

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

In the Matter of:)		
)	Case No.:	14-PRO-00095
Spo-dee-o-dee, LLC)	License No:	ABRA-89186
t/a The Showtime)	Order No:	2015-447
)		
Application for a Substantial Change to)		
Retailer's Class CT License)		
(Sidewalk Café with Six Seats))		
)		
at premises)		
113 Rhode Island Avenue, NW)		
Washington, D.C. 20001)		

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member¹
Donald Brooks, Member
Herman Jones, Member
Mike Silverstein, Member
Hector Rodriguez, Member
James Short, Member

ALSO PRESENT: Andrew Kline, Esq., on behalf of Spo-dee-o-dee, LLC t/a The Showtime, Applicant

Dr. Paul Collins, Abutting Property Owner, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

**ORDER DENYING IN PART AND GRANTING IN PART THE
APPLICANT'S MOTION FOR RECONSIDERATION OF
THE ORDER AMENDING BOARD ORDER NO. 2015-273**

INTRODUCTION

On July 20, 2015, the Applicant, Spo-dee-o-dee, LLC t/a The Showtime (The Showtime), filed a Motion for Reconsideration of the Alcoholic Beverage Control Board's (Board) Order

¹ Board Member Alberti was not present at the Protest Hearing. He has read the transcripts and other documents comprising the Board's official record and has participated in the Board's deliberation of this matter.

Amending Board Order No. 2015-273. For the reasons set forth below, the Board denies in part and grants in part the Applicant's Motion for Reconsideration.

Procedural Background

On May 20, 2015, the Board issued Board Order No. 2015-273 in which the Board approved The Showtime's application for a substantial change to its Retailer's Class CT License. Specifically, the Board approved The Showtime for the use of a sidewalk café containing six seats. *In re Spo-dee-o-dee, LLC t/a The Showtime*, Case No. 14-PRO-00095, Board Order No. 2015-273 (D.C.A.B.C.B. May 20, 2015). In order to ensure that this substantial change would not disrupt the peace, order and quiet of the neighborhood, the Board set forth specific conditions of operation. More specifically, the Board ordered that "there shall be no smoking within twenty-five feet of the entrance of the establishment." *In re Spo-dee-o-dee, LLC t/a The Showtime*, Case No. 14-PRO-00095, Board Order No. 2015-273, (D.C.A.B.C.B. May 20, 2015). This decision was primarily based upon demonstrated evidence in the record that without prohibition of smoking, the constant smoking activity in an around the establishment could cause great disturbance to the peace, order and quiet of the neighborhood. As one example, it is uncontested that the establishment owner allows patrons to go outside and smoke. *Transcript (Tr.)*, 3/11/15 at 33. Moreover, while monitoring the establishment, Inv. Townsend observed five or six patrons on the sidewalk café, two of whom were smoking. *Tr.*, at 26. He further testified that if patrons were to smoke in the back of the establishment, it would have greater impact because there are several residences there. *Id.* at 42. The Board also relied on the testimony of Dr. Collins who wants his clients to be able to enjoy the use of his property without having to be concerned about the multiple negative effects of second-hand smoke. *Id.* at 130-31; 145.

Upon a request from The Showtime for clarification, the Board amended its previous Order on July 1, 2015 modifying condition (3) to provide that: "there shall be no smoking within twenty-five (25) feet of the entrance of the establishment, including no smoking within the sidewalk café of the establishment." *In re Spo-dee-o-dee, LLC t/a The Showtime*, Case No. 14-PRO-00095, Board Order No. 2015-300, (D.C.A.B.C.B. July 1, 2015).

On July 20, 2015, The Showtime filed a Motion for Reconsideration of the Order Amending Board Order No. 2015-273. *ABRA Protest File 15-PRO-00095, Applicant's Motion for Reconsideration of the Order Amending Board Order No. 2015-273*, dated July 20, 2015 [*App. Mot.*] The Showtime makes two arguments in support of its Motion for Reconsideration: 1) the "25 feet" smoking restriction is unenforceable; and 2) smoking does not impact 'peace, order, and quiet' and therefore the smoking restriction is inappropriate. *Id.*

Discussion

The Board has reviewed the record and addresses The Showtime's arguments below.

First, The Showtime contends that the "25 feet" smoking restriction that the Board imposed in its original Order is unenforceable. The Board is persuaded by The Showtime's argument that restrictions placed on licenses that are outside the control of that licensee are impractical and beyond the scope of the Board's authority. Therefore, the Board strikes any

reference to the “25 feet” requirement in its previous Order and imposes the smoking restriction to the confines of the sidewalk café only.

Second, The Showtime contends that smoking does not impact peace, order, and quiet, thus qualifying as an appropriateness standard for examination by the Board. Therefore, The Showtime argues, because smoking does not affect peace, order and quiet, the Board cannot impose conditions on the license that restrict smoking. The Board disagrees.

The record and testimony is clear that the patrons’ smoking on the sidewalk café does indeed affect the peace, order and quiet of the neighborhood, and more specifically the Protestant’s enjoyment of the peace, order and quiet. The Board purposely imposed smoking restrictions to ensure that The Showtime’s operations of a sidewalk cafe would not disturb the peace, order and quiet of the neighborhood.

The prohibition on smoking is made necessary due to the close proximity of the Protestant’s abutting property to The Showtime. Specifically, in Board Order No. 2015-273, the Board reasoned that based on the proximity of residences and professional offices” it was necessary to impose conditions that would be in the best interest of the locality of the District where the establishment is located. *In re Spo-dee-o-dee, LLC t/a The Showtime*, Case No. 14-PRO-00095, Board Order No. 2015-273, 6 ¶ 17 (D.C.A.B.C.B. May 20, 2015).

The Board dismisses any argument raised by The Showtime that smoking is a public health concern and thus out of the purview of the Board’s authority. The Protestant’s use and enjoyment of his property free of smoke goes to the very heart of “peace, order and quiet.” Similar to the issue of noise, the record bears out that the smoking interfered with the Protestant ability to enjoy the property. The Board finds no other means to limit the smoke from The Showtime’s property from disturbing the abutting neighbor other than by prohibiting smoking on the sidewalk café. Thus the smoking prohibition imposed in the Board’s original Order stands.

ORDER

For all of the foregoing reasons, the Board, on this 30th day of September 2015, **GRANTS IN PART** and **DENIES IN PART** The Showtime’s Motion for Reconsideration.

IT IS ORDERED that Board Order No. 2015-273 is amended as follows:

1. The condition that: (3) there shall be no smoking within twenty-five (25) feet of the entrance of the establishment is stricken and shall be replaced with (3) there shall be no smoking within the sidewalk café of the establishment.

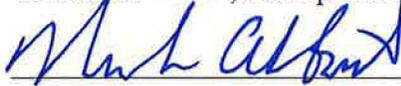
All other terms and conditions of Board Order No. 2015-273 shall remain in full force and effect.

The ABRA shall deliver a copy of this order to The Showtime and the Abutting Property Owner.

District of Columbia
Alcoholic Beverage Control Board



Ruthanne Miller, Chairperson



Nick Alberti, Member



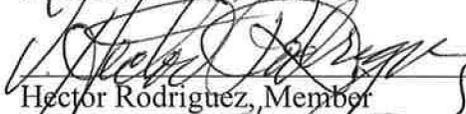
Donald Brooks, Member



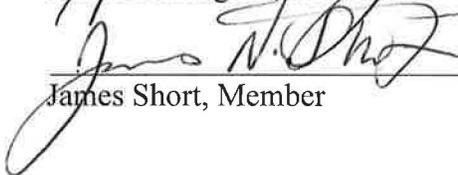
Herman Jones, Member



Mike Silverstein, Member



Hector Rodriguez, Member



James Short, Member

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

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 430 E Street, N.W., Washington, D.C. 20001; (202/879-1010). However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (2008) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. *See* D.C. App. Rule 15(b).