

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

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The Juniper Group, LLC	)	Case Number:	13-PRO-00096
t/a The Blaguard	)	License Number:	086012
	)	Order Number:	2014-125
Petition to Terminate a	)		
Settlement Agreement	)		
	)		
at premises	)		
2003 18th Street, N.W.	)		
Washington, D.C. 20009	)		

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**BEFORE:** Ruthanne Miller, Chairperson  
Nick Alberti, Member  
Donald Brooks, Member  
Herman Jones, Member  
Mike Silverstein, Member

**ALSO PRESENT:** The Juniper Group, LLC, t/a The Blaguard, Petitioner  
  
Elizabeth Makris, Owner, on behalf of the Petitioner  
  
Brian Hart, Commissioner, on behalf of Advisory Neighborhood  
Commission (ANC) 1C, Protestant  
  
Denis James, Kalorama Citizens Association (KCA), Protestant  
  
Martha Jenkins, General Counsel  
Alcoholic Beverage Regulation Administration

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

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**INTRODUCTION**

The Alcoholic Beverage Control Board (Board) finds good cause to amend the 2002 settlement agreement attached to the Retailer’s Class CR License held by The Juniper Group, LLC, t/a The Blaguard, (hereinafter “Petitioner” or “Blaguard”). Specifically, the Board strikes § 2 (capacity) and the last sentence of § 4 (trash can). The Board also modifies the entertainment and fixed pane window provision discussed in § 3. Furthermore, the Board finds that the 1995

agreement is attached to the Blaguard's license. Nevertheless, the Board credits the Blaguard's proffer that the owners were unaware of the agreement based on its confirmed absence from ABRA's electronic database. Consequently, the Board grants the Blaguard a ninety-day extension to file a second termination petition related to the 1995 agreement. The Board's reasoning is described in detail below.

### ***Procedural Background***

The Blaguard filed a timely Petition to Terminate a Settlement Agreement (Petition) requesting that the Board terminate its Settlement Agreements entered into with Advisory Neighborhood Commission (ANC) 1C, the Kalorama Citizens Association (KCA), and several individuals.<sup>1</sup> The Board approved the settlement agreement on December 17, 2002. In re Salgon Corporation, t/a The Common Share, Application No. 30315-02/080P, Board Order No. 2002-275 (D.C.A.B.C.B. Dec. 17, 2002).<sup>2</sup>

The Board found that the Petition satisfied D.C. Official Code § 25-446(d)(2), because it was filed during the Petitioner's renewal period and after four years from the date the Board originally approved the settlement agreement at issue in this matter. The Board notes that upon filing the Petition, the Blaguard was granted a two week extension to file an amended Petition. After the Blaguard filed an amendment, the Board deemed the Petition complete. The Alcoholic Beverage Regulation Administration (ABRA) then provided notice of the Petition in accordance with District of Columbia (D.C.) Official Code § 25-446(d)(3).

Subsequently, both the ANC 1C and the KCA filed protests against the Petition in accordance with District of Columbia (D.C.) Official Code §§ 25-601(1) and 25-602. *ABRA Protest File No. 13-PRO-00096*.

The Board recognizes that an Advisory Neighborhood Commission's (ANC) properly adopted written recommendations are entitled to great weight from the Board. See Foggy Bottom Ass'n v. District of Columbia ABC Bd., 445 A.2d 643 (D.C. 1982); D.C. Official Code §§ 1-309.10(d); 25-609. Accordingly, the Board "must elaborate, with precision, its response to the ANC[s] issues and concerns." Foggy Bottom Ass'n, 445 A.2d at 646. The Board notes that it received a resolution from ANC 1C, and will satisfy the great weight requirement in the Board's Conclusions of Law.

The parties came before the Board's Agent for a Roll Call Hearing on July 15, 2013, and the Protestants were granted standing to protest the Petition. The parties then came before the Board for a Protest Status Hearing on September 25, 2013. The Protest Hearing in this matter

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<sup>1</sup> The Board instituted a new form and new procedures related to the settlement agreement amendment and termination process during the Fall 2013 renewal period. The Board notes that these new procedures do not apply retroactively to petitions filed during the Spring 2013 renewal period, which includes the Petition filed in this matter. The Board instituted these changes in order to simplify and standardize the petition process.

<sup>2</sup> The 2002 agreement between the Blaguard, the KCA, and ANC 1C superseded the 2000 agreement between the parties. *Voluntary Agreement* (Aug. 8, 2000).

occurred on November 6, 2013. Finally, at the conclusion of the hearing, the Board received Proposed Findings of Fact and Conclusions of Law from each of the parties.

Based on ANC 1C and the KCA's initial protest letters, the Board may only grant the Petition if the Board finds that the request will not have a negative impact on peace, order, and quiet in the area located within 1,200 feet of the establishment and otherwise satisfies D.C. Official Code § 25-446. D.C. Official Code §§ 25-446(d)(4), 25-602.

## 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. The Blaguard holds a Retailer's Class CR License at premises 2003 18th Street, N.W., Washington, D.C. *ABRA Protest File No. 13-PRO-00096*, Notice of Public Hearing. The Petitioner's license has a settlement agreement attached to the license that the prior holder of the license entered into with ANC 1C, the KCA, and several individuals in 2002. See generally In re Salgon Corporation, t/a The Common Share, Board Order No. 2002-275.

### II. Testimony of ABRA Investigator Kofi Apraku

2. ABRA Investigator Kofi Apraku investigated the Petition and wrote the Protest Report submitted into the record. *Transcript (Tr.)*, November 6, 2013 at 22. The establishment is located in Adams Morgan in a C-2-A zone. Id. at 29. Thirty-six licensed establishments operate within 1,200 feet of the Blaguard. Id. No schools, public libraries, or daycare centers are located within 400 feet of the establishment. Id.<sup>3</sup>

3. The Blaguard is located in a green, two-story building with an entrance located in the front of the establishment. Id. The establishment's dumpster is located in an alley behind the building. Id. at 29-30. The establishment has two bars; one on the first floor and one on the second floor. Id. at 30. The walls of the establishment are covered in football memorabilia. Id. The establishment has a full kitchen on the second floor. Id.

4. The Metropolitan Police Department reported that it received three calls for service at establishment's address. Id. Nevertheless, none of the calls resulted in reports to ABRA. Id.

5. During the course of investigation, ABRA monitored the establishment on twelve occasions. Id. None of the investigators observed loitering, criminal activity, excessive trash, or noise emanating from the establishment. Id. Investigator Apraku further observed that the establishment becomes busy around 10:00 p.m. and 11:00 p.m. Id. at 40. He did not observe any residences abutting the establishment. Id. at 42.

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<sup>3</sup> This information is based on information provided by the District's Geographic Information System. Id. at 45.

6. Investigator Apraku also entered the establishment during his investigation. Id. at 43. He noted that the establishment played prerecorded music on speakers facing the interior of the establishment.

### III. Matthew Johnson

7. Matthew Johnson testified on behalf of the Petitioner. Id. at 54. Mr. Johnson lives approximately one block away from the Blaguard on U Street, N.W. Id. at 54-55. Mr. Johnson has patronized the establishment in the past. Id. In his experience, the establishment does not cause any problems or generate excessive noise. Id.

### IV. Testimony of Elizabeth Makris

8. Elizabeth Makris testified on behalf of the Blaguard. Id. She owns the establishment and also owns a home in Adams Morgan. Id. at 59, 61.

9. Ms. Makris discussed her efforts to locate the other parties to the agreement and negotiate an amended settlement agreement in good faith. Id. at 62. First, Ms. Makris sent letters to the individual signatories that executed the settlement agreement. *Petitioner's Exhibit No. 1* (Letters sent to Ryan Haupt, Tara Haupt, Denis James, Michael Ratney, Ronald Ross, Karen Sasahara, and Martin Tarratt). Second, on April 10, 2013, Ms. Makris attended a public safety committee meeting held by ANC 1C after corresponding with various ANC Commissioners about making changes to the agreement. Id. (Affidavit of Elizabeth Makris); *Tr.*, 11/6/14 at 64, 84. Third, Ms. Makris saw Denis James, the President of the KCA, at the ANC meeting on April 10, 2013, and asked to discuss the Blaguard's agreement. *Tr.*, 11/6/14 at 64.<sup>4</sup> Ms. Makris did not receive a response from the individual signatories. Id. at 63.

10. Ms. Makris later invited Mr. James to the Blaguard to discuss the agreement. Id. The parties did not reach an agreement during this meeting. Id. at 65-66.

11. Ms. Makris also met with various ANC commissioners, including Commissioner Hart, to discuss the establishment's settlement agreement. Id. at 67. Nevertheless, she could not reach an agreement with the ANC. Id. at 67.

12. Ms. Makris wants to eliminate the provision related to the windows. Id. at 91. According to Ms. Makris, the establishment wants the ability to open the second floor window in order to help cool the second floor. Id. According to Ms. Makris, current law is sufficient to prevent the establishment from generating disturbing noise. Id. at 92-93. She noted that nearby establishments like Jack Rose and Duplex Diner can keep their windows open. Id. at 117.

13. Ms. Makris noted that the properties adjacent to the Blaguard are all commercial properties. Id. at 94. Specifically, the establishment neighbors Jack Rose, Meat in a Box, and

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<sup>4</sup> The Board recognizes that some of the parties may have engaged in uncivil behavior during the course of negotiating an amended settlement agreement. The Board does not recount this portion of the testimony, because it is not relevant to the issue presently before the Board.

DeVino's Wine Store. Id. at 93-94. In addition, El Tamarindo and Dahlak restaurants are located across an alley behind the establishment. Id. at 94-95.

14. Ms. Makris further complained that the agreement requires the establishment to place a trash outside. Id. at 99. This is a problem for the establishment because Ms. Makris was told by the Fire Marshall that this is illegal. Id. at 98, 121. She also noted that the city provides two trash cans on the sidewalk by the establishment. Id. at 121.

15. Ms. Makris also complained that the agreement requires the establishment to have 49 seats. Id. at 98. Yet, the Fire Marshall and DCRA will no longer allow the establishment to have 49 seats. Id.

16. Ms. Makris noted that establishments located near the Blaguard already offer live entertainment. Id. at 115. Specifically, Jack Rose and El Tamarindo often provide entertainment. Id.

17. Ms. Makris further noted that the remaining portions of the settlement agreement merely repeat the law. Id. at 124.

#### **V. Nic Makris**

18. Nic Makris testified on behalf of the Blaguard. Id. at 136-37. Mr. Makris owns and operates the Blaguard. Id. at 137. Mr. and Ms. Makris purchased the business in 2010 from the prior owners. Id. The establishment operates seven days per week. Id. The establishment serves lunch and brunch five days per week and serves dinner all week. Id. The establishment typically uses the second floor as an event space for engagement parties, birthday parties, and fundraisers. Id. at 138. The owners seek to operate the establishment as a "gastropub . . . known for its food and beer selection." Id. at 137. The establishment has been voted "Best Neighborhood Bar" for multiple years. Id. at 139-40.

19. Mr. Makris described the entertainment provided by the establishment. Id. at 144. The establishment currently plays recorded music through a jukebox. Id. Mr. Makris noted that they have played recorded music with their windows open and have never received any complaints. Id.

20. Mr. Makris described the changes that had occurred in the neighborhood. Id. He noted that many Adams Morgan businesses are suffering economically. Id. Mr. Makris further noted that at the time the agreement was executed, the establishment's immediate vicinity had two to three vacant buildings that are now occupied. Id. at 191. He also noted that Jack Rose may open its second floor windows. Id. at 209.

21. The D.C. Fiscal Policy Institute further reports the following changes in Adams Morgan since 2008: (1) the addition of a new pedestrian crossing on the 2400 block of 18th Street, N.W.; (2) the creation of wider sidewalks; (3) the elimination of angled parking; (4) the elimination of dumpsters and increased visibility near Marie Reed school; (5) the local business improvement district pays for street cleaning and reimbursable detail; (6) the addition of crime cameras and

floodlights to the neighborhood; and (7) the addition of the Circulator bus to the neighborhood. D.C. Fiscal Policy Institute, "An Analysis of Issues Related to the Adams Morgan Liquor License Moratorium, 13-15 (Sept. 19, 2013).

22. The Blaguard presented a Certificate of Occupancy (COO) issued on December 16, 2010. *Petitioner's Exhibit A10*. The COO lists the establishment as having an occupancy of 49 seats and an occupied square footage of 2800 square feet. Id.

23. The Blaguard also presented a COO issued by DCRA on April 24, 2013. *Petitioner's Exhibit A11*. The COO lists the establishment as having an occupancy of 35 seats and an occupied square footage of 1505 square feet. Id.<sup>5</sup>

#### **VI. Testimony of Commissioner Ted Guthrie**

24. ANC Commissioner Ted Guthrie, representing ANC 1C03, testified on behalf of ANC 1C. Id. at 231.

25. On one occasion, Commissioner Guthrie has observed noise and music emanating from the establishment into the street. Id. at 232. He attributed the noise to the fact that the establishment had its windows and doors open around 11:00 p.m. Id.

26. Commissioner Guthrie noted that he has received complaints from residents regarding peace, order, and quiet. Id. at 234. He attributed many of these complaints to the fact that patrons from outside the neighborhood are attracted to Adams Morgan as a party destination. Id. He noted that patrons walking from and to their vehicles generate noise in many of the nearby residential neighborhoods. Id. at 235. Commissioner Guthrie could not connect the patrons to a specific establishment. Id. at 236. He further admitted that he has never received a complaint from any of his constituents regarding the operations of the Blaguard. Id. at 251.

27. Commissioner Guthrie confirmed that Ms. Makris appeared at the ANC meeting on April 10, 2013. Id. at 243.

28. Commissioner Guthrie admitted that the trash can provision of the settlement agreement is no longer necessary. Id. at 267. Specifically, Commissioner Guthrie noted that the streetscape project resulted in the city providing trash cans outside the establishment. Id.

#### **VII. Testimony of Denis James**

29. Denis James, president of the KCA testified on behalf of the KCA. Id. at 274, 276. Mr. James noted that the impetus of the agreement was the noise problems caused by the previous owners. Id. at 280.

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<sup>5</sup> ANC 1C also raised concerns about the Petitioner's ability to comply with the food sales requirement. *Tr.*, 11/6/14 at 325-26. The Board does not find this issue relevant to the present matter, because the provision related to occupancy does not limit the establishment's ability to change its seating.

30. Mr. James noted that he worked with Commissioner Hart to craft a new settlement agreement to propose to the Petitioner. Id. at 283. He also noted that he later met with Ms. Makris to negotiate an amendment to the agreement. Id. at 284. In addition, the KCA and the Petitioner attempted to negotiate a new agreement at the Good Will Baptist Church. Id. at 287.

### **VIII. Testimony of Commissioner Brian Hart**

31. ANC Commissioner Brian Hart, representing ANC 1C01, testified on behalf of ANC 1C. Id. at 305. Commissioner Hart chairs ANC 1C's ABC Committee. Id. He lives approximately two blocks away from the establishment on Wyoming Avenue, N.W. Id. at 306.

32. Commissioner Hart noted that the parties almost reached an agreement on an amended settlement agreement during their negotiations. Id. at 308.

33. Commissioner Hart is concerned that the establishment will have a negative impact on peace, order, and quiet. Id. at 309. Specifically, as a patron of the Blaguard, he has observed drunk patrons leave the establishment in a loud manner. Id. Commissioner Hart is concerned that residents across the street will be negatively impacted by noise if the termination is permitted by the Board. Id. at 320.

### **CONCLUSIONS OF LAW**

34. 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).

**I. THE BLAGUARD SATISFIED § 25-446(D)(4)(A) BY MAKING DILIGENT EFFORTS TO LOCATE THE OTHER PARTIES AND ATTEMPTING TO NEGOTIATE AN AMENDED SETTLEMENT AGREEMENT IN GOOD FAITH WITH ANC 1C AND THE KCA.**

35. The Board finds that the Blaguard satisfied § 25-446(D)(4)(A) through its efforts to find the other parties and negotiate an amended settlement agreement.

**a. The Blaguard made diligent efforts to locate the other parties to the agreement.**

36. The Board finds that the Blaguard made diligent efforts to locate the other parties. According to § 25-446(d)(4)(A)(i), “[t]he applicant seeking the amendment has made a diligent effort to locate all other parties to the settlement agreement.” § 25-446(d)(4)(A)(i). The parties to the original agreement were the Blaguard, the KCA, ANC 1C, and a group of individual signatories. *Supra*, at ¶ 1. The record shows that the Blaguard sent letters to the individual signatories notifying them of their desire to terminate or amend their settlement agreement but did not receive a response. *Supra*, at ¶ 9. The parties did not dispute that the Blaguard located ANC 1C and the KCA.

37. The KCA asks the Board not to credit the letters submitted by the Blaguard. Nevertheless, the Board finds the testimony of Ms. Makris and the letters submitted by the Blaguard credible.<sup>6</sup> *Kenion v. U.S.*, 302 A.2d 723, 724 (D.C. 1973) (The determination of credibility rests with the trier of fact). It is simply speculative to doubt their authenticity, because they were not signed, dated, or sent certified mail or by email, as the KCA argues. *Tr.*, 11/6/2013 at 346. Further, adopting the position taken by the KCA would result in the Board imposing an “unarticulated and unannounced” standard on the Blaguard, because there is no specific statute or regulation governing how a licensee must contact the other parties under § 25-446(d)(4)(A)(i). *Haight v. D.C. Alcoholic Beverage Control Bd.*, 439 A.2d 487, 493 (D.C. 1981). Consequently, the Board rejects the KCA’s credibility argument, and finds that the Blaguard satisfied § 25-446(d)(4)(A)(i).

**b. The Blaguard made a good faith effort to negotiate an amended settlement agreement with the KCA and ANC 1C.**

38. 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.” § 25-446(d)(4)(A)(i)-(ii).

39. In *Hank’s Oyster Bar*, the Board stated that a licensee satisfies its obligation to attempt to negotiate an amended settlement agreement in good faith by engaging in “honesty in fact in the

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<sup>6</sup> The Board notes that Ms. Makris was subject to cross-examination during the hearing; yet, the parties did not extract any compelling statements that created doubt regarding the credibility of the letters.

conduct or transaction concerned.” § 25-446(d)(4)(A)(ii); In re Leeds the Way, LLC t/a Hank’s Oyster Bar, Case Number 10-PRO-00094, Board Order No. 2012-319, ¶ 54 (D.C.A.B.C.B. Sept. 12, 2012) citing Big Builders, Inc. v. Israel, 709 A.2d 74, 77 (D.C. 1998). Consequently, if the licensee engages in negotiations with the other signatories to its agreement, the Board will only deem such efforts unsatisfactory under § 25-446(d)(4)(A)(ii) if it is shown that the licensee engaged in “fraud, deceit, or dishonesty.” In re Leeds the Way, LLC t/a Hank’s Oyster Bar, Board Order No. 2012-319, at ¶ 55.

40. The Board credits testimony that the Blaguard attempted to negotiate an amended settlement agreement with the KCA and ANC 1C. Supra, at ¶¶ 9-11. The record shows that the Blaguard sent letters to the individual signatories advising them of its interest in seeking the termination or amendment of its agreement. Supra, at ¶ 9. In addition, Ms. Makris, the Blaguard’s representative, attempted to negotiate an amended settlement agreement with the parties on April 10, 2013, and the parties did not dispute that they engaged in extensive negotiations over the agreement before the date of the Protest Hearing in this matter. Supra, at ¶¶ 9-11, 27, 30. Finally, there is no evidence in the record that the representatives of the Blaguard engaged in any type of fraud, deceit, or dishonesty. Consequently, the Board concludes that the Blaguard made a diligent effort to locate the other parties and negotiate an amended settlement agreement in good faith under § 25-446(d)(4)(A)(i)-(ii).

**c. The Blaguard’s efforts to negotiate an amended settlement agreement were timely.**

41. The KCA and ANC 1C argue that the Blaguard’s efforts to negotiate an amended settlement agreement beginning on April 10, 2013, after the renewal deadline on April 1, 2013 require the Board to dismiss the petition. The Board disagrees.

42. Under § 25-446(d)(2), “[t]he Board may accept an application to amend or terminate a settlement agreement by fewer than all the parties . . . [d]uring the license’s renewal period . . . .” D.C. Official Code § 25-446(d)(2), (A). The Board has also held in prior orders, such as Haydee’s Restaurant, that licensees may satisfy the good faith negotiation requirement by engaging in the official mediation process offered by ABRA. NHV Corporation, Inc., t/a Haydee’s Restaurant, Case No. 10515-07/065P, Board Order No. 2008-189, ¶¶ 82-83 (D.C.A.B.C.B. Apr. 23, 2008); Don Juan Restaurant, Inc. t/a Don Juan Restaurant & Carryout, Case No. 21278-07/042P, Board Order No. 2008-233, ¶¶ 77-78 (D.C.A.B.C.B. Jul. 30, 2008).

43. The Board notes that mediation through ABRA only occurs after the filing of a petition and the occurrence of a roll call hearing; therefore, the Blaguard engaged in the required negotiations long before licensees fulfilled the requirement in other cases. In addition, the phrase “[d]uring the license’s renewal period” does not mandate that negotiations must be completed at the time filing; therefore, the determination of when to cutoff the petition period or whether to allow licensees to correct deficiencies rests solely within the discretion of the Board. Ammerman v. D.C. Rental Accommodations Comm’n, 375 A.2d 1060, 1063 (D.C. 1977) (“Agencies must be, and are, given discretion in the procedural decisions made in carrying out

their statutory mandate.”<sup>7</sup> As a result, there is no basis for the Board to dismiss the petition for failing to timely complete the requirements of § 25-446(d)(4)(A).

**II. THE BLAGUARD DEMONSTRATED THAT SOME OF THE PROVISIONS OF THE SETTLEMENT AGREEMENTS MERIT AMENDMENT UNDER § 25-446(D)(4)(B) BASED ON A CHANGE IN THE NEIGHBORHOOD AND CIRCUMSTANCES BEYOND THE CONTROL OF THE PETITIONER.**

44. The Blaguard has provided sufficient evidence to demonstrate that amendments to the settlement agreement provisions related to the Petitioner’s COO, the prohibition on entertainment, the agreement’s trash and garbage requirements, and window are warranted.

45. Under § 25-446(d)(4)(B), in order to terminate or amend the settlement agreements, the Blaguard 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).

**a. The Board strikes § 2, because it conflicts with the current COO.**

46. Section 2 of the settlement agreement states,

The seating capacity for this establishment provided in its Certificate of Occupancy is 49. Total occupancy (seated and standing) shall not exceed the number permitted by the D.C. Fire Marshal and/or BOCA Code, as applicable.

*In re Salgon Corporation, t/a The Common Share*, Board Order No. 2002-275 at *Settlement Agreement*, § 2. The Board interprets settlement agreement using the law of contracts. *North Lincoln Park Neighborhood Ass’n v. District of Columbia Alcoholic Beverage Control Bd.*, 727 A.2d 872, 875 (D.C. 1999). Accordingly, the Board generally construes settlement agreements according to the agreement’s plain language. *Capital City Mortgage Corp. v. Habana Vill. Art & Folklore, Inc.*, 747 A.2d 564, 567 (D.C. 2000).

47. The Blaguard’s current COO provides for fewer seats and square footage than the COO described in § 2 of the agreement. *Supra*, at ¶¶ 22-23. The Board notes that there is no language in the provision that prevents the Blaguard from changing its seating and occupancy, and the provision merely requires the licensee to comply with current law. The Board notes that the issuance of the COO rests solely within the control of DCRA and the Petitioner has no control over DCRA’s decisions. Therefore, because § 2 conflicts with the establishment’s current COO and does not provide any tangible benefits to the neighborhood beyond current law, the Board strikes the provision from the agreement.

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<sup>7</sup> The Board further notes that neither the KCA or ANC 1C have alleged prejudice by the timing of the negotiations.

**b. The Board strikes the prohibition against providing entertainment, because the law governing the enforceability of entertainment restrictions has changed.**

48. Section 3(c) of the settlement agreement states, “Applicant will not offer live music or entertainment, and there shall be no music played on the roof.” In re Salgon Corporation, t/a The Common Share, Board Order No. 2002-275 at *Settlement Agreement*, § 3. The Board notes that it previously stated in Hank’s Oyster Bar that a change to the liquor law 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.

49. The Board notes that the law governing the enforceability of entertainment restrictions has changed since the Board approved the settlement agreement in 2002. The Council recently added D.C. Official Code §§ 25-446.01 and 25-446.02, which describes enforceable and non-enforceable provisions in settlement agreements. D.C. Official Code §§ 25-446.01, 25-446.02. Specifically, §§ 25-446.01(1) and 25-446.02(1)(E) now govern the enforceability of conditions on the provision of entertainment by a licensee. Based on these changes, the Blaguard merits an opportunity to apply for entertainment, negotiate a settlement agreement (if it chooses to do so), and have its application considered under current law. Nevertheless, the Board maintains the restriction on music on the roof, because there is a reasonable basis in the record for concluding that such activity may generate disturbing noise. Supra, at ¶¶ 25, 29.

**c. The Board strikes the garbage can requirement contained in § 4**

50. Section 4 states, “In addition, Applicant will place a trash receptacle in front of the establishment no later than 10 pm each evening it is in operation and will remove said trash receptacle following the departure of its patrons from the area after closing.” In re Salgon Corporation, t/a The Common Share, Board Order No. 2002-275 at *Settlement Agreement*, § 4. The Board notes that the two trash cans placed near the establishment by the city render this portion of the agreement unnecessary and redundant. Supra, at ¶ 14. Therefore, the Board strikes § 4.

**d. The Board modifies the window provision found in § 3(b)**

51. The last sentence of § 3(b) states, “In addition, Applicant agrees to close the front windows on its first floor by no later than 7:30 pm [sic] each night, and further agrees to replace the front windows on its second floor with a fixed pane window not capable of being opened.” The record shows that other establishments in the neighborhood are not required to have fixed pane windows and keep their windows open without generating disturbing noise. Supra, at ¶¶ 12, 19. The Board finds that requiring the establishment to close its windows at 10:00 p.m. provides a sufficient balance between the interests of the Blaguard and the neighborhood’s interest in quiet.

**e. The Board maintains the remaining portions of the settlement agreement.**

52. The Board notes that the Blaguard failed to show that any changes to the neighborhood or changes in circumstance outside the Petitioner's control to merit further changes to the agreement. Therefore, the Board denies the Petitioner's request to amend or terminate the remaining provisions of the agreement.

**III. THE BLAGUARD DEMONSTRATED THAT AMENDING THE SETTLEMENT AGREEMENTS WILL NOT RESULT IN AN ADVERSE IMPACT UNDER § 25-446(D)(4)(C).**

53. The Board finds that the amendments imposed by the Board in this Order will not have a negative impact on the neighborhood. The burden is on the Petitioner to show that "[t]he 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 only appropriateness standard raised by ANC 1C and the KCA is § 25-313(b)(2), which states, "[i]n determining the appropriateness of an establishment, the Board shall consider . . . [t]he effect of the establishment on peace, order, and quiet, including the noise and litter provisions set forth in §§ 25-725 and 25-726." D.C. Official Code § 25-313(b)(2). First, the Board finds that the deletion of the agreement's occupancy provision will have no impact on the establishment's occupancy and seating, because § 2 never limited the ability of the establishment to change its seating or occupancy. Second, deletion of the provision prohibiting entertainment will have no impact, because the Blaguard still has to apply for the privilege. In addition, the Board's amendment maintains the prohibition on music on the roof. Third, the deletion of the trash can provision will have no impact, because the city now provides trash cans outside the establishment. Fourth, allowing the Blaguard to remove its fixed pane window and keep its second floor window open until 10:00 p.m. will continue to mitigate the generation of unreasonable late-night noise.<sup>8</sup> Consequently, the amendments imposed by the Board will not have an adverse impact on the neighborhood.

**IV. THE BLAGUARD MERITS AN OPPORTUNITY TO APPLY FOR THE TERMINATION OF THE 1995 AGREEMENT.**

54. During the protest hearing, the parties disputed whether the 1995 agreement, executed by the Salgon Corporation, the Vernon House, and the Ashley Condominium Association attached to the Blaguard's current license. The Blaguard argues that the license should not attach, because it has a different license number than the prior holder of the license, and because § 4 of the 1995 agreement states that the agreement only applies to "this license." Nevertheless, the Board notes that it is ABRA's practice to change an establishment's license number whenever a new owner takes over the operations of an establishment; therefore, the mere fact that the license has a new number does not alter the fact that the original license was issued and renewed contingent on compliance with the existing settlement agreement. N. Lincoln Park Neighborhood Ass'n v. Alcoholic Beverage Control Bd., 666 A.2d 63, 67 (D.C. 1995) ("we hold . . . [that] the voluntary agreement [is] a part of the license, and that any renewal of the license

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<sup>8</sup> See D.C. Official Code § 22-1321(d) (stating that "It is unlawful for a person to make an unreasonably loud noise between 10:00 p.m. and 7:00 a.m. . . .").

will therefore include a renewal of the voluntary agreement as well, unless the agreement is modified by the parties or by the Board.”) Therefore, as the successor in interest to Salgon Corporation, the Blaguard is bound by the 1995 agreement.

55. At this time, the Board cannot take any action to amend or terminate the 1995 agreement, because it was not described in the public notice advising the public of the Blaguard’s Petition. Nevertheless, the Board credits the Blaguard’s ownership that they were not aware of this agreement until April 18, 2013. Letter from Elizabeth Makris to the Alcoholic Beverage Control Board (Apr. 29, 2013). The Board notes that ABRA’s Public Information Office confirmed that the agreement was not maintained in ABRA’s electronic database; therefore, the owners could not have reasonably known that the 1995 agreement was attached to their license. Email from William Hager to Elizabeth Makris (May 2, 2013). Therefore, in order to avoid undue prejudice to the Blaguard and the public, the Board will grant the Blaguard a ninety-day extension to file a second termination petition related to the 1995 agreement.

**V. THE BOARD’S ORDER GIVES ANC 1C’S ISSUES AND CONCERNS GREAT WEIGHT.**

56. The Board addressed ANC 1C’s concerns regarding peace, order, and quiet, as well as concerns that the Petition did not comply with § 25-446 in Section I through III of this Order. The Board emphasizes that it is only making minor amendments to the settlement agreement, and is leaving the remaining portions of the agreement in place.

**VI. THE BLAGUARD WAS PERMITTED TO AMEND ITS APPLICATION AFTER FILING A TIMELY PETITION.**

57. As part of this Order, the Board affirms that the Blaguard was entitled to amend its timely filed Petition. As noted in Kingman Park, the Board has the discretionary authority to permit a licensee to amend an application or petition submitted to the Board after the original filing of the relevant documents, so long as the action does not result in prejudice to the protestants. Kingman Park Civic Ass’n, Et Al., v. District of Columbia Alcoholic Beverage Control Bd., No. 11-AA-831, 7 (D.C. 2012). Similar to Kingman Park, the amendment of the Petition occurred before the matter was placarded, “discussed during the hearing,” and the licensee was subject to “cross-examination”; therefore, the amendment permitted by the Board resulted in no prejudice to the KCA and ANC 1C. Id. Based on this reasoning, the Board upholds its decision to permit the Blaguard to amend its timely filed Petition.

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

58. Finally, the Board is only required to produce findings of fact and conclusions of law related to those matters raised by the Protestants 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, the Petitioner has

satisfied all remaining requirements imposed by Title 25 and Title 23 to merit the amendment of its settlement agreements by the Board in accordance with this Order.

### ORDER

Therefore, the Board, on this 7th day of May 2014, hereby **AMENDS** the Settlement Agreements entered into by the Petitioner, ANC 1C, and the KCA as follows:

(1) The following portions of the agreement are struck from the settlement agreement, approved by the Board on December 17, 2002:

- a. section 2;
- b. and the last sentence of § 4.

(2) The last sentence of § 3(b) shall be struck and replaced with the following:

- a. In addition, Applicant agrees to close the front windows on its first floor by no later than 7:30 p.m. each night. Finally, the Applicant shall close the second floor windows by no later than 10:00 p.m. each night.

(3) Section 3(c) shall be struck and replaced with the following:

- a. Applicant shall not provide music on the roof.

**IT IS FURTHER ORDERED** that all other provisions of the settlement agreement approved on December 17, 2002, shall remain in full force and effect.

**IT IS FURTHER ORDERED** that the following clarification shall guide the interpretation of the existing settlement agreements:

The Board **ADVISES** the Blaguard that, under the 2002 agreement, the mere fact that patrons participating in a pub crawl or tour enter the establishment is not sufficient to merit a violation of § 7. The Board notes that a pub crawl under the law is defined “as an organized group of establishments within walking distance which offer discounted alcoholic drinks during a specified time period.” 23 DCMR § 712.1 (West Supp. 2014). Therefore, so long as the establishment does not intentionally offer discounts in coordination with other establishments, voluntarily participate in a coordinated event where individuals visit multiple establishments, or sign up to participate in an organized event involving multiple establishments, the Board will not find that the Blaguard engaged in a “pub crawl”; “tour”; or “other similar event. See Webster’s II New College Dictionary (2001) (defining “tour” as a “. . . comprehensive trip including visits to points of interest”).

**IT IS FURTHER ORDERED** that the Blaguard shall have ninety (90) days from the date of this Order to file a termination petition for the 1995 settlement agreement that complies with § 25-446, including the provisions regarding locating the other parties and negotiating an

amended settlement agreement in good faith before the filing of the second petition.<sup>9</sup> The Board notes that if the Blaguard does not file a second petition within the allotted time frame, the Board shall find that the Blaguard waived its opportunity to seek the unilateral termination or amendment of the 1995 agreement.

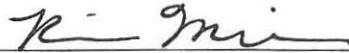
The Board further **ADVISES** the Blaguard that it may immediately apply for entertainment endorsement that complies with the 1995 settlement agreement, if it so chooses.

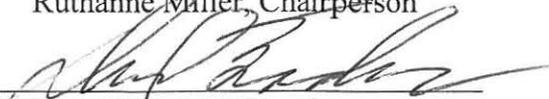
ABRA shall provide copies of this Order to the Petitioner, ANC 1C, and the KCA.

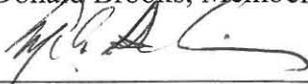
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<sup>9</sup> The Board notes that if the parties to the 1995 agreement voluntarily agree to the modification or termination of the 1995 agreement, there will be no need for the Blaguard to file a second petition.

District of Columbia  
Alcoholic Beverage Control Board

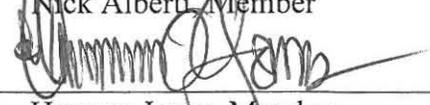
  
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Ruthanne Miller, Chairperson

  
\_\_\_\_\_  
Donald Brooks, Member

  
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Mike Silverstein, Member

I partially concur with the decision reached by the majority of the Board. Nevertheless, I did not find sufficient evidence in the record to justify the modification of the provisions related to the establishment's fixed pane window and entertainment.

  
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Nick Alberti, Member

  
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Herman Jones, Member

Under 23 DCMR § 1719.1 (2008), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, Reeves Center, 2000 14th Street, NW, 400S, Washington, D.C. 20009.

Also, under section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration under 23 DCMR § 1719.1 (2008) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b) (2004).