

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

In the Matter of:)		
)		
)	Case No.:	13-PRO-00152
Solomon Enterprises, LLC)	License No:	088290
t/a Climax Restaurant & Lounge)	Order No:	2014-474
)		
Application to Renew a)		
Retailer's Class CT License)		
)		
at premises)		
900 Florida Avenue, N.W.)		
Washington, D.C. 20001)		

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

ALSO PRESENT: Solomon Enterprises, LLC, t/a Climax Restaurant & Lounge, Applicant

Andrew Kline, Counsel, on behalf of the Applicant

Rajat Benerjee, on behalf of a Group of Fourteen Residents or Property Owners (Benerjee Group), Protestants

Eartha Clark and Jeremy Sigmon, on behalf of a Group of Eight Residents or Property Owners (Clark Group), Protestants

Tony Norman, Chair, Advisory Neighborhood Commission (ANC) 1B

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

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

INTRODUCTION

The Alcoholic Beverage Control Board (Board) finds that Solomon Enterprises, LLC, t/a Climax Restaurant & Lounge, (hereinafter "Applicant" or "Climax") is having an adverse impact on the community by permitting its amplified music to be heard in residents located more than 700 feet away from the establishment. This behavior violates the reasonable expectation of neighboring residents to peace and quiet in their homes. Further, if continued unabated, Climax will likely engage in ongoing violations of the establishment's Settlement Agreement and the noise provisions of the disorderly conduct law. Consequently, the Board approves the Application to Renew a Retailer's Class CT License filed by Climax subject to the following conditions: (1) Climax shall not permit amplified music or sound to emanate from the establishment so that it may be heard inside a residence after 11:00 p.m., Monday through Thursday, and midnight, Friday through Sunday; and (2) Climax's outdoor seating hours shall end at 11:00 p.m., Monday through Thursday, and midnight, Friday through Saturday.

Procedural Background

The Notice of Public Hearing advertising Climax's Application was posted on October 4, 2013, and informed the public that objections to the Application could be filed on or before November 18, 2014. *ABRA Protest File No. 13-PRO-00152*, Notice of Public Hearing [*Notice of Public Hearing*]. The Alcoholic Beverage Regulation Administration (ABRA) received timely protest letters from a Group of Fourteen Residents or Property Owners (Benerjee Group) and a Group of Eight Residents and Property Owners (Clark Group) (collectively, the "Protestants"). *ABRA Protest File No. 13-PRO-00152*, Roll Call Hearing Results. Advisory Neighborhood Commission (ANC) 1B was not seated as a protestant, because it did not file a timely protest letter. *Roll Call Hearing Results*, 8 (Dec. 2, 2013)

The parties came before the Board's Agent for a Roll Call Hearing on December 2, 2013, where all of the above-mentioned parties were granted standing to protest the Application. On February 5, 2014, the parties came before the Board for a Protest Status Hearing. Finally, the Protest Hearing in this matter occurred on April 2, 2014, and May 21, 2014.

The Board recognizes that an ANC's properly adopted written recommendations are entitled to great weight from the Board. *See Foggy Bottom Ass'n v. District of Columbia Alcoholic Beverage Control Bd.*, 445 A.2d 643, 646 (D.C. 1982); D.C. Code §§ 1-309.10(d); 25-609 (West Supp. 2014). 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 written recommendation from ANC 1B. The ANC expressed concern regarding the Applicant's impact on the neighborhood's peace, order, and quiet. Letter from Tony Norman, Chair, Advisory Neighborhood Commission (ANC) 1B (Nov. 14, 2014). This issue shall be addressed in the Board's Conclusions of Law, below.

Based on the issues raised by the Protestants, the Board may only grant the Application if the Board finds that the request will not have an adverse impact on the peace, order, and quiet of the area located within 1,200 feet of the establishment. D.C. Official Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2014).

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. Climax has submitted an Application to Renew a Retailer's Class CT License at 900 Florida Avenue, N.W., Washington, D.C. *Notice of Public Hearing*.
2. ABRA Investigator Felicia Dantzler investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 13-PRO-00152, Protest Report* (Mar. 2014) [*Protest Report*].
3. The proposed establishment is located in a C-2-B zone. *Protest Report*, at 2. Thirty-nine licensed establishments are located within 1,200 feet of the proposed location. *Id.* at 3. There are no schools, recreation centers, public libraries, or day care centers located within 400 feet of the establishment. *Id.* at Exhibit 6.
4. According to the Protest Report, Climax's hours of operation and entertainment are as follows: 10:00 a.m. to 2:00 a.m., Sunday through Thursday, and 10:00 a.m. to 3:00 a.m. on Friday and Saturday. *Protest Report*, at 7. The establishment's summer garden hours are 11:00 a.m. to 2:00 a.m., Sunday through Thursday, and 11:00 a.m. to 3:00 a.m. on Friday and Saturday. *Id.*
5. Investigator Dantzler observed that the restaurant occupies "a two-story brick building." *Transcript (Tr.)*, May 21, 2014 at 8. The establishment's first floor is located at street level. *Id.* The first floor contains seats, a bar, and stage area. *Id.* The second floor contains seating and an entrance to Climax's outdoor seating area. *Id.* The summer garden seats twenty-four patrons. *Id.*
6. Between February 14, 2014, and March 22, 2014, ABRA investigators monitored the establishment on eight separate occasions. *Tr.*, 5/21/14 at 9. Investigator Dantzler reported that she heard the establishment's music emanating from the rear of the premises on February 25, 2014. The Protest Report indicates that on Thursday, February 27, 2014, ABRA Investigator Kofi Apraku entered a residence near the establishment around 1:15 a.m. *Protest Report*, at 8. Investigator Apraku heard music from Climax emanating from one of the resident's bedrooms. *Id.* at 8-9. Investigator Jones went inside a bedroom in the residence and heard music when he stood in front of a window. *Tr.*, 5/21/14 at 10. The Noise Task Force found no noise level violations between March 20, 2014, and April 19, 2014. *Case Report 13-PRO-00152(b)*.
7. Investigator Dantzler observed no speakers on the establishment's summer garden when she visited the premises. *Tr.*, 5/21/14 at 14. She further noted that the door to the summer garden had a crack in the area where the seal meets the door. *Id.* at 15, 20, 31. Therefore, she

concludes that the music she heard came from Climax's internal audio system and may have been leaking from the summer garden door. *Id.* at 14-15.

8. The investigator further observed that the establishment was making efforts to soundproof the premises. *Id.* at 14. During one visit, she saw the establishment install plywood on the rear windows. *Id.*

II. Solomon Yegzaw

9. Solomon Yegzaw described the establishment's operations. *Tr.*, April 2, 2014 at 14. He has owned Climax for two years. *Id.* at 14. Climax operates as sports bar that serves American and Ethiopian cuisine. *Id.* The establishment occupies two floors. *Id.* The establishment has six televisions on the first floor and three televisions on the second floor. *Id.* at 15. The establishment also offers disc jockey entertainment on the second floor. *Id.* at 160. The establishment also features outdoor seating in the back of the building. *Id.* at 16. The outdoor seating area faces an alley. *Id.* at 17.

10. The establishment is located near U Street, N.W. *Id.* at 17-19, 24, 28. The alley behind the establishment borders other establishments, such as Velvet Lounge, Dodge City, Brixton, and Nellie's. *Id.* at 17. The Velvet Lounge and the Brixton have outdoor seating areas facing the alley. *Id.* at 17-19. Climax is also located near a gas station that operates twenty-four hours per day. *Id.* at 24. The establishment also faces the 9:30 Club's parking lot. *Id.* at 28.

11. Mr. Yegzaw discussed the establishment's efforts to maintain security. *Id.* at 30, 54. The establishment has an eight camera security system. *Id.* at 30. The cameras are located on both floors of the establishment. *Id.* He also employs three security staff. *Id.* at 54. Security is responsible for checking identification and monitoring for intoxication. *Id.* at 55.

12. Mr. Yegzaw has taken steps to address noise issues related to the operation of his establishment. *Id.* at 34. In response to concerns, the establishment boarded up the two windows in the back of the establishment with wood and sealed the back door. *Id.* at 36, 38. He also ensures that the back windows remain closed. *Id.* He also attempts to use a low level of bass when playing amplified music inside the establishment and disconnected one speaker. *Id.* at 37, 49. The establishment has recently installed another set of doors at the entrance in order to reduce the transmission of sound when people are entering and exiting the premises. *Id.* at 39, 44-45. He also fixed the door to the summer garden. *Tr.*, 5/21/14 at 84.

13. Mr. Yegzaw attributed noise in the neighborhood to other nearby establishments; however, he admitted that even after these changes he still receives noise complaints. *Tr.*, 4/2/14 at 53, 125-26. The establishment's outdoor seating area also does not have a wall. *Id.* at 115.

14. Mr. Yegzaw added that the establishment could take additional steps to mitigate sound if necessary. *Id.* at 127. First, he could reduce the number of speakers or eliminate high volume speakers. *Id.* at 128. Second, he could play music at a reduced volume. *Id.*

15. Mr. Yegzaw also discussed the establishment's trash management practices. *Id.* at 57. Climax has ceased dumping bottles after midnight. *Id.* He also regularly hires pest control services to control rats. *Id.* at 147; *see also* 167-68.

16. Climax has not been found in violation of the city's noise level laws when inspected by the D.C. Department of Consumer and Regulatory Affairs on three separate occasions. *Tr.*, 5/21/14 at 80, 82. Mr. Yegzaw noted that the police frequently respond to noise complaints at the establishment. *Id.* at 108

III. Mr. Solonu¹

17. Mr. Solonu serves as the Climax's general manager and has worked at the establishment for two years. *Id.* at 163-64. He indicated that noise from Climax may occasionally be heard in the alley, but the noise is not very loud. *Id.* at 166. He indicated that noise from other establishments may be heard in the alley. *Id.* at 165-66, 171.

IV. Eartha Clark

18. Eartha Clark resides lives directly behind the establishment on Vermont Avenue, N.W. *Id.* at 181. A ten foot alley separates residents living on Vermont Avenue, N.W., from the establishment. *Id.* Ms. Clark's street features a row of at least seven residences. *Id.* at 226, 258.

19. Ms. Clark indicated that Climax's operations generate disturbing noise. *Id.* at 189. She regularly hears the establishment's interior music and the establishment's patrons when they use the outdoor seating area. *Id.* at 189-90, 233. Music from the establishment comes into her house through a window on the second floor of her home. *Id.* at 246.² She noted that in the summer the noise lasts until 2:00 a.m. and 3:00 a.m. *Id.* at 221.

20. Based on the location of her property, Ms. Clark is not disturbed by noise from other establishments in the neighborhood. *Id.* at 181-89. She also noted that she can identify Climax as the source of the noise, because Climax is the only establishment that regularly plays Ethiopian music near her home. *Id.* at 189, 259.

21. Ms. Clark described Climax's efforts to soundproof the establishment as cosmetic. *Id.* at 192. She noted that Climax has not installed an acoustic ceiling, "rating glass," installed sufficiently thick plywood on the windows, or otherwise installed sufficient insulation. *Id.* at 192-96. She further noted that the establishment's outdoor seating area has no soundproofing features whatsoever. *Id.* at 200.

22. Ms. Clark indicated that she has not been able to regularly sleep undisturbed in her home due to the noise generated by Climax. *Id.* at 201.

¹ The transcript did not indicate Mr. Solonu's first name and used a phonetic spelling of his last name. *Tr.*, 4/2/2014 at 162-63.

² There is some dispute in the record over whether Ms. Clark's window is damaged. *See e.g., id.* at 217. The Board credits Ms. Clark's testimony that the window has been sealed from the inside. *Id.* at 218.

V. Rajat Banerjee

23. Rajat Banerjee lives across the street from Climax in an apartment building. *Id.* at 269. He represents other residents who live in various apartments across the street from the establishment. *Id.*

24. Mr. Banerjee has observed that the establishment's music can regularly be heard approximately 700 to 800 feet away from the establishment. *Id.* at 269. He regularly hears Climax's music in his fifth floor apartment. *Id.* at 276. Mr. Banerjee knows the music is coming from Climax, because he has stood outside his building and observed Ethiopian-style music emanate from the establishment. *Id.* at 270-71. He has repeatedly called the police to complain about noise emanating from the establishment. *Id.* at 276. While Climax has turned down the music in response to complaints on individual nights, the noise problem repeatedly reoccurs, because the establishment plays music at the same loud level on other nights. *Id.* at 272. He noted that the noise disturbances often occur at night. *Id.* at 269-70.

25. Mr. Banerjee criticized Climax's efforts to soundproof the establishment. *Id.* at 274. He observed that the establishment has a large sound system located on its second floor; yet, the plywood used to seal the thin windows is flimsy and the windows rattle. *Id.* He further noted that Climax's efforts have focused on the back of the establishment, not the front. *Id.* at 275. Finally, even though Climax installed plywood on its windows, there is no indication that Climax used any insulating foam to further block the transmission of sound. *Id.* at 294.

VI. ARTS Overlay

26. Climax is located in the Uptown Arts-Mixed Use (ARTS) Overlay District. According to § 1900.2, the purpose of the ARTS Overlay District is to (1) "Encourage . . . development [and] a mixture of building uses . . . as generally required by the Comprehensive Plan"; (2) "Require uses that encourage pedestrian activity . . ."; (3) "Provide for an increased presence . . . of the arts and related cultural . . . uses"; (4) "Expand the area's housing supply . . ."; (5) "Expand . . . and encourage development of residential and commercial buildings"; (6) "Strengthen the design character and identify of the area by means of physical design standards"; (7) Encourage adaptive reuse of older buildings"; and (8) "Foster eighteen (18) hour activity and increased public safety." 11 DCMR § 1900.2(a)-(h) (West Supp. 2014).

VII. Settlement Agreement

27. Climax's Settlement Agreement states:

Applicant acknowledges familiarity with and will comply with noise-control provisions of the District of Columbia law and regulations, including preventing emissions of sound, capable of being heard outside the premises, by any musical instrument or amplification device or other device or source of sound or noise in accordance with DCMR 20.

In re Michael Naizghi t/a Bella, Board Order No. 2010-411, Settlement Agreement, § A (D.C.A.B.C.B. Aug. 4 2010).

CONCLUSIONS OF LAW

28. The Board may approve an Application to Renew a Retailer's Class CT License when the establishment will not have an adverse impact on the neighborhood. D.C. Official Code §§ 25-104, 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2014). Specifically, the question in this matter is whether the Application will have a negative impact on the peace, order, and quiet of the area located within 1,200 feet of the establishment. D.C. Official Code § 25-313(b), § 25-314(c); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2014).

29. Under the appropriateness test, the burden of proof lies with the Applicant. D.C. Official Code § 25-311(a). Furthermore, the Board shall only rely on “reliable” and “probative evidence” and base its decision on the “substantial evidence” contained in the record. 23 DCMR § 1718.3 (West Supp. 2014).

30. The appropriateness test has never been limited to mere compliance with the law. *See Panutat, LLC v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 269, 277 n. 12 (D.C. 2013) (“However, in mandating consideration of the effect on peace, order, and quiet, § 25-313(b)(2) does not limit the Board's consideration to the types of noises described in § 25-725.”). It has been said, that each location where an establishment is located is “unique,” which requires the Board to evaluate each establishment “. . . according to the particular circumstances involved.” *Le Jimmy, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 433 A.2d 1090, 1093 (D.C. 1981). Under this test, the Board must consider the “prospective” effect of the establishment on the neighborhood.” *Id.* Among other considerations, this may include the Applicant’s efforts to mitigate or alleviate operational concerns,³ the “character of the neighborhood,”⁴ the character of the establishment,⁵ and the license holder’s future plans.⁶

I. THE BOARD FINDS THAT THE DISTURBING NOISE GENERATED BY CLIMAX IS INAPPROPRIATE.

31. “In 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); *see also* D.C. Official Code §§ 25-101(35A), 25-314(a)(4). Among other considerations, the Board is instructed to consider “. . . noise, rowdiness, loitering, litter, and criminal activity. 23 DCMR § 400.1(a) (West Supp. 2014).

³ *Donnelly v. District of Columbia Alcoholic Beverage Control Board*, 452 A.2d 364, 369 (D.C. 1982) (saying that the Board could rely on testimony related to the licensee’s “past and future efforts” to control negative impacts of the operation); *Upper Georgia Ave. Planning Comm. v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 992 (D.C. 1985) (saying the Board may consider an applicant’s efforts to “alleviate” operational concerns).

⁴ *Citizens Ass'n of Georgetown, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 410 A.2d 197, 200 (D.C. 1979).

⁵ *Gerber v. D.C. Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1196 (D.C. 1985); *Sophia's Inc. v. Alcoholic Beverage Control Bd.*, 268 A.2d 799, 801 (D.C. 1970).

⁶ *Sophia's Inc.*, 268 A.2d at 800.

a. It is unreasonable and inappropriate for Climax to have its amplified music emanate throughout the neighborhood.

32. The peace, order, and quiet test permits the Board to consider whether an establishment is generating little or no sound. *In re 19 th and K, Inc., t/a Ozio Martini & Cigar Lounge*, Case No. 13-PRO-00151, Board Order No. 2014-366, ¶ 37 (D.C.A.B.C.B. Oct. 1, 2014); *see also Panutat, LLC*, 75 A.3d at 276-77 n. 12. In determining the appropriate level of sound, the drafters of Title 25 intended that the Board determine the appropriate amount of sound in light of the reasonable expectations of residents. *See* D.C. Council, Bill 6-504, the “District of Columbia Alcoholic Beverage Control Act Reform Amendment Act of 1986,” Committee on Consumer and Regulatory Affairs, 38 (Nov. 12, 1986).⁷

33. In *T.L.*, the court determined that “[t]he government has a substantial interest in protecting its citizens from unwelcome noise” *In re T.L.*, 996 A.2d 805, 812 (D.C. 2010) (quotation marks removed). This interest is “. . . greatest when [the] government seeks to protect the well-being, tranquility, and privacy of the home. *Id.* As a result, the government has a right to prevent noise so unreasonably loud that it “. . . unreasonably intrude[s] on the privacy of a captive audience or so loud and continued as to offend[] a reasonable person of common sensibilities and disrupt[] the reasonable conduct of basic nighttime activities such as sleep. *Id.* at 813 (quotation marks removed).

34. In *Ozio*, the Board determined that it was unreasonable for the licensee to have its amplified music emanate into a residence approximately 100 feet away from the establishment. *Ozio*, Board Order No. 2014-366 at 2.

35. The Board credits Mr. Banerjee testimony that he can hear Climax’s amplified music at night in his fifth floor apartment, which is located more than 700 feet away from the establishment. *Supra*, at ¶ 24. The Board also credits Ms. Clark’s testimony that she can hear the establishment’s music inside her home around 2:00 a.m. and 3:00 a.m. *Supra*, at ¶ 19. Furthermore, these disturbances occur on a regular basis. *Supra*, at ¶¶ 13, 19, 24. Indeed, based on the distance and the location of Mr. Banerjee’s residence, it is reasonable to presume that Climax is disturbing other residents as well. Consequently, similar to *Ozio*, the Board determines that the late-night noise generated by Climax is unreasonable and inappropriate.

b. Climax failed to establish that its soundproofing measures are sufficient.

36. Under § 25-313, the Applicant’s efforts to alleviate operational concerns may be used to justify a finding of appropriateness. *Donnelly v. District of Columbia Alcoholic Beverage Control Board*, 452 A.2d 364, 369 (D.C. 1982); *Upper Georgia Ave. Planning Comm. v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 992 (D.C. 1985). Accordingly, the Board may consider the establishment’s soundproofing features related to both amplified music and the

⁷ In another part of the report, the Committee advised that the District’s noise laws were based on a “reasonable man standard.” D.C. Council, Bill 6-504, the “District of Columbia Alcoholic Beverage Control Act Reform Amendment Act of 1986,” Committee on Consumer and Regulatory Affairs, 27 n. 5 (Nov. 12, 1986).

human voice.⁸ *Panutat, LLC*, 75 A.3d at 267-77 n. 12; *see also Riverfront at the Ball Park*, Case No. 13-PRO-00088, Board Order No. 2013-512, ¶ 43 (D.C.A.B.C.B. Nov. 13, 2013) (holding that providing live music in an open field without any physical soundproofing features is inappropriate).

37. The Board credits Climax's evidence that it has attempted to soundproof the establishment. *Supra*, at ¶ 12. Nevertheless, significant questions have been raised regarding the efficacy of these measures. Specifically, the Board is not convinced that the plywood used to cover the windows is sufficient to block the transmission of the establishment's amplified music. *Supra*, at ¶¶ 12, 21, 25. Given the ongoing nature of the problem and Climax's inability to ensure that its music is played at an acceptable volume, the Board requires concrete assurances that the problem will not continue during the next licensure period. *Supra*, at ¶¶ 13, 24.

38. In addition, the record shows that residents live close to the establishment's outdoor seating area. *Supra*, at ¶¶ 18-19. Because the outdoor seating area lacks soundproofing, this makes it likely that patrons sitting in the outdoor seating area will disturb nearby residents. *Supra*, at ¶¶ 13, 19, 21.

39. Therefore, the establishment's lack of adequate soundproofing measures is unreasonable and inappropriate.

c. Climax has breached and will likely breach the noise provisions of its Settlement Agreement if its operations continue without restrictions.

40. As a matter of law, ". . . any breach of the voluntary agreement constitutes a breach of the license itself and must be taken into account by the Board in considering an application for renewal of the license." *N. Lincoln Park Neighborhood Ass'n v. Alcoholic Beverage Control Bd.*, 666 A.2d 63, 67 (D.C. 1995). A licensee's settlement agreement must be interpreted according to the principles of contract law. *North Lincoln Park Neighborhood Ass'n v. District of Columbia Alcoholic Beverage Control Bd.*, 727 A.2d 872, 875 (D.C. 1999). 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). In this case, Climax has agreed to comply with Title 20 of the D.C. Municipal Regulations related to noise. *In re Michael Naizghi t/a Bella*, Board Order No. 2010-411 at Settlement Agreement, § A.

41. Chapter 27 of Title 20 regulates "excessive or unnecessary noises within the District." 20 DCMR § 2700.1 (West Supp. 2014); *Delegation of Authority Under D.C. Law 2-53*, District of Columbia Noise Control Act of 1977, Mayor's Order 97-60, § 2 (Mar. 21, 1997). Pertinent to this matter, under § 2700.14, it is a violation for an individual to create a "noise disturbance." 20 DCMR § 2700.14 (West Supp. 2014). A noise disturbance is defined as "any sound which is loud and raucous or loud and unseemly and unreasonably disturbs the peace and quiet of a

⁸ *See Kingman Park Civic Association v. Alcoholic Beverage Control Bd.*, Case No. 11-AA-831, 5 (D.C. 2012) (unpublished) (saying that the establishment's location in a "sound-proofed basement venue without windows" constituted substantial evidence of appropriateness).

reasonable person of ordinary sensibilities in the vicinity thereof . . .” § 2799 (“Noise disturbance”).

This determination is made by consider[ing] the location, the time of day when the noise is occurring or will occur, the duration of the noise, its magnitude relative to the maximum permissible noise levels permitted under the Act, the possible obstruction or interference with vehicular or pedestrian traffic, the number of people that are or would be affected, and such other factors as are reasonably related to the impact of the noise on the health, safety, welfare, peace, and quiet of the community.”

Id. Chapter 27 and Chapter 28 of Title 20 also explicitly states that noise from musical instruments, loud speakers, and amplifiers are subject to both the noise level and noise disturbance standards. 20 DCMR §§ 2700.3, 2800.1-2800.2 (West Supp. 2014).

42. The Board concludes that the noise experienced by Mr. Banerjee and Ms. Clark constitutes an ongoing noise disturbance under § 2700.14. *Supra*, at ¶¶ 19, 24. In this case, the totality of the circumstances weighs against Climax. Certainly, late-night commercial activity at Climax is appropriate given its zoning; nevertheless, the purpose of the ARTS Overlay was not to permit nuisance behavior that disturbs residents in their homes on a regular basis. § 2799; *supra*, at ¶ 26. The Board is also aware that several noise tests have not shown a violation of the noise level requirements. *Supra*, at ¶ 6. Nevertheless, the record in this case shows that Climax’s music is emanating more than 700 feet away from the premises and may be heard in at least two residences on an ongoing basis; therefore, the Board may infer that Climax’s amplified music disturbs additional residents. *Supra*, at ¶¶ 19, 24. The record also shows that the establishment’s music may be heard in the early morning hours when most residents are trying to sleep. *Id.* Consequently, the record contains sufficient evidence to find that Climax will likely violate the noise disturbance standard if it continues to operate in the same manner. Any other conclusion would permit Climax to burden residents by imposing “unwelcome noise” that interferes with the privacy of residents “captive” in their homes as they attempt to “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).

d. Climax’s operations will likely violate the disorderly conduct law if its operations continue without restrictions.

43. If permitted to operate in the same manner, Climax’s operations will likely result in an ongoing violation of the disorderly conduct law. The appropriateness test includes the word “order,” which generally refers to “[t]he rule of law and custom or the observance of prescribed procedure.” § 25-313(b)(2); WEBSTER’S II NEW COLLEGE DICTIONARY, at 771 (“order”). Further, § 400.1 permits the Board to consider “criminal activity” as part of its “peace, order, and quiet” analysis. 23 DCMR § 400.1(a). Thus, in any protest involving peace, order, and quiet, the Board may consider whether the licensee’s operations will comply with the District’s alcohol laws or generate criminal activity.

44. Under § 25-823(1), a licensee may not violate Title 25 of the District of Columbia (D.C.) Official Code, Title 23 of the D.C. Municipal Regulations (Title 23), “. . . or any other laws of

the District.” D.C. Official Code § 25-823(1). Similarly, under § 25-823(2), a licensee may not “. . . allow[] the licensed establishment to be used for any unlawful or disorderly purpose.” D.C. Official Code § 25-823(2). Consequently, the plain language of §§ 25-823(1) and 25-823(2) authorizes the Board to punish licensees for violating the law or permitting unlawful or disorderly conduct to occur.

45. The District’s disorderly conduct law provides in § 22-1321(d) that “[i]t is unlawful for a person to make an unreasonably loud noise between 10:00 p.m. and 7:00 a.m. that is likely to annoy or disturb one or more other persons in their residences.” D.C. Official Code § 22-1321(d). The Board has previously said that it will not find a licensee’s noise-making activities unreasonable under the disorderly conduct law when the “. . . licensee has taken commercially reasonable steps to soundproof its establishment and is not otherwise in violation of the District of Columbia’s noise laws.” *In re Krakatoa, Inc., t/a Chief Ike’s Mambo Room*, Case No. 10-PRO-00160, Board Order No. 2011-205, ¶ 35 (D.C.A.B.C.B. May, 18, 2011).

46. The disorderly conduct law seeks to curb “excessive loudness” that disturbs people in their homes. The Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence, *Revising the District of Columbia Disorderly Conduct Statutes: A Report and Proposed Legislation*, 9-10 (Oct. 14, 2010) [*CCE Report*] found in Committee on Public Safety and Judiciary, *Report on Bill 18-425, the Disorderly Conduct Amendment Act of 2010*, Council of the District of Columbia (Nov. 18 2010).⁹ Based on the specific nighttime hour limitation written into part (d), the law protects the right of residents to “conduct . . . basic nighttime activities such as sleep.” *In re T.L.*, 996 A.2d 805, 813 (D.C. 2010) citing *City of Marietta v. Grams*, 531 N.E.2d 1331, 1336 (O.H. 1987); *CCE Report*, at 9 n. 15.

47. As noted above, the Board determined that Climax’s soundproofing efforts are insufficient and violate the noise disturbance standard. *Supra*, at ¶¶ 36-42. As such, the Board finds that if permitted to continue unabated, Climax’s operations will likely violate the disorderly conduct law.

II. THE BOARD IMPOSES CONDITIONS ON THE LICENSE TO RESOLVE THE NOISE ISSUES RAISED BY THE PROTESTANTS

48. Under § 25-104(e), “[t]he Board, in issuing licenses, may require that certain conditions be met if it determines that the inclusion of the conditions will be in the best interest of the [neighborhood] . . . where the licensed establishment is to be located. D.C. Official Code § 25-104(e). Among other purposes, the Board uses conditions to address “. . . valid concerns regarding appropriateness that may be fixed through the imposition of specific operation[al] limits or requirements on the license.” *Riverfront*, Board Order No. 2013-512 at ¶ 49.

⁹ The Committee states that it was relying on the recommendations provided by the Council for Court Excellence (CCE). Committee on Public Safety and Judiciary, *Report on Bill 18-425, the Disorderly Conduct Amendment Act of 2010*, Council of the District of Columbia, 9 (Nov. 18 2010) also available at <http://dcclims1.dccouncil.us/images/00001/20110128161004.pdf>.

49. The first condition imposed by the Board is that Climax shall not generate music or other amplified sounds that may be heard in a residence after 11:00 p.m. during the week and midnight during the weekend. The Board finds that this condition will ameliorate the issues raised by the Protestants during their presentation. The Board notes that this condition will protect the ability of residents to enjoy peace and quiet in their home at night. Climax will not be overly burdened by this condition, because the establishment merely has to ensure that music played inside the establishment is kept at a reasonable volume. The Board notes that this condition also grants Climax the flexibility to determine the best manner in which to ensure that the establishment is appropriately soundproofed.

50. The second condition imposed by the Board requires Climax to end its outdoor operations at 11:00 p.m. during the week and midnight during the weekend. This condition will prevent nearby residents from being disturbed by unreasonable late-night patron noise. The Board notes that this condition is consistent with the Board's prior determinations in cases involving unenclosed outdoor seating areas near residents. *See, e.g., In re 301 Romeo, LLC t/a Romeo & Juliet*, Case Number 13-PRO-099136, Board Order No. 2014-045, ¶ 46 (D.C.A.B.C.B. Jan. 29, 2014).

III. THE APPLICATION SATISFIES ALL REMAINING REQUIREMENTS IMPOSED BY TITLE 25

51. Finally, the Board is only required to produce findings of fact and conclusions of law related to contested issues of fact. *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 (West Supp. 2014). Accordingly, based on the Board's review of the Application and the record, the Applicant has satisfied all remaining requirements imposed by Title 25 of the D.C. Official Code and Title 23 of the D.C. Municipal Regulations.

ORDER

Therefore, the Board, on this 19th day of November 2014, hereby **APPROVES** the Application to Renew a Retailer's Class CT License at premises 900 Florida Avenue, N.W., filed by Climax subject to the following conditions

1. Climax shall not permit amplified music or sound to emanate from the establishment so that it may be heard inside a residence after 11:00 p.m., Monday through Thursday, and midnight, Friday through Sunday.
2. Climax's outdoor seating hours shall end at 11:00 p.m., Monday through Thursday, and midnight, Friday through Saturday.

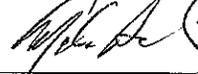
IT IS FURTHER ORDERED that the Board's findings of fact and conclusions of law contained in this Order shall be deemed severable. If any part of this determination is deemed invalid, the Board intends that its ruling remain in effect so long as sufficient facts and authority support the decision.

The ABRA shall deliver a copy of this order to the Applicant, Rajat Benerjee, Eartha Clark, Jeremy Sigmon, and ANC 1B.

District of Columbia
Alcoholic Beverage Control Board



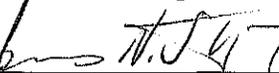
Donald Brooks, Member



Mike Silverstein, Member

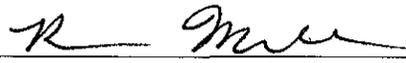


Hector Rodriguez, Member

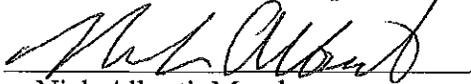


James Short, Member

I concur with the decision reached by the majority of the Board. Nevertheless, I would permit the establishment's outdoor seating hours to end at midnight during the week and 1:00 a.m. during the weekend.

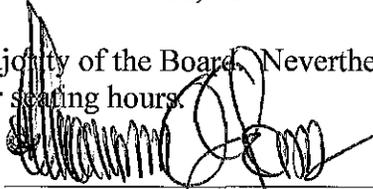


Ruthanne Miller, Chairperson



Nick Alberti, Member

I concur with the decision reached by the majority of the Board. Nevertheless, I would permit the establishment to maintain its full outdoor seating hours.



Herman Jones, Member

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

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 430 E Street, N.W., Washington, D.C. 20001; (202/879-1010). However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 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).