THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

Colorado & Cohen, LLC t/a Bullfrog Bagels Application for a New Retailer's Class CR License at premises 317 7th Street, S.E. Washington, D.C.20001	Case Number: License Number: Order Number:	15-PRO-00121 100249 2016-285

BEFORE: Donovan Anderson, Chairperson
Nick Alberti, Member
Mike Silverstein, Member
Ruthanne Miller, Member
James Short, Member

ALSO PRESENT: Colorado & Cohen, LLC, t/a Bullfrog Bagels, Applicant

Matthew Furmin, Esq. on behalf of the Applicant

Ellen Opper-Weiner, Esq. on behalf of the Abutting 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 (Board) approves the Application for a New Retailer's Class CR License and Sidewalk Café Endorsement (Application) filed by Colorado & Cohen, LLC, t/a Bullfrog Bagels (hereinafter "Applicant" or "Bullfrog Bagels") subject to limits on the hours of operation of various portions of the premises, limits on trash removal and deliveries, and a prohibition on the use of outdoor speakers as follows:

a) The hours of operation of the balcony shall be from 6:00 a.m. to 10:00 p.m., Monday through Friday. The hours of sale, service, and consumption on the balcony shall be from 10:00 a.m. to 10:30 p.m., Saturday and Sunday.

b) Trash shall not be removed from the building via the stairwell behind the building between 11:00 p.m. and 6:00 a.m., daily.
c) Deliveries shall not be received between 11:00 p.m. and 5:00 a.m. daily.
d) Outdoor speakers shall not be used.

The Board's reasoning and the specifics of the conditions are discussed below.

Procedural Background

The Notice of Public Hearing advertising Bullfrog Bagels' Application was posted on October 16, 2015, and informed the public that objections to the Application could be filed on or before November 30, 2015. *ABRA Protest File No. 15-PRO-00121; Notice of Public Hearing* [*Notice*]. At the request of the Applicant and Advisory Neighborhood Commission (ANC) 6B, the Board extended the petition filing deadline to December 14, 2015. *ABRA Protest File No. 15-PRO-00121*; *Board Order No. 2015-557.* On or before the protest deadline, the Alcoholic Beverage Regulation Administration (ABRA) received a letter from the abutting property owners, Mehmet Yalcin, Ph.D. and Dr. and Mrs. Jack and Roberta Blanchard (hereinafter collectively the "Protestants"), protesting Bullfrog Bagels in accordance with D.C. Official Code §§ 25-601 and 25-602. *Protest Letter (Dec. 1, 2015)* [*Protest Letter*].

On or about December 10, 2015, ANC 6B submitted an executed settlement agreement between it and Bullfrog Bagels. *ABRA Protest File No. 15-PRO-00121*; *Settlement Agreement By and Between Advisory Neighborhood Commission 6B and Colorado & Cohen LLC d/b/a Bullfrog Bagels [Settlement Agreement].* On January 20, 2016, the Board voted five (5) to zero (0), to approve the settlement agreement with modifications. *ABRA Protest File No. 15-PRO-00121*; *Board Order No. 2016-024.*

The Protestants and Applicant came before the Board's Agent for a Roll Call Hearing on January 11, 2016, where the abutting property owners were granted standing to protest the Application. *ABRA Protest File No. 15-PRO-00121.* On January 20, 2016, the parties appeared before the Board for a Protest Status Hearing. *Id.* And on March 16, 2016, the parties appeared before the Board for a Protest Hearing. *Transcript (Tr.)*, at 1.

I. Limitation of Issues

Based on the protest and representations made by the Protestants, the sole issues in this case are:

1. Whether Bullfrog Bagels' hours of operation, service, sale, and consumption for its dining room, sidewalk café, and balcony will negatively impact the peace, order, and quiet in the neighborhood; and

2. Whether Bullfrog Bagels' use of the alleyway stairs to remove trash from the second floor and to receive bagel deliveries will have an adverse impact on the peace, order, and quiet of the neighborhood.[1]

[1] The Protestants also raised concerns about the Applicant's refusal to include a "notice and opportunity to cure" provision in the previously approved settlement agreement with the ANC. *Tr.*, at 306-307. The Board

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; *Protest Letter*, at 1; *Tr.*, at 224-230, 261-263; 266-269, 290, 293-304.

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. Bullfrog Bagels submitted an Application for a New Retailer's Class CR License with Sidewalk Café Endorsement for 317 7th Street, S.E. *Notice* at 1.

II. ABRA Investigator Tasha N. Cullings

2. ABRA Investigator Tasha N. Cullings investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 15-PRO-00121*, Protest Report (Feb. 2016) [*Protest Report*].

3. The proposed establishment will be located in a commercial C-2-A zone. *Tr. at 43-44; Protest Report*, at 5. Twenty-one licensed establishments are located within 1,200 feet of the establishment's proposed location. *Tr.* at 44; *Protest Report* at 5. Of the 21 establishments, 12 hold a CR license, and 14 have a sidewalk café. *Tr. at 44; Protest Report* at 6.

4. There are no schools, public libraries, or day care centers located within 400 feet of the proposed location. *Protest Report*, at 3. There is one recreation center located within 400 feet of the proposed location. *Id.*

5. The establishment's proposed hours of operation of the restaurant will be 6:00 a.m. to 11:00 p.m., Sunday through Saturday, while the hours of sale for the restaurant will be 10:00 a.m. to 11:00 p.m., Sunday through Saturday. The hours of operation of the sidewalk café will be 6:00 a.m. to 11:00 p.m., Sunday through Saturday, while the hours of sale on sidewalk café will be 10:00 a.m. to 11:00 p.m., Sunday through Saturday. *ABRA Protest File No. 15-PRO-00121; Alcoholic Beverage License Application*, at 2.

6. Investigator Cullings described her observations when she monitored the establishment. The site for the establishment was undergoing construction and the balcony had not been built yet. *Tr.* at 44, 52.

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will not address this concern because the Protestants do not have standing to challenge a settlement agreement that they are not a party to. *Kingman Park Civic Assoc., et al. v. D.C. Alcoholic Beverage Control Board*, No. 11-AA-831, Mem. Op. & J. at 6-7 (D.C. June 26, 2012)(Questioning whether a non-party to a settlement agreement has standing to challenge its validity.)

7. Bullfrog Bagels will be located in a mixed use area in a block with several commercial establishments. *Tr.* at 44; *Protest Report*, at 7; *Inv. Exhibits* 16-18. The establishment is a row-style building consisting of two above ground floors located in the 300 block of 7th Street, S.E. *Tr.* at 44; *Protest Report*, at 7; *Inv. Exhibits* 16-18. 8. Bullfrog Bagels is located in between two buildings, both of which have commercial establishments on the first floor, apartments on the second floor, and party walls in between. *Tr.* at 56-57, 60. The building where Bullfrog Bagels is located is solely commercial. *Id.* at 57.

8. Mrs. Blanchard's building is on one side of Bullfrog Bagels and it contains her children's bookstore, the Fairy Godmother Bookstore, on the first floor and an apartment that she owns upstairs. *Tr.* 55-57; *Protest Report*, at 3; *Inv. Exhibit* 7.

9. ABRA Investigators did not observe any ABRA violations on the six occasions that they monitored the proposed location of the restaurant. *Id.* at 45; *Protest Report*, at 8-9. There were no service calls made to the Metropolitan Police Department or to the D.C. Noise Task Force concerning Bullfrog Bagels. *Tr.* at 45; *Protest Report*, at 9.

10. Bullfrog Bagels, located at 317 7th Street, S.E., is bounded by Pennsylvania Avenue, S.E. to the south and C Street, S.E., to the north. *Protest Report* at 9. The Eastern Market Metro Station is within walking distance to establishment. *Id.* at 8.

III. Jeremiah Cohen

11. Jeremiah Cohen is the owner and founder of Bullfrog Bagels. *Tr.* at 73. Mr. Cohen currently sells his freshly-made bagels in a restaurant on H Street, N.E. *Tr.* at 75.

12. Mr. Cohen intends to operate a restaurant that focuses on breakfast, brunch, and dinner. *Tr.* at 75, 77. He plans to offer specialty drinks with brunch and wine with dinner. *Tr.* at 75, 77. He does not plan to host dance parties or blast music from the balcony. *Id.* at 75-76. He intends to have background music playing inside the restaurant. *Id.* at 43, 76, 207.

13. Regarding the restaurant's occupancy, the Department of Consumer and Regulatory Affairs (DCRA) has not issued a Certificate of Occupancy (CO) as of the date of the hearing. The settlement agreement approved by the Board limits the establishment to 90 people at this time. *ABRA Protest File No. 15-PRO-00121*; *Board Order No. 2016-024*.

14. Mr. Cohen intends to use the stairway behind the restaurant so that he does not have to carry garbage through the dining room area where patrons are dining. *Id.* at 81. Instead, he would prefer to carry the garbage down the stairway at the back of the building; out of view of customers. *Id.* The stairway is partially enclosed by the wall of the building on two of the four of its sides and there is a five or six foot fence covering a portion of it. *Id.* at 83; *Applicant's Exhibit* 13 [*App. Exhibit*]. Mr. Cohen acknowledged that he could carry the garbage through the interior of the building after the establishment closes and when the patrons are gone as opposed to using the stairway from the second floor. *Id.* at 158-159.

15. Mr. Cohen expects the renovations of the premises to be completed in May 2016. *Id.* at 84; *App. Exhibits* 15, 16. He intends to have soft quiet wood tone colors in the restaurant with antique wood floors. *Id.* at 84-85. He will have refurbished bowling alley lanes affixed to the walls as dining tables; so they will not be movable. *Id.* at 85 and 87. The dining tables represent the majority of the restaurant's seating area on the second floor. *Id.* at 87; *App. Exhibit* 2. There will also be a kitchen area and bar area with four or five bar stools. *Id.* at 87; *App. Exhibit* 2.

16. In addition to the second floor dining space, Mr. Cohen will have at least four tables on the balcony that extend from the second floor. *Tr.* at 136. The Applicant also applied for a sidewalk café with seven seats. *ABRA Licensing File No. 15-PRO-00121.*

17. In addition to the aesthetic renovations at the proposed location for Bullfrog Bagels, Mr. Cohen noted the soundproofing measures that were made to the building. *Id.* at 89. Specifically, the landlord repointed the building for purposes of creating a sound barrier between Bullfrog Bagels and the neighboring buildings. *Id.* There are also party walls on both sides of his building to help diminish noise from emanating into the neighboring buildings. *Id.* at 123.

18. Regarding storage and deliveries, Mr. Cohen intends for a portion of the bagel preparation (*i.e.*, mixing, rolling, and racking) will take place in his warehouse located in the Brookland neighborhood. *Id.* at 90. As with its H Street, N.E. location, some of the bagels will be stored in the warehouse. *Id.* at 91. Unlike the Mr. Cohen's 8th Street location, Mr. Cohen testified that the 7th Street, S.E. location has better refrigeration, which will allow him to store more bagels onsite. *Id.* The bagels will be cooked onsite beginning at approximately 5:00 a.m. *Id.* at 135.

19. Although Mr. Cohen can store more bagels at the 7th Street, S.E. proposed location, he suspects there will be occasions when his supply of bagels at the restaurant will run low and he will need to bring in a shipment from the warehouse prior to the establishment opening in the morning. *Id.* He does not intend for this to occur frequently, but when it does, he plans to do so quietly so that he does not disturb the residents. *Id.* at 104. Ordinarily, he expects the bagels to be delivered around 4:00 p.m. or 5:00 p.m. *Id.* at 149. On those occasions in which he has to make an early morning delivery, he intends to use his four-cylinder Ford Transit Connect. *Id.* at 90.

20. When he has to deliver the bagels, he will roll the bagel rack up the five or six inch ramp into the trash room, which is on the first floor, as opposed to carrying them up the steps in the front of the building because the trays of bagels are too heavy for him to carry. *Id.* at 93, 103-104, and 142-144; *App. Exhibit* 13.

IV. Alex Golding

21. Alex Golding testified on behalf of the Applicant. *Id.* at 184. Mr. Golding is the managing member of 317 7th Street, LLC, along with this father and brother. *Id.* His company owns the property where Bullfrog Bagels will be located. *Id.*

22. When Mr. Golding's company acquired the building located at 317 7th Street, S.E., it had several problems that the company needed to address. *Id.* at 185. His company

repointed an entire wall, including reshaping the bricks and adding new mortar and sealing the walls. *Id.* The company is currently working on creating a shed for the business' equipment, which it believes will reduce sound. *Id.* at 185-186 His company added new joists in between the bricks to ensure that sound would not travel through the walls. *Id.* His company also added a trash room. *Id.* at 185. Mr. Golding admitted the company did not conduct a sound test to ensure that noise from Bullfrog Bagels would not travel to the neighboring units. *Id.* at 196-197.

23. There is an alley behind the building located at 317 7th Street that is a "commercial alley." It is approximately 20 feet and used by the residents nearby as well as the commercial business owners. *Id.* at 188-190. Cars travel through the alley frequently during the day. *Id.* at 188. At night after the garage closes, parking pass owners use their key fobs to enter and exit the garage; thereby, contributing to the noise in the area. *Id.* Mr. Golding further testified that the alley services four buildings, with 11 retail spaces. *Id.* at 19. The alley is used by the four buildings for trash disposal and pick up. *Id.* at 189. There is one communal trash room with a recycling and trash compactor and a garage door that opens and closes. *Id.*

24. Mr. Golding's plans on installing a ramp in the alley leading from the ground to Bullfrog Bagels' trash room. *Id.* at 190, 194. He stated that there is approximately four inches from the lip of the entrance to the trash room. *Id.* at 194. Although the ramp is currently made of gravel, the future ramp will be made of concrete or a removable metal. *Id.*

V. Maggie Hall

25. Maggie Hall testified on behalf of the Protestants. *Id.* at 190. Ms. Hall lives at 649 C Street, Apt. 207. *Id.* at 223. Her apartment is located on the corner of the second floor and overlooks the alley. *Id.*; *App.'s Exhibit* 11.

26. Ms. Hall is concerned about Bullfrog Bagels' early morning deliveries. *Id.* at 224. Ms. Hall acknowledged Mr. Cohen's promise to use a quiet vehicle, but she believes there will still be noise stemming from his turning off his engine and opening and closing the trash room metal door. *Id.* at 224-225.

27. Ms. Hall would prefer that Bullfrog Bagels comply with the same regulations that govern trash pickups. *Id.* at 225. Specifically, she would prefer that deliveries not take place before 7:00 a.m. and end by 8:00 p.m. *Id.* at 225-227.

28. On cross-examination, Ms. Hall acknowledged that other vehicles transgress through the alley, including trash trucks and persons entering and exiting the garage. *Id.* at 240. She stated noise is not a problem for these vehicles because they are traveling through the alley in the day; not at 4:00 a.m. *Id.* Nonetheless, she did admit that there is not a limit on the time of day in which one may travel through the alley. *Id.*

29. Regarding the trash, Ms. Hall is not as concerned about the establishment using the back stairwell to remove garbage. She understands Mr. Cohen's concern about not offending the customers by parading the trash bags in front of them. *Id.* at 229. She did not

think the community should be upset with his clamoring down the stairwell's metal steps because there are only 12 steps and about half of them are covered. *Id.* at 229-230.

VI. Mehmet Yalcin

30. Mehmet Yalcin testified on behalf of the Protestants. *Tr.* at 259. Mr. Yalcin owns the property located at 313 and 315 7th Street, S.E. *Id.* He resides on the second floor of both buildings, but his retail store is located on the first floor. *Tr.* at 260.

31. Mr. Yalcin testified that he was initially excited about Bullfrog Bagels moving into the adjacent building, but became concerned about it after learning that the establishment had applied for a liquor license. *Id.* at 260-261.

32. Mr. Yalcin stated that he is particularly concerned about the establishment's customers drinking and making noise late into the evening, particularly when he is putting his children to bed. *Id.* at 261, 262-263, 269, 274, 277.

33. Mr. Yalcin is concerned about the loud noise coming from persons fraternizing on the establishment's balcony because the buildings are near one another even though is bedroom is not adjacent to where Bullfrog Bagels' balcony would be. *Id.* at 281.

34. Mr. Yalcin acknowledged that the Applicant told him that the walls were repointed and that mortar was added to the walls, but he did not believe that those are sufficient measures for addressing his noise concerns. *Id.* at 264; 281.

35. Mr. Yalcin would like the establishment's hours of operation to be from 7:00 a.m. to 10:00 p.m., and fort deliveries not occur before 7:00 a.m. *Id.* at 264-266; and 276.

36. Mr. Yalcin stated that he would not be directly impacted by the Applicant's removing trash down the stairwell based on the location of his home. *Id.* at 268. He testified that trash should not be removed past 11:00 p.m. but that 10:00 p.m. would be ideal. *Id.*

VII. Roberta Blanchard

37. Roberta Blanchard testified on behalf of the Protestants. *Id.* at 285. Ms. Blanchard resides at 649 C Street, S.E., Apt. 407; approximately 35 to 40 steps from the rear of Bullfrog Bagels. *Tr.* at 288-289; *Prot.'s Exhibit* 4; and *Inv.'s Exhibit* 7.

38. She owns the Fairy Godmother Bookstore located at 319 7th Street, S.E. *Tr.* at 285; *Inv.'s Exhibit* 7. The bookstore is on the first floor of the building and she owns the apartment located on the second floor. *Tr.* at 293. Mrs. Blanchard testified that she does not currently reside in the second floor apartment, but that her children stay there periodically. *Id.* at 293-294. Mrs. Blanchard further testified that she does not know what her future plans are for the second floor apartment. *Id.* at 339. Presently, the apartment is used for storage. *Id.* at 342-343.

39. Mrs. Blanchard is concerned about the noise resulting from patrons dining on the balcony and the Applicant delivering items in the rear of the restaurant. *Id.* at 290. Her

apartment overlooks the alley which is only partially paved. *Id.* at 295; *Prot.'s Exhibit* 4. Ms. Blanchard stated that it is very noisy when people drive through the alley, and therefore, she does not believe the Applicant should be permitted to have bagels delivered before 7:00 a.m. or after 9:00 p.m. at the latest *Tr.* at 295-296. Mr. Blanchard also does not believe the establishment should open for business before 8:00 a.m., and does not believe music should emanate outdoors through open doors and windows. *Id.* at 301-302. Mrs. Blanchard is opposed to the establishment having outdoor speakers. *Id.* at 302.

40. Mrs. Blanchard acknowledged that there is a private garage behind her apartment with an entrance between her building and the proposed location of Bullfrog Bagels that opens at 7:30 a.m. *Id.* at 325. There is no time limit on when parking permit holders can access the garage. *Id.* at 326. If the garage is closed, persons can use their key fob to open the garage door. *Id.* at 333. Although Mrs. Blanchard has problems with persons opening and closing the garage door at night, she has never complained to the condominium association to set a limit on when the garage can be accessible. *Id.* at 33-334.

41. The stairs of the back stairway are metal and unenclosed, which make them noisy. *Id.* at 299-300. It is her position that the establishment could leave the trash they accumulate on the second floor until the restaurant closes; thereby, not disturbing their customers. *Id.* After the restaurant closes, the Applicant could take the trash down the stairs across the kitchen and into the back trash room. *Id.* at 296-297. It would be too noisy if the Applicant were permitted to remove the trash down the stairway from the second floor because he would need to walk down the stairs, go through the alley, open the trash room door, put the trash in, close the trash room door, and then return to the establishment through the alley. *Id.* at 296. She believes the latest the Applicant should be permitted to remove trash down the stairway is 8:00 p.m. or 9:00 p.m. *Id.* at 300.

42. Mrs. Blanchard is also concerned about the soundproofing measures of the proposed location. *Id.* at 302. She is concerned that noise will travel along the nails the Applicant will enter into the wall when hanging its dining room tables. *Id.* at 303. She acknowledged that the establishment added new mortar to the walls, but she does not believe it will adequately prevent noise from traveling through the walls adjoining to the buildings. *Id.* at 303-304.

43. Mrs. Blanchard's only concern with the Applicant's sidewalk café is that she believes the sidewalk is too small. *Id.* at 308-309. She believes the sidewalk is very narrow and that only about three or four tables would be able to be placed on the side walk café. *Id.* at 309-310. If the establishment is permitted to have a sidewalk café, Mr. Cohen should be required to manage persons coming and going so that they do not block the sidewalks adjacent to either side of his building. *Id.*

44. Mrs. Blanchard also expressed concern regarding the Applicant's use of a balcony based on its proximity to her apartment. *Id.* at 340.

CONCLUSIONS OF LAW

45. The Board may approve a request for a New Retailer's Class CR 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 and

1607.7(b). Under D.C. Official Code § 25-313, the Board must consider all evidence of record, including, but not limited to, "[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).

46. The overarching issue in this case is noise – noise stemming from the Applicant's use of the stairway behind his building; noise originating from the Applicant delivering goods during the early morning hours; noise from patrons fraternizing on the balcony; and noise seeping through the walls from the establishment to the neighboring buildings. Based on these valid concerns, the Board approves the Application subject to conditions.

47. In determining appropriateness, the Board must consider whether the applicant's future operations will satisfy the reasonable expectations of residents to be free from disturbances and other nuisances—not just whether the Application complies with the minimum requirements of the law. 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); *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."). As part of its analysis, the Board should evaluate each "unique" location "according to the particular circumstances involved" and attempt to the determine the "prospective" effect of the establishment on the neighborhood. *Le Jimmy, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 433 A.2d 1090, 1093 (D.C. 1981). Furthermore, the analysis may also include the Applicant's efforts to mitigate or alleviate operational concerns, the "character of the neighborhood," the character of the establishment, and the license holder's future plans. *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); *Citizens Ass'n of Georgetown, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 410 A.2d 197, 200 (D.C. 1979); *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, 800-801 (D.C. 1970).

48. "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." 23 DCMR § 400.1(a).

I. THE RISK OF NOISE FROM THE BALCONY RENDERS BULLFROG BAGELS' ESTABLISHMENT PARTIALLY INAPPROPRIATE.

49. The Board received ample evidence from neighbors which leads it to conclude that if the Bullfrog Bagels is permitted to operate on its balcony at late hours that the noise stemming from there would have an adverse impact on the peace, order, and quiet of the neighborhood.

50. The Board credits Mr. Yalcin's testimony concerning how he and his children would be impacted by restaurant patrons fraternizing on the balcony, particularly in the evenings. *Infra* at ¶ 34. Further, the establishment's balcony is directly below Ms. Blanchard's two rear windows. *Infra* at ¶ 45. If Mrs. Blanchard and her husband decided to use the apartment as a private residence for themselves or family, they, too, would be adversely impact by the noise emanating in the evening from the balcony.

A. The Proximity of the Residents Merits Restriction the Applicant's Hours of on the Balcony.

51. In light of the Board's findings regarding appropriateness, the Board finds it necessary to impose conditions on the Applicant's license. *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").

52. 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. Official Code § 25-104(e). The Board is also authorized to reduce the hours of sale and delivery of alcohol at an establishment under § 25-724. D.C. Official Code § 25-724.

53. In prior cases, the Board has restricted outdoor seating hours when faced with potential late night noise problems. For example, in *Romeo & Juliet*, the Board disapproved of full operational hours for an outdoor seating area, because the proposed tree enclosure was not sufficient to prevent the leakage of sound and the prior business generated noise that could be heard by nearby residents on their property. *In re 301 Romeo, LLC, t/a Romeo & Juliet*, Case No. 13-PRO-00136, Board Order No. 2014-045, ¶ 56 (D.C.A.B.C.B. Jan. 29, 2014). The Board then conditioned licensure on the sidewalk café not operating past 11:00 p.m., Sunday through Thursday, and midnight on Friday and Saturday. *Id.* at 11; *see also In re 1001 H Street, LLC, t/a Ben's Chili Bowl/Ben's Upstairs*, Case No. 13-PRO-00133, Board Order No. 2014-071 (D.C.A.B.C.B. Mar. 12, 2014) (imposing similar conditions on a restaurant applicant's sidewalk café and rooftop).

54. The Board conditions issuance of Bullfrog Bagels' license on its ceasing to use the balcony at 10:00 p.m., Sunday through Friday, and 10:30 p.m. on Saturday and Sunday. The Board finds that these conditions are in the best interest of the neighborhood for the following reasons: first, the Board finds a reduction in hours necessary, because noise coming from the balcony after those hours will likely disturb residents in their homes, if unabated. *Infra* at ¶¶ 34, 45. Second, a reduction in hours is the best means of ensuring "quiet" to the neighborhood, because an outdoor balcony will create a risk of generating disturbing late night noise. Lastly, the Board's action is consistent with prior decisions of the Board in similar cases. *Supra*, at ¶ 52.

II. THE RISK OF NOISE FROM DELIVERIES AND TRASH REMOVAL IN THE ALLEY MERIT RESTRICTIONS.

55. In review of the wealth of evidence presented by the Protestants regarding how they would be negatively impacted by Bullfrog Bagels having unrestricted access to the alley for purposes of delivering bagels and using the stairwell behind the establishment, the Board concludes that restrictions on the Applicant's hours of deliveries and trash removal are necessary. Deliveries shall not occur before 5:00 a.m. or after 11:00 p.m., daily, and trash shall not be removed down the back stairwell after 11:00 p.m. or before 7:00 a.m., daily.

56. D.C. Official Code § 25-313(b)(2) authorizes the Board to consider noise beyond the scope of D.C. Official Code § 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.").

57. While the alley may be paved in the future, the Board must consider the present conditions of the alley. Presently, the Board is faced with evidence of Mr. Cohen driving his vehicle in the alley to deliver his bagels. *Id.* at 90. He plans on rolling metal rack from the vehicle in the alley and up a slight incline. *Id.* at 93. From there, he will take individual trays of bagels from the rack into the establishment via its first floor trash room. *Id.* at 142-145. All along the way, noise will be generated in the otherwise quiet early morning hours; thereby, potentially disturbing nearby residents.

58. Mr. Cohen's efforts to mitigate the amount of noise generated from his making deliveries do not go unnoticed by the Board. Nevertheless, given the close proximity of residents to the restaurant, the Board finds a restriction on the hours of deliveries is warranted.

59. The Protestants asked the Board to impose the same hours for trash collections on the establishment's deliveries. *Id.* at 225. *See* 20 DCMR § 20-2806.2("No person shall operate or permit the operation of any refuse collection vehicle in, or within three hundred (300) feet of, any residential, special purpose, or waterfront zone, at nighttime on any day of the week."); see also 20 DCMR § 2806.3("Notwithstanding the prohibitions in [20 DCMR § 2806.2], the collection of residential refuse by District government-owned vehicles may commence at 6 a.m. during the months of June, July, and August or when the daily high temperature is forecast to be above 90 degrees Fahrenheit."). The Board elects not to do so, because trash removal and delivering food and beverages are not similar activities; therefore, the Board rejected imposing a condition based on this reasoning.

60. Additionally, the Board received persuasive evidence concerning the Applicant's use of the back stairway to remove garbage from the second floor. The stairway is made out of metal and only few of its steps are covered. Noise will be generated from the restaurant's staff removing trash down the stairway. Furthermore, the stairway is only partially enclosed; thus, noise will not be contained to a confined space as Mr. Cohen would have this Board to believe.

61. The Board credits Mr. Cohen's concerns regarding the health and safety of patrons if trash is carried out through the establishment while in operation; however, he indicated that he could remove trash through the establishment after the establishment is closed.

62. For the foregoing reasons, the Board concludes that deliveries shall not occur before 5:00 a.m., Sunday through Saturday, and that trash shall not be removed from the second floor of the establishment and down the back stairwell after 11:00 p.m., Sunday through Saturday.

III. THE PROXIMITY OF RESIDENTS WARRANTS RESTRICTIONS ON THE APPLICANT'S PROVISION OF BACKGROUND MUSIC.

63. Mr. Cohen is planning on having background music playing inside the restaurant. *Id.* at 43, 76, 207. None of the Protestants opposed the Applicant's plans to offer background music inside of the establishment, but concerns were raised about music being played outdoors. *Id.* at 302.

64. As previously discussed, the Board "may consider an applicant's efforts to address or alleviate operational concerns." *Infra* at ¶ 52; *In re Inner Circle 1223, LLC t/a Dirty Maritni Inn Bar/Dirty Bar*, Case No. 13-PRO-00172, Board Order No. 2014-507, ¶ 34 (D.C.A.B.C.B. Dec. 10, 2014)("The Board may consider the establishment's soundproofing features and noise mitigation practices related to both amplified music and the human voice.").

65. The evidence presented before the Board supports its decision not to allow outdoor speakers. The Applicant has not employed any soundproofing measures on the exterior of the establishments (*i.e.*, on the balcony or sidewalk café). *Infra* at ¶ 60. Based on the proximity of residents and the absence of soundproofing measures, the presence of outdoor speakers would more than likely be a nuisance to nearby residents. Therefore, the Board conditions licensure on the prohibition of outdoor speakers at the establishment.

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

66. 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 18 day of May 2016, hereby **GRANTS** Application for a New Retailer's Class CR License and Sidewalk Café Endorsement filed by Colorado & Cohen, LLC, t/a Bullfrog Bagels, subject to the following conditions:

1. The hours of operation of the balcony shall be from 6:00 a.m. to 10:00 p.m., Monday through Friday.

2. The hours of sales, service, and consumption on the balcony shall be from 10:00 a.m. to 10:30 p.m., on Saturday and Sunday.

3. The Applicant shall not remove trash from the second floor of the establishment down the back stairway after 11:00 p.m. and before 6:00 a.m., daily.

4. The Applicant shall not receive deliveries between 11:00 p.m. and 5:00 a.m., daily.

5. The Applicant shall not have outdoor speakers.

The Applicant is **ADVISED** that is must comply with the future Certificate of Occupancy issued by DCRA and the terms of its settlement agreement, which limit the establishment's occupancy to 90 people. If there is a conflict in the number in both documents, the lowest number will control.

The ABRA shall distribute copies of this Order to the Applicant and the Abutting Property Owners.
District of Columbia
Alcoholic Beverage Control Board

Donovan Anderson, Chairperson

Nick Alberti, Member

Ruthanne Miller, Member

Mike Silverstein, Member

James Short, Member

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

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