

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

In the Matter of:)

Bardo, LLC)
t/a Bardo River Brewery)

Applicant for a)
Manufacturer's Class B License)

25 Potomac Avenue, S.E.)
Washington, D.C. 20003)

License No: 103291
Case No.: N/A
Order No: 2016-709

BEFORE: Donovan Anderson, Chairperson
Nick Alberti, Member
Mike Silverstein, Member
James Short, Member
Mafara Hobson, Member
Jake Perry, Member

ALSO PRESENT: Bardo, LLC, t/a Bardo River Brewery

Matthew August LeFande, Counsel for Bardo, LLC

FINAL ORDER

On November 30, 2016, the Alcoholic Beverage Control Board issued Board Order No. 2016-667, which approved the Application for a Manufacturer's Class B License to Bardo, LLC, t/a Bardo River Brewery, (hereinafter "Applicant" and "Bardo") with conditions through the vehicle of a consent order. *In re Bardo, LLC, t/a Bardo River Brewery*, ABRA License No. 103291, Board Order No. 2016-667, 1 (D.C.A.B.C.B. Nov. 30 2016) (Consent Order).

This Order was issued before the transcript of the hearing was made available by the Alcoholic Beverage Regulation Administration's court reporting service. Upon review of the transcript, it appears that Bardo, in fact, did not intend to agree to a consent order, but rather moved that the Board approve the application subject to approval of a security plan and camera management plan, which the Applicant committed to submit. *Transcript (Tr.)*, November 16, 2016 at 39.

Based upon this clarification, the Board *sua sponte* vacates Board Order No. 2016-667 and replaces and supersedes it with this Order. This Order also supercedes Board Order No. 2016-543. The Board further issues this Order to explain its departure from its prior decisions involving this location. *See Hensley v. D.C. Dep't of Employment Servs.*, 49 A.3d 1195, 1203 (D.C. 2012) (“[u]nexplained’ inconsistency in an agency's interpretation of its governing statute can be ‘a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.’”)

Procedural Background

The Board initially held two fact finding hearings regarding the Application for Manufacturer’s Class B License filed by Bardo, LLC, t/a Bardo River Brewery (hereinafter “Applicant” or “Bardo”) at 25 Potomac Avenue, S.E. The first hearing was held on August 3, 2016, and the second hearing was held on August 10, 2016.

Based on these hearings and prior protest actions involving 25 Potomac Avenue, S.E., the Board notified Bardo through Board Order No. 2016-543, published on October 5, 2016, that the Board was considering denying the request for an on-site sales and consumption permit or imposing conditions, including limiting the hours of any on-site sales and consumption permit issued to the Applicant to a maximum of 10:00 p.m. *Bardo, LLC, t/a Bardo River Brewery*, License No. 103291, Board Order No. 2016-543, 1-8 (D.C.A.B.C.B. Oct. 5, 2016).

The Board had two major concerns regarding the Application, which the Board expounded upon in detail in the sixteen (16) page Order. *Id.* at 8-14. First, based on the recent denial of two similar applications with similar business models at the same location, the Board reasoned it would be arbitrary and capricious to grant the Application. *Id.* at 10-11. Second, the Board further reasoned that the Application did not address concerns regarding noise or pedestrian and vehicular safety, which had been identified as concerns in prior Orders concerning the location. *Id.* at 11-14.

Before taking a final action against the Applicant, the Board scheduled a hearing for October 20, 2016, for the purpose of receiving argument and evidence disputing the Order. *Id.* at 2.

Instead of adjudicating the issues raised by the Board, Bardo requested a non-adversarial proceeding to discuss alternative resolutions to the controversy. *Letter from Matthew LeFande, Counsel, Bardo to Fred Moosally, Director, Alcoholic Beverage Regulation Administration*, 1 (Nov. 14, 2016). The Board held a status hearing on November 16, 2016, in which the Board and Bardo discussed the Application.

FINDINGS OF FACT

During the hearing on November 16, 2016, the Board considered the following representations and commitments made by Bardo:

1. First, when asked whether the Applicant “would . . . be willing to provide a security plan that comports with the statute that is part of your license,” counsel for Bardo responded: “Yes, if what you have right now isn’t that, we will have it in to you right away.” *Tr.*, 11/16/16 at 16.
2. Second, when asked whether the Applicant “[w]ould . . . be willing to have cameras,” the owner responded, “[w]e already have cameras.” *Id.* at 16. The owner further indicated that the premises currently have “[f]our” cameras. *Id.* at 17. Counsel for Bardo then added “that will be reflected in the security plan.” *Id.* Further, in response to questions about the ability and commitment of Bardo to provide adequate camera coverage, counsel for Bardo responded that he would “personally buy [the owner] the cameras” needed and that the Applicant would “fully cooperate” with an investigator examining the camera coverage. *Id.* at 32-34.
3. Third, when asked whether the Applicant would “have a map” defining the specific area for alcohol service, the owner said, “[y]es . . .” *Id.* at 19. Counsel for Bardo indicated that the map is “in the record already . . .” *Id.* Moreover, counsel for Bardo indicated that the map “hasn’t changed.” *Id.* at 20.
4. Fourth, in regards to hours, the Applicant represented that the imposition of an hour limitation on the license would create a financial hardship to the business. *Id.* at 20-21.
5. Fifth, when asked whether the Applicant “would . . . agree not to have . . . an entertainment endorsement,” counsel for Bardo responded, “That’s fine.” *Id.* at 24.
6. Sixth, regarding noise, counsel for Bardo indicated that in comparison to the nearby baseball stadium, the crowd noise at Bardo—even at full capacity—will be minimal. *Id.* at 27. Further, counsel for Bardo asked the Board to consider the presence of a police helipad and the highway. *Id.* at 28.
7. At the end of the proceeding, counsel for Bardo requested that the Board approve the Application subject “to the approval of the security plan and the approval of the camera management plan as part of that.” *Id.* at 39.

CONCLUSIONS OF LAW

8. As to the specific motion made by Bardo to issue a license subject only to security and camera plans, the Board denies the motion because as worded by Bardo it does not reflect the extent of the commitments and representations made by the Applicant during the hearing. Nevertheless, based on the commitments and representations made by the Applicant, the Board approves the Application subject to conditions under the authority granted by D.C. Official Code § 25-104(e).
9. Under § 25-104(e), the Board is granted the authority to impose conditions on a license when “. . . the inclusion of conditions will be in the best interest of the [neighborhood]” D.C. Code § 25-104(e). In prior cases, the Board has resolved issues regarding appropriateness by imposing conditions. *See In re Dos Ventures, LLC, t/a Riverfront at the Ball Park*, Case No.

092040, Board Order No. 2014-512. ¶ 49 (D.C.A.B.C.B. Nov. 13, 2013) (saying “[i]n practice, the Board has imposed conditions when it is shown that there are valid concerns regarding appropriateness that may be fixed through the imposition of specific operational limits and requirements on the license”). Moreover, the Board has previously held that promises and pledges made by an applicant may be converted into conditions of licensure and satisfy the requirements of § 25-104(e), because such pledges pertain to the nature of the operations of the establishment considered by the Board when it granted the license. *In re HRH Services, LLC, t/a The Alibi*, Case No. 15-PRO-00096, Board Order No. 2016-280, ¶ 94 (D.C.A.B.C.B. May 18, 2016)

10. In light of this authority, the Board approves the Application based on the representations and commitments made by the Applicant during the hearing on November 16, 2016. Furthermore, at this juncture, the Board is satisfied that the security plan, camera plan, and restriction on entertainment are sufficient to address the concerns raised by the Board in its prior Order No. 2016-543. Moreover, the Board is satisfied that the representations and commitments made by the Applicant, as well as the conditions imposed through this Order, sufficiently distinguish the present Application from the prior applicants, which merit a different result.

ORDER

On this 14th day of December 2016, the Board hereby **VACATES** Board Order 2016-667 and supersedes it with this Order.

IT IS FURTHER ORDERED that Bardo’s motion for approval of the license made at the end of the hearing on November 16, 2016, is **DENIED**.

IT IS FURTHER ORDERED that the Application for a Manufacturer’s Class B License filed by Bardo is **APPROVED** subject to the following conditions, which reflect the Applicant’s commitments. Specifically, the license holder shall abide and comply with the following:

1. The license holder shall not provide entertainment.
2. The license holder shall submit a security plan compliant with the requirements of D.C. Code § 25-402. The license holder’s operations shall at all times comply with the security plan on file with the Board.
3. The license holder shall also maintain a copy of the security plan on its licensed premises and make the security plan available for inspection by officials of the Metropolitan Police Department and the Alcoholic Beverage Regulation Administration upon request.
4. The license holder shall maintain a network of security cameras in good working order during the operation of the business. The cameras shall continuously record all areas of the premises accessible to the public during the operation of the business. Bardo shall

have the ability to store and provide copies of the footage in accordance with the requirements of D.C. Code § 25-402(e)(G)(i)-(iii).

5. The license holder shall provide a map showing the location and number of cameras as part of the establishment's security plan.
6. Alcohol service and consumption on the premises shall be limited to the areas indicated in the application for licensure.

District of Columbia
Alcoholic Beverage Control Board



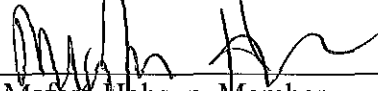
Donovan Anderson, Chairperson



Nick Alberti, Member



James Short, Member

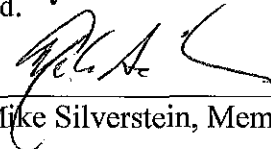


Mafara Hobson, Member



Jake Perry, Member

I dissent from the majority of the Board because I do not believe the hours of sales, service and consumption are appropriate for the neighborhood.



Mike Silverstein, Member

Under 23 DCMR § 1719.1 (West Supp. 2016), 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).