've been the business property manager since 2012 and I'm here to -- if allowed -- I guess it's still a question if Dr. Collins has

standing or not, I'm not sure if that's been settled.

CHAIRPERSON ANDERSON: It has, it has been settled that Dr. Collins does not have -- I'm going to propose something later on but it is settled that Dr. Collins does not have standing as an abutting property owner.

MR. JACKSON: In this protest.

CHAIRPERSON ANDERSON: In this protest. That is the position of the board, that he does not have standing because Dr. Collins did not file a protest, a specific protest as an abutting property owner in this matter. I know there is some misunderstanding in communication at the roll call and I remember, as this case is coming back to me, I remember that when the protest was scheduled I think the board did receive a settlement agreement and we cancelled it then and I think Dr. Collins had shown up the deputy thought that he was going to move forward with it if I remember -- I could be wrong but I think that's what happened at that time. And from what

I'm hearing at least from Mr. Blanchard who is here I think it's also clear that Dr. Collins does not have standing in this protest, but I'm going to recommend something, I think, to the board members what to do by the end of this hearing, and maybe that will -- I'm not sure if people will be satisfied but maybe it will give some more clarity with the issue and everyone will have an opportunity to weigh in, but you can go ahead, sir, as this is a fact finding hearing and you're here. I'm not going to say you can't speak.

MR. JACKSON: Okay. I do appreciate it.

CHAIRPERSON ANDERSON: All right. Yes, Dr. Collins.

DR. COLLINS: The board order that was subsequent to the protest raised the questions I had [inaudible 2:23] -- any sort of activity out there. However, he has not posted signs as required by law since May of 2015, and he continues each day to violate the orders of the board.

CHAIRPERSON ANDERSON: Dr. Collins, this is the position of the board. It's -- the board basically says that you did not submit a protest either individually or collectively with the ABRA as an abutting property owner challenging this substantial change application as an abutting property owner. That you, Dr. Collins, you along with seven other residents and owners signed as members of the group. Because you did not individually challenge or file a protest as an abutting property owner, that is the reason why the board did not provide you standing. So, if you had filed a protest as an abutting property owner, then you would have, but as far as the board was concerned you were part of the group, and it's my understanding, and I'm new to this proceeding so you're more knowledgeable about this than I am, it's my understanding that you've been in many protests -- you've been -- you have participated in ABRA protests regarding this property, so you are very well versed, and I'm going to ask what it is that you need to do and

what the board is saying is that you did not specifically file a protest as the abutting property owner, that you went in with the group and you did not at any time did you say, 'oh, by the way, I'm an abutting property owner and so, therefore, I'm filing a separate protest.' The group can always fall apart, but if the group falls apart, if you had done that, then you would always stand, and then although the other groups would have -- although the ANC and the group of five that signed the settlement agreement, of course, because you already -- if you had established standing you would have had the hearing and listened to your comment and then we would have moved forward. But I think what I'm going to recommend to the board is that -- for the applicant to file a motion asking the board to vacate the initial order -- the initial order -- and then you'll have an opportunity to weigh in whether or not the board should vacate that order -- the order that still stands today to prohibits the smoking, and so, therefore, if the

board determines that we're not going to vacate our order, then that order still stands. I don't know what the board's going to do, but that would depend on the responses that we get from what -- from the applicant and your response because you will be given an opportunity to respond to that because in the original order you had standing and so, therefore, you will have an opportunity to weigh in because the board will be asked to vacate an order that you are a party to. So, do you understand? We'll move further, but do you understand -- this is what I'm going to recommend that the board vote on. That would give you an opportunity to weigh in on the initial order that you are a party to. Go ahead, sir, I mean I'm just --

DR. COLLINS: Yeah, the additional information that I sent to the board --

CHAIRPERSON ANDERSON: Which are you talking about? This case or the earlier case?

DR. COLLINS: This one.

CHAIRPERSON ANDERSON: For this case?

DR. COLLINS: Yeah, it was eight people who signed this sheet that we sent in lodging the original protest and is noted that it is as an owner, not as an abutting property owner, but as an owner. And this is why I felt that, according to all the procedure, I was part of this original group of protestants.

CHAIRPERSON ANDERSON: But, as part of the group or as an abutting property owner?

DR. COLLINS: No, as a part of the group.

CHAIRPERSON ANDERSON: Yes, and that's -- you are a member of the group. What we're saying is that as a member of the group you do have standing, however you do not have standing as an abutting property owner. So, I'm not denying the fact that you have standing as a member of the group. And I'm not well versed, and I'll say this on the record, but I need to get some clarification once the group signs a settlement agreement do all members of the group have to sign off on it? And if there are 10 members and nine agree, if the one doesn't does it really

matter? I don't know that and I'll go on the record and legal will let me know that if you're a member of the group and if nine people signed off and if you didn't, does that mean 'tough luck' or can you still move on? It appears that if you are -- if the ten members in the group and nine agree, and you don't agree, then majority -- and so, so you do have standing as a member of the group and there's no denying that. What we're stating is that you do not have standing as an abutting property owner because you did not make that clear to the -- you did not do that in the beginning. Okay?

MR. KLINE: It would be our position that as a member of the group that he would be stopped from now coming forward. He can't have it -- our position would be he can't have it both ways, he can't be a member of the group and then when the group makes a decision, assuming that decision is binding, and we believe it is given the settlement agreement that was submitted, and then say, 'well, no, I'm not part of it, I don't want

to do that.'

CHAIRPERSON ANDERSON: Well, as my counsel and learning counsel, and I'll state it on the record that I've only been doing this for five months, to learn counsel, to know the laws in the sense of what it means to the group, and I think Dr. Collins has stated, and he has stated to us clearly today, that he was a member of the group.

MR. KLINE: Correct.

CHAIRPERSON ANDERSON: And I've made it clear to him that he has standing as a member of the group but not individually as an abutting property owner.

MR. KLINE: Understood.

CHAIRPERSON ANDERSON: Yes, sir, go ahead.

DR. COLLINS: In the original protest, the original letter that came before the board --

CHAIRPERSON ANDERSON: Mm hmm?

DR. COLLINS: It declared very clearly that two people, well actually two people, who signed on with the [inaudible 2:31] which is immediately adjacent to 113, they indicated that the problems

they were having with this outside -- this sidewalk café was the fact that there was so much smoke, there was so much smoke they couldn't open their front windows. Ultimately, they became so exasperated that they sold their property. They sold their property. That's why they were not on this, because they followed the procedure as far as they could and then finally Rick indicated that he could no longer put up with it, therefore he would not be a part of the final information -- the final agreement, the settlement agreement. Now, all along the way I did respond when they wrote e-mails, and I constantly said that the applicant is not in compliance with the board order, and I suggested to them, I gave them the information that told them what he was supposed to do, what he was not doing, for over a year. And in the process I was not able to rent my second story apartment. And my witness here, as a property manager, knows that because parents had to come to review the environment and their young ladies were going to be in that second

floor apartment. When they came, the sidewalk café was in full operation and the parents made decisions that they would not let their girls live in such an environment. I consider that a blot not only on my property but the rest of the neighborhood and which is stated in this document that I submitted to the board. And Mr. Jackson here can verify the fact that he has -- for over a year he has been trying to rent that second floor apartment. If you like I'll give you some direct information as to the person who said that,

CHAIRPERSON ANDERSON: Dr. Collins. Mr. Jackson?

MR. JACKSON: Yes?

CHAIRPERSON ANDERSON: Mr. Jackson, you're speaking but you cut him off, so I was not -- I was giving him an opportunity to speak since he had started but then you cut him off, so I will entertain him speaking since he was here.

DR. COLLINS: Thank you, sir.

MR. KLINE: Mr. Chair, if we're going to get

into these factual issues --

CHAIRPERSON ANDERSON: Mr. Kline, we're not going to get into -- I just -- I see where he wants to be heard and the board will hear him. But I'll tell you what the recommendation is I'm going to make --

MR. KLINE: I understand --

CHAIRPERSON ANDERSON: -- to the board -- to my board members and I think that's the way we're going to go, to resolve this issue, because I think that -- I don't think that the board is in the position, based on this fact finding, to make that type of decision. I don't know, but I think it's a cleaner way to address it, the way I'm going to propose to the board.

MR. KLINE: Just for the record, for the benefit of some board members, we dispute the factual allegations in terms of --

CHAIRPERSON ANDERSON: You don't know what he's going to say, Mr. Kline. I say, 'come on, Mr. Kline, I'm going to do something' and then later you go for the opposite.

MR. KLINE: I'm talking about the other things we've heard -- the allegations -- that there hasn't been compliance with the agreement and that people haven't moved in and my client would say that the people next door had been regulars in his establishment, so I mean I just want to make it clear that there's another side of wanting the board members' perception to be colored by testimony that we don't think is relevant so we're not here to rebut.

CHAIRPERSON ANDERSON: Thank you very much, Mr. Kline, for your zealous representation of your clients, and I do mean that.

MR. KLINE: Thank you.

CHAIRPERSON ANDERSON: Go ahead, Mr. Jackson.

MR. JACKSON: Again, I have been in the property since 2012, March, so I have a close relationship with the block, the neighbors, the businesses that work in the area. If I could just ask one question to the board. If I understand what you're saying, if you are going to request or have or make a motion that the

original order is vacated, then if that is passed, do I understand it right that at that time Dr. Collins will have an opportunity because he's a part of the original order to then share with you the information with you for why he's in support of being vacated or not, what he thinks?

CHAIRPERSON ANDERSON: Yeah, so, what the motion that I'm going to ask to be made by the applicant is that the board vacate the order, the initial order that in a sense that prohibits -- so if that order is vacated, then we'll issue another order supplementing it with the settlement agreement. Since Dr. Collins was granted -- and if I'm not correct, please correct me -- I think Dr. Collins was granted standing in the first case as an abutting property owner.

MR. JACKSON: And at that time he would have standing.

CHAIRPERSON ANDERSON: He still has standing in the first protest so he can respond to the motion by the applicant to vacate that order, so all the information that you're stating he can

put that in his response to the motion by the applicant and that's in the first case because he has standing and if the board then votes -- and the board will review the motion, review the opposition, or support, they might agree to support, and then the board will make a decision moving forward and then it will be a clean matter and clear to both parties, to each side, what is it that now proposes. So, Dr. Collins, at least what I'm proposing he will still have an opportunity to weigh in on whether or not the board should vacate the order regarding the smoking issue. And if he believes that the applicant was not complying with the previous settlement agreement then he can put that in his response to the motion.

MR. KLINE: Then we're going to be litigating issues and waivers that will be more properly the subject of another evidentiary hearing, which we would prefer not to do. I mean, we think that this is a procedural, legal issue that needs to be resolved by the board. There is a settlement

agreement with the only protestant in this case, and it seems to us the issues should be confined to: Number one, which we think we addressed, whether the board has revisory power over its previous order, and, second, whether that order should be revised based upon the agreement that's been reached with the only protestants in this case, and thirdly, whether Dr. Collins' participation with the protestants leads to either a stop or a lapse in terms of his -- whether the board should entertain his complaints about vacating the order.

CHAIRPERSON ANDERSON: I think the board is of the opinion that -- and I can be wrong -- but I I think the board is of the opinion that they would have to issue an order to vacate the previous order, that that is not automatic.

MR. KLINE: No, I understand that. That's not what I'm addressing.

CHAIRPERSON ANDERSON: Ms. Miller -- I, I, please, what I've stated, I said I think, I didn't say this was the board's position, so I'm

very careful in what I'm saying, so it's not necessary for you to say that's not so. I'm not taking a vote, but I'm just saying I think this is where the board -- this is where the board is.

MR. KLINE: Right, I understand that, and I wasn't suggesting.

CHAIRPERSON ANDERSON: I'm just clarifying the record by saying that I'm not -- as chair, I'm not saying the board voted and this is what the board -- I think that the board believes that it has to -- it has to do something with the previous order, and what does that something mean and how do we do that? Do we have to write another order vacating that order, so if we adopt the settlement agreement does it have to state specifically in this new order that the previous order is vacated? So, it has to be addressed.

MR. KLINE: Understood.

CHAIRPERSON ANDERSON: And so, how the best way to address that issue?

MR. KLINE: The only thing I was addressing is what is relevant to that decision, and our

standpoint -- our stand -- is that disputes over the operation or things that might be properly appropriate in a contested protest hearing should not be part of that discussion, should not be part of information, that this relates to process, it relates to the law, it relates to standing, and a lot of legal issues, but I would hope that we're not going to get into factual issues because if we are, and the board needs to resolve this, then we have to have a hearing.

CHAIRPERSON ANDERSON: I think what Mr. -- what I'm suggesting is that the applicant file the motion asking the board to vacate its previous order and to give the analysis of why the board should do what it needs to do and I can't tell him what to put in his answer. Of course, when folks will always file an answer and an attorney will look at it and say it's irrelevant, this is not important, I don't know where he's at. I've been here long enough that I've read responses and some are on point and some are not on point to the issue, and so the

board will take that for what it is worth when we get.

MR. KLINE: Understood.

CHAIRPERSON ANDERSON: But I don't know what is going to come -- I don't know, but I just think that this is just where we are right now. Do we have any other questions by any other board members? Yes, Ms. Miller.

MS. MILLER: This is somewhat of a question and a response. I agree, I think you have a good idea that we go forward with addressing the order first, but I just don't -- I just reacted to you saying that it would be vacated because I think that we're just dealing with one condition basically in the order and I don't see the order being vacated. I think Mr. Kline did refer to it as maybe being revised or amended or overruled in part, but just -- you may think that's semantics, I don't know, but I just wanted to say that's the way that I'm looking at it, but also when I was looking at the settlement agreement we don't usually have conversations about settlement

agreements with parties. I thought that a reason for revising the board order so that it was consistent with a settlement agreement might be that circumstances had changed and, if so, if we had evidence saying that condition isn't necessary anymore or things have changed, I would find that somewhat persuasive. There may be other reasons in which they could address the order but I think that it is important for the parties to address why the board should revise the order.

CHAIRPERSON ANDERSON: Do we have any other comments by any other board members?

MR. ALBERTI: Just real quick.

CHAIRPERSON ANDERSON: Yes, Mr. Alberti.

MR. ALBERTI: I'll just quickly point out that the order only has one condition on it.

MS. MILLER: Yeah, but it has a lot of other statements of fact and it was dealing with other -- maybe the whole thing can be vacated if the --

MR. ALBERTI: I just want to point that out for the record, I'm just pointing it out for the

record.

MS. MILLER: Okay.

MR. ALBERTI: No response necessary.

CHAIRPERSON ANDERSON: All right. Do we have any other questions by any other board members? Yes, Mr. Blanchard?

MR. BLANCHARD: Mr. Chairman and board members, just on the point raised by Ms. Miller as to current conditions. My clients couldn't be here today. Mr. -- schedule unfortunately didn't allow him to be here today and -- and Elizabeth -- are overseas because they work with the State Department. I believe that [inaudible 2:44] but they wanted me to relay to the board that their goal with this agreement is to ensure that the board understands that their agreement is not only better but it protects against noise and other disturbances of the peace, and actually does more to limit the block's -- the people that reside in the entire block -- their exposure to smoke as it constrains the number of people who can smoke and confines them to one area and makes

the tavern more accountable for patrons smoking elsewhere. Mr. -- did tell me by e-mail yesterday -- because I asked him about current conditions -- he said noise hasn't been a problem for a long time and that smoking hasn't been a problem recently. For what that's worth.

CHAIRPERSON ANDERSON: All right. Yes, Dr. Collins?

DR. COLLINS: I guess the smoking problem isn't a big thing for the people who live on the other side of the wall. 115 is an open area. Smoke can go that way. There is a wall between my building and the next building. Any smoke that comes from my property line on the left and comes this way, it is stopped by the wall and because I have air conditioning units working or heating units, it sucks that secondhand smoke right into my building, and I imagine that the consideration that there was an agreement, there still is as far as I know, it's part of history. It is still in the original agreement that was signed back in 2012 between Paul Vivari and

myself stating that his operation on the conditions of that agreement. It says that his operation was to be behind closed doors. Since then, he has asked for a substantial change which was granted by the board, for this sidewalk café which he surreptitiously got without informing me that he was going to do it, from the department of transportation, he did not report it to the board of consumer regulatory affairs as he was supposed to. He has consistently violated property lines and his wall is impinging on my pocket. So, I -- to vacate the original and have it changed to state -- I would.

MR. JACKSON: If I can finally just finish and I -- I -- I will do my best to keep it very, very brief. I don't speak for Dr. Collins. I work as his property manager. I'm at that property four, maybe five times a week as the property manager, so I see it on a regular basis. I have had a chance to go into the restaurant initially when it was opened before -- the bar -- before they moved out into the sidewalk area out

front and there were some issues with them encroaching on the egress of the residents' leaving. I would hope that the board would go ahead and allow the original order to be vacated so that Dr. Collins could have an opportunity to speak about what's still going on. There are still -- I won't go into the list of items -- but there are still issues from that original agreement that remain to date. I know that their attorney just mentioned something about residents actually being patrons of the bar and that's fine if that's what they choose to do. The question is whether or not prospects and future renters have been deterred from renting the property for almost a year due to situations that they have seen. That I can go into detail at another time. But I would just hope that the board will allow that.

CHAIRPERSON ANDERSON: Any final thoughts, Mr. Kline?

MR. KLINE: No. Just in response to that, my client advises that he owns the building on the

other side and he rented the condo in one day, so we're not sure what all the hoopla is about, whether we think it's particularly relevant to what we think the board needs to know to make a decision.

MR. JACKSON: The relevance of that, just FYI, as a realtor, when someone comes to a property to rent it or possibly buy it, especially if they're renting, one of the main things you tell a renter is to go by the property different times of the day, different days of the week, and see if that is a place that you would want to live. The greater majority of my portfolio are students. We house -- our largest building, well not our largest but the largest in D.C., is the Girard House directly across from Howard University. As you know, Howard University's housing has a lottery system. So, when all the dormitories are filled we get some of that overflow. Well, when parents come into town for the summer session or for the yearly session, and they're looking for places for their

young ladies and gentlemen to rent, and you give them an opportunity to see your property, and they go by and out of eight applications about six of them have been turned down because of issues that they've seen and it all relates to the establishment abutting the property, that means that there still is a problem and a loss of income. You might have been able to rent your property in one day to an adult, but since my portfolio targets students, 18, 17, 19-year-olds that will be out on their own for the first time, most parents have an issue with some of the things they have seen.

CHAIRPERSON ANDERSON: All right. I am making a motion to the board that we -- that the applicant file a motion to the board asking us to vacate the previous order.

MR. ALBERTI: I second. May I make a second recommendation to the applicant?

CHAIRPERSON ANDERSON: Yes. Is there any discussion?

MS. MILLER: I will just say that I think it

would be useful if the applicant also addresses the person [inaudible 2:52:30].

CHAIRPERSON ANDERSON: All right. Thank you. I think that we've had the discussions and I think it's clear to the parties what the expectation is -- what it is that ought to clean this matter up. Those in favor say aye. (chorus of ayes.) All those opposed? (no audible response.) The matter passes 5-zero-zero, so that's our expectation. Thank you very much for your attendance and everybody is dismissed.

MR. KLINE: For the board, we didn't discuss timing, we didn't set a deadline, explain this to me because my associate who works with me on these issues as far as timing and I'm leaving on vacation on Saturday, so I just want to alert the board that it likely will be within 21 days. Normally I do it within 10, but I did want the board to know that.

CHAIRPERSON ANDERSON: It's up to you when you want to do that, Mr. Kline.

MR. KLINE: I don't know what would be

[inaudible 2:53:45].

CHAIRPERSON ANDERSON: Thank you for the clarification. We know that, Mr. Kline, you're not a shrinking violet so I don't think that the board will have to wait too long to get something from you, okay.

MR. KLINE: Lord only knows.

CHAIRPERSON ANDERSON: Okay. Thank you. Yes, Dr. Collins?

DR. COLLINS: Just one point.

CHAIRPERSON ANDERSON: Yes sir?

DR. COLLINS: The applicant has filed for renewal of his alcohol, his liquor license --

CHAIRPERSON ANDERSON: Yes sir.

DR. COLLINS: -- and as part of the -- it seems like much of the -- the position that was on the protest was included in his application and I just wanted to know whether or not -- it's for October so maybe --

CHAIRPERSON ANDERSON: Well, if he filed a renewal, and as an abutting property owner if this settlement doesn't cover the renewal then,

of course, if the timeline has not passed you can file a protest as an abutting property owner. You always have that right to do that during renewal as long as you comply with the laws and regulations and, since you have -- you're familiar with the process, and if you're not familiar with the process you can talk to Ms. Randall from this office, but make sure that you comply with the timelines and make sure that moving forward and, if you continue to own the property, that you always make it clear to the board whichever -- whether or not you belong to a group, the ANC, that I as an individual am expressing my right to protest this matter as an abutting property owner. So, that's a right that you always have as long as you own the property. But you have to assert that. You have to always make sure by saying 'yes, I'm joining this group of five, however I'm a part of the group of five but as an abutting property owner I am always going to file my protest because the group might fall, but if I don't agree with the group then I

still have standing to challenge what I believe I want to occur with this property. Okay?

DR. COLLINS: Yes, sir.

CHAIRPERSON ANDERSON: All right, thank you. Have a good day, everyone. We are recessed.

(Whereupon, the above-entitled matter was concluded.)