THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
	Case No.:	13-PRO-00151
19th and K, Inc. t/a Ozio Martini & Cigar Lounge	License No: Order No:	089394 2014-315
Application to Renew a Retailer's Class CN License		
at premises 1813 M Street, N.W. Washington, D.C. 20036		

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

ALSO PRESENT: 19th and K, Inc., t/a Ozio Martini & Cigar Lounge, Applicant

Michael Fonseca, on behalf of the Applicant

Sarah Peck, on behalf of a Group of Five or More Residents or Property Owners, Protestants

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

INTRODUCTION

The Alcoholic Beverage Control Board hereby approves Application to Renew a CN License filed by 19th and K, Inc., t/a Ozio Martini & Cigar Lounge, (hereinafter "Applicant" or "Ozio Martini & Cigar Lounge") subject to the conditions described, which the Board imposes based on the establishment's failure to control noise emanating from its roof.

Procedural Background

The Notice of Public Hearing advertising Ozio's Application was posted on September 27, 2013, and informed the public that objections to the Application could be filed on or before November 11, 2012. *ABRA Protest File No. 13-PRO-00151*, Notice of Public Hearing [*Notice of Public Hearing*]. The Alcoholic Beverage Regulation Administration (ABRA) received a protest petition a Group of Five or More Residents or Property Owners, represented by Sarah Peck and Abigail Nichols (Protestant). *ABRA Protest File No. 13-PRO-00151*, Roll Call Hearing Results.

The parties came before the Board's Agent for a Roll Call Hearing on November 25, 2013, where the Protestant was granted standing to protest the Application. On January 22, 2014, the parties came before the Board for a Protest Status Hearing. Finally, the Protest Hearing in this matter occurred on March 19, 2014. Both parties filed Proposed Findings of Fact and Conclusions of Law.

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 Alcoholic Beverage Control Bd., 445 A.2d 643 (D.C. 1982); D.C. Code §§ 1-309.10(d); 25-609 (West Supp. 2012). 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 has not received a written recommendation from any ANC regarding the Application.

Based on the issues raised by the Protestant, 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 and real property values 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. Testimony of ABRA Investigator Felicia Dantzler

1. Ozio Martini & Cigar Loungehas submitted an Application to Renew a Retailer's Class CN License at 1813 M Street, N.W., Washington, D.C. *Notice of Public Hearing.*

2. Alcoholic Beverage Regulation Administration (ABRA) Investigator Felicia Dantzler investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 13-PRO-00151*, Protest Report (Mar. 2014) [*Protest Report*].

3. The proposed establishment is located in the Golden Triangle neighborhood and sits in a DC/C-3-C commercial zone. *Protest Report*, at 3. At least, fifty-eight licenses have been issued

within 1,200 feet of the establishment. Id. at 3-6. There are least thirty-four restaurants, four nightclubs, nine taverns, one club, and one establishment holding a Retailer's Class DR license. 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 2.

4. According to the public notice, Ozio Martini & Cigar Lounge's hours of operation 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. *Notice of Public Hearing*. The establishment has hours of alcoholic beverage sales, service, and consumption which are as follows: 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. The establishment also operates a sidewalk café and summer garden. Id. The sidewalk café operates until 11:00 p.m. during the week, except for Sundays. Id. The summer garden operates until 2:00 a.m. during the week and 3:00 a.m. during the weekend. Id.

5. Investigator Dantzler monitored the establishment on February 28, 2014 around 11:00 p.m.; on March 1, 2014, around 11:45 p.m.; on March 14, 2014, around midnight; and on March 15, 2014, around midnight. *Protest Report*, 9. During these visits, the investigator heard music from Ozio's rooftop summer garden as she stood behind the building, even though there was a large industrial fan present. Id. She could hear music from another establishment as well. Id.

6. The establishment's investigative history shows that it has been convicted of one primary tier violation, one secondary tier violation and one unlisted violation in the period between 2010 and 2013. Id. at 10-11.

II. Commissioner Kevin O'Conner

7. Advisory Neighborhood Commissioner (ANC) Kevin O'Conner serves as the representative of ANC 2B02 and Chairperson of the ANC's ABRA policy committee. *Tr.*, March 19, 2014 at 61. Mr. O'Conner is aware that Ozio hired a professional sound engineer to conduct sound measurements. Id. at 63. The ANC does not believe the establishment has been in violation of its settlement agreement. Id. at 69.

III. Gerald Henning

8. Gerald Henning serves as an acoustical engineer. Id. at 85. He drafted the sound report for Ozio and conducted tests at the establishment in 2010. *Applicant's Exhibit No. 1*; *Tr.*, 5/19/14 at 87-88. The tests involved multiple measurements under various conditions. Id.

9. The test involved sound level measurements in Units 13 and 20 at the Jefferson Row Condominiums, as well as the building's terrace. Id. at 88, 120. Unit 20 is located on the north side of the building, while Unit 13 is located adjacent to the alley that runs behind Ozio. Id. at 120. The terrace had a view of Ozio. Id. at 121. The report documents the decibels (dBA) under three conditions at the establishment: with the roof open, with the roof half open, and with the roof closed while playing music. Id. at 91; *Applicant's Exhibit No. 1, 4.* He noted that when the establishment played music at around 92 dBA, the noise generated by Ozio could not be heard at the test locations and met the requirements of D.C. law. Id. at 91-92, 95.

10. He noted that he used a Type 1 meter during his test. Id. at 97. A Type 1 meter is more precise than a Type 2 meter, which is used by the District of Columbia to measure sound. Id. at 97.

11. Mr. Henning admitted that in 2010 he could hear music in Units 13 or 20 while he conducted the test. Id. at 166. Yet, he noted that he could not tell where the music was coming from while inside the building. Id. He noted that when he stood on the terrace he could tell that the sound was coming from Ozio. Id.

12. Mr. Henning conducted additional sound readings before the current protest, which involved the establishment playing music from its rooftop area. Id. at 100, 103. He stood at both the back and front of the building, approximately three to four feet from the building, in order to take sound measurements. Id. at 100. He also took measurements from inside the establishment and determined a baseline reading from measurements taken in the afternoon. Id. at 101.

13. Mr. Henning found that the baseline reading in front of the establishment was 68 dBA and the baseline reading in the back of the establishment was 60 dBA. Id. When Mr. Henning had Ozio play music from the roof, he measured a sound reading of 68 dBA in front of the establishment and a sound reading of 64 dBA in the rear of the establishment with the roof closed. Id. at 104. He noted that when he took these measurements he could not hear music from the establishment, but rather, only heard noise from traffic. Id. As a result, the 68 dBA measurement he took represented the ambient sound level of the area. Id. Nevertheless, he admitted that he could hear Ozio's music play in the rear of the establishment when he took the measurement in the rear of the establishment. Id. at 105. Mr. Henning also took measurements with the roof open. Id. Under these conditions, he found that the establishment generated a sound reading of 70 dBA. Id. He did not take a measurement in the front of the establishment. Id. Mr. Henning concluded that when Ozio plays music on the roof, it should keep the source of the music at 88 dBA with the roof closed, and less than that with the roof open. Id. at 106.

IV. Sall Abdoulaye

14. Sall Abdoulaye serves as the general manager of Ozio. Id. at 176. Ozio's rooftop has a separate disc jockey area with a distinct sound system. Id. at 195-96.

15. Mr. Abdoulaye was present at the establishment when Mr. Henning conducted the sound test in 2010. Id. at 176-77. He noted that the tests were conducted partly in response to complaints by nearby residents. Id. at 179. In 2011, the establishment received a number of complaints from one person. Id. at 187. In 2012, the establishment received one noise complaint. Id. In 2013, the establishment received no complaints from residents. Id. at 187.

16. He noted that a resident complained about hearing music generated by the establishment on February 20, 2014. Id. In response, the establishment turned down the music. Id. at 181. He admitted that on that day disturbing noise came from Ozio. Id. at 181-82. He attributed the disturbance to a band using its own sound equipment. Id. at 182; see also id. at 237.

17. Mr. Abdoulaye has heard music from other establishments in the neighborhood on Ozio's roof during his operating hours. Id. at 182. He attributed the noise in the neighborhood to the Eighteenth Street Lounge. Id. at 183.

18. Mr. Abdoulaye uses an "app" to determine the sound level generated by the establishment's roof. Id. at 188, 206. He admitted that the app is not accurate, but it is used to determine whether the establishment is complying with the sound engineer's recommendations. Id. at 190, 198-99. Ozio attempts to play music on the roof at 88 dBA, regardless of whether the roof is open or closed. Id. at 221.

V. Steven Christacos

19. Steven Christacos serves as the Vice President of Ozio. Id. at 227. The establishment's sound system has a computerized sound limiter. Id. at 231, 280. The limiter may only be accessed by a "sound person." Id. at 231, 265, 283. He believes that the sound system of the roof is set to generate sounds below 88 dBA. Id. at 232, 269-70.

VI. Anne Kappel

20. Anne Kappel lives at the Jefferson Row Condominium in Unit 20. Id. at 298. Ms. Kappel's unit contains the rooftop terrace where Mr. Henning conducted his tests. Id. at 308. She currently serves as her building's vice president. Id. at 299. She negotiated a settlement agreement with Ozio in 2011. Id. at 307-08.[1]

21. Between May 2011 and September 2011, a number of residents complained about noise coming from Ozio. Id. at 307. Ms. Kappel has heard noise coming from Ozio's roof when the roof is open or closed. Id. at 318, 322, 344-46. She further confirmed that she hears music from other establishments in her apartment. Id. at 323. Finally, she estimates that her residence is located between 100 and 150 feet away from Ozio. Id. at 315.

VII. Carl Nelson

22. Carl Nelson lives at the Palladium Condominium, which is located on the 1300 block of 18th Street, N.W. Id. at 355. Mr. Nelson's has observed noise in his bedroom. Id. at 432. In response, he invested $4,500 in a set of laminated glass storm doors that provide extra noise protection. Id. at 432-33. He admitted that his property values have risen. Id. at 432.

23. Mr. Nelson used a noise meter to take sound measurements in the neighborhood. Id. at 356-57. Mr. Nelson conducted sound readings near Ozio. Id. at 358. He specifically took readings in the driveway behind Ozio near the establishment's eastern wall on six occasions. Id. at 367. He generally found that readings conducted at this location were in the 70 to 77 dB(A) range after 10:00 p.m. *Protestant's Exhibit H (Corrected).*

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[1] The Board advises the parties that the process by which Ozio and other parties negotiated a settlement agreement is not relevant to these proceedings. Id. at 305-06.

24. Mr. Nelson took a sound reading on the Jefferson Row Terrace on March 9, 2014 at 12:45 a.m. *Tr.*, 3/19/14 at 384. While on the terrace, he heard music from Ozio. Id. at 379. The noise meter Mr. Nelson had in his possession indicated a reading of 68 dB(A) to 73 dB(A). Id. He did not observe noise coming from the front of Ozio while he was conducting readings. Id.

25. Mr. Nelson admitted he could "make no claim about the source of any of the noise" during his sound readings. Id. at 388, 426.[2]

VIII. Abigail Nichols

26. Abigail Nichols lives at the Palladium Condominium. Id. at 437. She has observed a lot of noise in her apartment that makes her windows shake. Id. at 437-38. On one occasion, when Ms. Nichols was disturbed by noise, she went outside and observed that the sound came from another establishment. Id. at 438.

CONCLUSIONS OF LAW

27. The Board may approve an Application to Renew a Retailer's Class CN License when the proposed establishment will not have an adverse impact on area located within 1,200 feet of the establishment. 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 and real property values 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).

I. THE BOARD GIVES MINIMAL WEIGHT TO THE SOUND METER READINGS SUBMITTED BY BOTH PARTIES.

28. Before delving into the merits of the protest issues, the Board resolves the issue of the credibility and weight given to the noise meter readings submitted by both parties. Section 2700.7 of Chapter 27 of Title 20 of the D.C. Municipal Regulations requires sound levels to be tested in accordance with the "test procedures to be used for measuring sound levels to determine compliance with Chapters 27 and 28 . . . ." 20 DCMR §§ 2700.7. Section 2700.20 further provides that

> Noise levels under the Act may be measured by any official designated by the Mayor or by any person who is a qualified acoustical engineer who holds a certificate of registration as a professional engineer issued by the District. The measurements shall be admissible as evidence in any civil, criminal, or administrative proceeding relating to the enforcement of any provision of the Act.

20 DCMR § 2700.20 (West Supp. 2014). The Board interprets § 2700.7 as requiring all sound measurements to comport with the testing procedures created in accordance with Chapter 27 in

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[2] The Board accepted the protestant's video of the establishment into the record. The Board notes that it merely considers the video supportive of the testimony of other witnesses regarding noise from the establishment. *Protestant's Exhibit B.*

order to find a violation of Chapter 27. Furthermore, the Board interprets § 2700.20 as only allowing the Board to deem measurements taken by a government official or "qualified acoustical engineer" sufficient to determine whether a licensee is in violation of Chapter 27.[3] The testing procedures are discussed in Chapter 29 of Title 20 of the DCMR. 20 DCMR § 2900 *et seq.* (West Supp. 2014).

29. In this case, neither party established that either Mr. Henning or Mr. Nelson were "qualified acoustical engineer[s] [that] hold[] a certificate of registration as a professional engineer issued by the District."[4] § 2700.20. As a result, the Board cannot accept any of the measurements as proof that Ozio is in violation of Chapter 27. The Board is also not convinced that the parties established that the sound tests conducted by each side comply with the extensive testing procedures outlined in Chapter 29. See e.g., 20 DCMR §§ 1900.1.2 (requiring annual qualification of the noise meter), 2902.1 (requiring battery checks before and after tests), 2903.1(a), 2903.2(a) (requiring a wind screen), 2906.2 (creating specific reporting requirements). Consequently, the Board solely relies on the measurements insofar as they bolster the credibility of witnesses testifying that they heard noise at a specific location and shows that Ozio attempted to take steps to mitigate the noise generated by the establishment.

II. THE BOARD FINDS THE APPLICATION FILED BY OZIO INAPPROPRIATE DUE TO THE DISTURBING NOISE GENERATED BY THE ESTABLISHMENT.

30. Under the appropriateness test, ". . . , the applicant shall bear the burden of proving to the satisfaction of the Board that the establishment for which the license is sought is appropriate for the locality, section, or portion of the District where it is to be located . . . ." D.C. Official Code § 25-311(a). 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).

31. During the hearing, the parties focused extensively on whether Ozio was generating too much noise. "In determining the appropriateness of an establishment, the Board shall consider all relevant evidence of record, including: . . . The effect of the establishment on peace, order, and quiet, including the noise . . . provisions set forth in [§ 25-725]." D.C. Official Code § 25-313(b)(2); see also D.C. Official Code §§ 25-101(35A), 25-314(a)(4).

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[3] The Nichols Group argues that § 2700.20 is permissive; however, the Board is not persuaded by this interpretation *Protestant's Proposed Findings of Fact and Conclusions of Law*, 8 n. 6. The second sentence of § 2700.20 shows that the drafters of the regulation strongly preferred--if not required—that sound measurements used in administrative proceedings comply with the testing procedures described in the regulations. *Protestant's Proposed Findings of Fact and Conclusions of Law*, 8 n. 6. If the Board were to rely on measurements that did not follow the testing procedures described in the statute, the Board risks relying on measurements that may not be technically or scientifically sound.

[4] In this case, it is likely that Mr. Henning has such a certificate but Ozio did not submit it to the Board. Therefore, based on the record before the Board, the Board cannot use Mr. Henning's measurements to determine if Ozio is in violation of Chapter 27.

a. The record does not show that Ozio's operations do not violate § 25-725(a).

33. Under § 25-725(a) an on-premise license holder (e.g., restaurant, tavern, or nightclub) cannot "produce any sound, noise, or music . . . that . . . *may be heard in any premises* other than the licensed establishment by the use of any . . ." instrument, mechanical device, or other device used to amplify sound. § 25-725(a), (a)(1)-(a)(3) (emphasis added). The language used by § 25-725(a) excludes the unamplified human voice from this prohibition; therefore, noise generated by patron voices (e.g., loud talking, laughing, or yelling) does not constitute a violation of § 25-725(a). Furthermore, § 25-725(b) provides specific exceptions for noise generated by the licensee that is heard (1) in the same building as the licensee; (2) a building owned by the licensee that abuts the establishment; or (3) a premise located in a C-1, C-2, C-3, C-4 C-M, or M zone. § 25-725(b), (b)(1)-(b)(3). Section 25-725(b) also exempts noises caused by the occasional opening of doors for the purpose of entering or exiting the establishment, as well as noise generated by heating, ventilation, and air conditioners. § 25-725(b), (b)(4)-(b)(5).

34. The Board credits Ms. Kappel's testimony that she hears the establishment's music in her residence. Supra at ¶ 21. Nevertheless, the Jefferson Row Condominium is located in a commercial zone. *Protestant's Proposed Findings of Fact and Conclusions of Law*, ¶ 2. Therefore, the noise Ms. Kappel hears does not constitute a violation under § 25-725(a). § 25-725(a)-(b).

35. The Board also finds that neither Mr. Nelson or Ms. Nichols could identify Ozio as the source of the noise heard in the apartment. Supra, at ¶¶ 22, 26; *Applicant's Proposed Findings of Fact and Conclusions of Law*, ¶ 9. Therefore, the Board cannot find that Ozio is causing any vioaltions of § 25-725(a) at the Palladium.

a. The Board agrees with the Nichols Group that the establishment is generating too much disturbing noise under § 25-313(b)(2).

36. In Panutat, the court advised that § 25-313(b)(2) permits the Board to consider noise beyond the scope of § 25-725. Panutat, LLC, t/a District of Columbia Alcoholic Beverage Control Bd., 75 A.3d 269, 267-77 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").

37. In this case, the Board credits Ms. Kappel that she hears noise from the establishment on repeated occasions. Supra, at ¶ 21. The Board finds this situation unacceptable, because her residence is located over 100 feet away from Ozio. Id. Furthermore, while Ozio appears to have good intentions, its efforts to curb noise are not sufficiently effective given that the establishment is using an admittedly inaccurate device to ensure that it complies with Mr. Henning's recommendations. Supra, at ¶ 18. As a result, it is not surprising that the establishment is generating noise that can be heard in a property over 100 feet away from the establishment.

b. The Board finds that Ozio is not having a detrimental impact on real property values.

38. The mere fact that Ozio may be generating too much noise is not sufficient proof that the establishment is having a negative impact on real property values. The Board further credits Mr. Nelson that his property values have risen. Id. Therefore, the Board finds that there is insufficient evidence in to demonstrate that Ozio is having a negative impact on real property values.

III. THE BOARD IMPOSES CONDITIONS ON OZIO TO ENSURE THAT THE ESTABLISHMENT'S OPERATIONS REMAIN APPROPRIATE.

39. 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 locality, section, or portion of the District where the licensed establishment is to be located." D.C. Official Code § 25-104(e).

40. The Board finds that a live band on the roof is not appropriate given the proximity of residents to the establishment. Ozio shall also ensure that the roof is closed when it provides entertainment. Finally, the Board prohibits Ozio from generating amplified sounds that may be heard in a residence or dwelling. The Board finds that these measures will ensure that the establishment has a minimal impact on residents and complies with current law.[5]

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[5] The Board does not address the additional noise violations alleged by the Nichols Group related to Chapter 28 of Title 20 and the noise disturbance standard, because the Board finds that the conditions imposed in this order adequately address any impact on residents related to those alleged violations. *Protestant's Proposed Findings of Fact and Conclusions of Law*, 8-9

The Board also notes that the Nichols Group appears to have incorrect interpretation of § 25-725(c). This section requires that licensees "comply with the *noise level requirements* set forth in Chapter 27 of Title 20 of the District of Columbia Municipal Regulations." § 25-725(c) (emphasis added). As noted by the District of Columbia Court of Appeals, an administrative agency's ". . . authority and discretion are limited to that which is granted under [its] founding statutes." Rupsha 2007, LLC v. Kellum, 32 A.3d 402, 409-10 (D.C. 2011). While an administrative agency is generally given discretion to interpret its own statute, ". . . courts have been reluctant to read into a statute powers for a regulatory agency which are not fairly implied from the statutory language since the agency is statutorily created." Chesapeake & Potomac Tel. Co. v. Pub. Serv. Comm'n, 378 A.2d 1085, 1089 (D.C. 1977).

In this case, § 25-725(c) does not mention Chapter 28 as falling within the Board's purview. Because of this limitation, any alleged violations of Chapter 28 should be referred to an appropriate agency with jurisdiction.

Similarly, Title 20 clearly creates two distinct categories of noise violations, one being noise level violations and the other noise disturbance violations. 20 DCMR §§ 2700.3, 2701.1 (West Supp. 2014); compare 20 DCMR § 2799 ("noise disturbance") with 20 DCMR § 2799 ("noise level") (providing separate definitions to the terms "noise disturbance" and "noise level"). As a result, it is clear that the legislature intentionally excluded noise disturbances from § 25-725(c). Therefore, any alleged violations of the noise disturbance standard should be referred to an appropriate agency with jurisdiction.

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

41. 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 (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 15th day of August 2014, hereby **APPROVES** the Application to Renew a Retailer's Class CN License at premises 1813 M Street, N.W. filed by 19th and K, Inc., t/a Ozio Martini & Cigar Lounge, subject to the following conditions:

1. Ozio is prohibited from having live bands perform on its roof.

2. Ozio must keep its roof closed when it provides entertainment as defined by D.C. Official Code § 25-101(21A).

3. Ozio shall not generate amplified sounds that can be heard in a residence or dwelling.[6]

The ABRA shall deliver a copy of this order to the Applicant and the Nichols Group.

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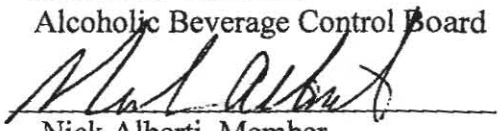
[6] In light of the complicated regulations and technical background requirements involving the proper use of noise meters, conditions that solely require an investigator to have working ears are likely the best way to address noise problems.

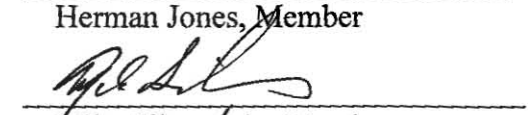
District of Columbia
Alcoholic Beverage Control Board



Nick Alberti, Member

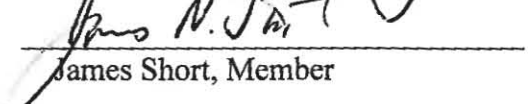
Donald Brooks, Member

Herman Jones, Member



Mike Silverstein, Member

Hector Rodriguez, Member



James Short, Member

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, 500 Indiana Avenue, N.W., Washington, D.C. 20001. 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).

THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:	)	
19th & K, Inc. t/a Ozio Martini & Cigar Lounge	)	
Holder of a Retailer's Class CN License	)	License No. ABRA-023167 Order No. 2011-346
at premises 1813 M Street, N.W. Washington, D.C. 20006	)	

19th & K, Inc., t/a Ozio Martini & Cigar Lounge (Licensee)

Will Stephens, Chairperson, Advisory Neighborhood Commission (ANC) 2B

Anne Kappel, Vice President, Jefferson Row Condominium Association

BEFORE: Nick Alberti, Interim Chairperson
Donald Brooks, Member
Herman Jones, Member
Calvin Nophlin, Member
Mike Silverstein, Member

ORDER ON VOLUNTARY AGREEMENT

The official records of the Alcoholic Beverage Control Board (Board) reflect that 19th & K, Inc., t/a Ozio Martini & Cigar Lounge (Licensee), ANC 2B, and Jefferson Row Condominium Association entered into a Voluntary Agreement (Agreement), dated July 11, 2011, that govern the operation of the Applicant's establishment.

The Agreement has been reduced to writing and has been properly executed and filed with the Board. The Applicant; Chairperson Will Stephens, on behalf of ANC 2B; and Anne Kappel, on behalf of Jefferson Row Condominium Association, are signatories to the Agreement. The Agreement, dated July 11, 2011, replaces previous Voluntary Agreements between the parties.

Accordingly, it is this 27th day of July 2011, **ORDERED** that:

1. The above-referenced Voluntary Agreement submitted by the Applicant, ANC 2B, and Jefferson Row Condominium Association to govern the operations of the Applicant's establishment is **APPROVED** and **INCORPORATED** as part of this Order; and

2. Copies of this Order shall be sent to the Applicant, ANC 2B, and Anne Kappel, on behalf of Jefferson Row Condominium Association.

District of Columbia
Alcoholic Beverage Control Board

Nick Alberti, Interim Chairperson

Donald Brooks, Member

Herman Jones, Member

Calvin Nophlin, Member

Mike Silverstein, Member

Pursuant to 23 DCMR § 1719.1 (April 2004), 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, 1250 U Street, N.W., Third Floor, Washington, DC 20009.

VOLUNTARY AGREEMENT

This Voluntary Agreement made this 11th day of July, 2011 by and among 19th & K, Inc., t/a Ozio Martini & Cigar Lounge (Applicant) and Advisory Neighborhood Commission 2B (ANC 2B) and Anne Kappel, designated representative of a group of seven residents of the Jefferson Row Condominium, 1830 Jefferson Place, N.W. (collectively Protestants).

RECITALS

WHEREAS, Applicant is the holder of retailer's license ABRA-023167 Class CN for premises located at 1813 M Street, NW; and

WHEREAS, Applicant has constructed a new summer garden space on its third floor level, with said space having an operable skylight roof, and with said space useable year round during all hours that the establishment is open for business; and,

WHEREAS, the new summer garden space will increase the current occupancy load of the establishment by 110 persons; and,

WHEREAS, ANC 2B and certain residents of the Jefferson Row Condominium have protested Applicant's request for a summer garden endorsement to its license for use of its third floor level with an occupancy load of 110 persons; and,

WHEREAS, the parties have agreed to enter into this superseding voluntary agreement, pursuant to DC Code Section 25-446, to resolve the issues raised by Protestants' objections, after a monitoring period under the predecessor voluntary agreement, and to request that the Alcoholic Beverage Control (ABC) Board approve Applicant's request for a summer garden endorsement and increase in occupancy conditioned on Applicant's compliance with the terms of this written agreement.

NOW, THEREFORE, in consideration of the recitals set forth above and the mutual covenants and conditions set forth below, the parties agree as follows:

1. Recitals Incorporated. The recitals set forth above are incorporated herein by reference.

2. The third floor level summer garden space with an operable skylight roof shall have hours of operation consistent with the hours permitted under the ABC license.

3. The occupancy on the third floor level summer garden shall not exceed 110 persons.

4. Applicant acknowledges familiarity with the District of Columbia Noise Control Act of 1977 (Noise Control Act), as amended, and the noise control provisions of District of Columbia laws and regulations, in general, including but not limited to DC Code Section 25-725, and agrees to comply with such provisions as required by law.

5. Applicant shall take appropriate action to control noise levels emanating from the third floor level summer garden so as not to disturb residents in their dwellings. Such action may include, but is not limited to, regulating the sound system and the skylight roof, as necessary.

6. Applicant shall regulate the audio system sound levels, including use of the audio system by contracted musicians, disc jockeys and other vendors, so that it is consistent with the provisions of paragraphs 4 and 5.

7. Protestants and residents of the Jefferson Row Condominium agree to notify Applicant directly by telephone in the event that noise emanating from the summer garden space is heard within their dwellings and is disturbing to the enjoyment of their property. Applicant shall provide Protestants, and other residents of the Jefferson Row Condominium requesting the same information, with a written list of telephone numbers and email addresses of its officers and managerial employees to contact with any complaint, and to update same when staffing changes occur. Applicant agrees to take appropriate action not more than one hour after receiving a complaint by telephone, to reduce the disturbing noise levels.

8. Applicant shall maintain a record of any and all complaints received directly from residents of the Jefferson Row Condominium regarding noise from the summer garden space and actions taken to address such complaints. Applicant shall provide Protestants with copies of such records within seven (7) days of Protestants' request for them.

9. The compliance agreed to hereby is primarily directed at sounds emitted by Applicant's music and entertainment through its audio system control on the third floor summer garden; however, it also includes unreasonable noise attributable to persons' continuing conduct or otherwise emitted from the operation of the third floor summer garden space that is disruptive to residents in their dwellings.

10. Withdrawal of protest. Protestants hereby agree to withdraw their protests and join with Applicant in requesting that the ABC Board accept this Agreement as a condition of approval of the summer garden endorsement and increase in occupancy. The withdrawal of Protestants' request is contingent upon the text of this Voluntary Agreement being incorporated in an Order of the Board granting Applicant's summer garden endorsement application and increase in occupancy.

11. Counterparts. This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original and all, when taken together, constitute one and the same document. The signature of any party to any counterpart shall be deemed a signature and may be appended to any other counterpart.

12. Authority. Representatives executing this Agreement on behalf of the respective parties do hereby affirm that they have the authority to do so.

13. Termination and Replacement of Prior Agreement. The parties hereby terminate and rescind the Voluntary Agreement adopted by ABC Board Order dated November 17, 2010 subject to the Board's acceptance and issuance of an Order adopting this superseding Voluntary Agreement.

In witness whereof, the parties have executed this Voluntary Agreement as of the day and date first above written.

Applicant: 19th & K, Inc.

By: _____
George Christacos, President

Protestants: Advisory Neighborhood Commission 2B

By: _____ 7/11/11
Will Stephens, Chairman

Group of Seven Residents on behalf of Jefferson Row Condominium Association

By: _____ 7/11/11
Anne Kappel, Vice President, Jefferson Row Condominium Association, and Designated Representative of the Group of Seven Residents of the Jefferson Row Condominium Association