

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

In the Matter of:)		
)		
AMDuffy, LLC)	License Number:	072539
t/a Duffy's Irish Restaurant)	Case Number:	10-PRO-00185
)	Order Number:	2011-301
Petition to Terminate a)		
Voluntary Agreement)		
)		
at premises)		
2106-2108 Vermont Avenue, N.W.)		
Washington, D.C. 20001)		

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

ALSO PRESENT: AMDuffy, LLC, t/a Duffy's Irish Restaurant, Petitioner

 Andrew Kline, on behalf of the Petitioner

 Lorraine J. White, an abutting property owner, Protestant

 Stanley J. Mayes, on behalf of the Protestant

 Martha Jenkins, General Counsel
 Alcoholic Beverage Regulation Administration

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

AMDuffy, LLC, t/a Duffy's Irish Restaurant (Petitioner), which holds a Retailer's Class CT License, at premises 2106-2108 Vermont Avenue, N.W., Washington, D.C., and represented by Andrew Kline, filed a Petition to Terminate its Voluntary Agreement (Petition). A timely protest was filed by Lorraine J. White, an abutting property owner, on December 20, 2010. Ms. White is represented by Stephen J. Mayes. Advisory Neighborhood Commission (ANC) 1B submitted its recommendation to the Board on December 7, 2010. The ANC recommended that

the Board retain the Voluntary Agreement but remove the restrictions on the establishment's indoor hours. *ABRA Protest File No. 10-PRO-00185, Letter from ANC 1B to ABC Board* (Dec. 3, 2010).

The Petition came before the Alcoholic Beverage Control Board (Board) for a Roll Call Hearing on January 3, 2011, and a Status Hearing was held on February 23, 2011. The parties attended mediation on February 17, 2011, but were not able to negotiate a new voluntary agreement. The Protest Hearing was held on April 6, 2011.

Pursuant to D.C. Code §§ 25-602(a) (2001) and 25-446 (Supp. 2011), the protest issues are whether the Petition will adversely impact the peace, order, quiet, residential parking, vehicular and pedestrian safety, and real property values of the neighborhood. Jaime T. Carillo, t/a Don Jaime, Board Order No. 2011-143, para. 58-59 (D.C.A.B.C.B. Feb. 23, 2011) aff'd Board Order No. 2011-165 (D.C.A.B.C.B. Mar. 23, 2011).

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 OF FACT

1. The Petitioner has requested that the Board terminate its Voluntary Agreement. See ABRA Protest File No. 10-PRO-00185.
2. The establishment is located at 2106-2108 Vermont Avenue, N.W., in a C-2-B zone. *Protest Report, 2-3.* There are no recreation centers or public libraries within 400 feet of the Petitioner. *Protest Report, 4.* The Christian Tabernacle Child Development Center is approximately 275 feet from the establishment and the Shaw Middle School at Garnet-Patterson is approximately 328 feet from the establishment. *Protest Report, 4, Exhibit No. 6.* There are 22 ABC-licensed establishments located within 1200 feet of the establishment. *Protest Report, 3.*
3. The Petitioner has three previous alcoholic beverage control (ABC) violations in the past four years. *Protest Report, 11.* Since 2008, the Petitioner has failed to submit quarterly statements to the Board on three occasions, each instance constituting a secondary-tier violation. *Protest Report, 7; 23 DCMR § 800 (2008).*
4. Andy Duffy opened the establishment in May 2006. *Transcript, April 6, 2011 at 111.* Mr. Duffy envisions that his establishment serves as a neighborhood bar. *Tr., 4/6/11 at 111.* The establishment is often patronized by Howard University students and staff, 9:30 Club patrons, and people from the surrounding neighborhood. *Tr., 4/6/11 at 111.* The establishment has previously offered live entertainment on New Year's Eve and St. Patrick's Day. *Tr., 4/6/11 at 116.* The establishment generally offers a DJ on New Year's Eve and hosts a band on St. Patrick's Day. *Tr., 4/6/11 at 116.*

5. The other bars and restaurants in the neighborhood are permitted to operate later than the Petitioner. *Tr.*, 4/6/11 at 44. The 9:30 Club, one of the most popular venues in the District of Columbia, is located near the Petitioner's establishment. *Tr.*, 4/6/11 at 69. In addition, there is a gas station, which is open 24 hours per day. *Tr.*, 4/6/11 at 69-70, 131.

6. Lorraine White's residence and the Applicant's establishment are located in an ARTS Overlay Zone. *Petitioner's Exhibit No. 9*. The purpose of the ARTS Overlay Zone is to:

(a) Encourage a scale of development, a mixture of building uses, and other attributes such as safe and efficient conditions for pedestrian and vehicular movement, all of which will be as generally required by the Comprehensive Plan; (b) Require uses that encourage pedestrian activity, especially retail, entertainment, and residential uses; (c) Provide for an increased presence and integration of the arts and related cultural and arts-related support uses; (d) Expand the area's housing supply in a variety of rent and price ranges; (e) Expand business and job opportunities, and encourage development of residential and commercial buildings; (f) Strengthen the design character and identity of the area by means of physical design standards; (g) Encourage adaptive reuse of older buildings in the area and an attractive combination of new and old buildings; and (h) Foster eighteen (18) hour activity and increased public safety.

7. Craig Melvin lives in a condominium located at 919 Florida Avenue, N.W. *Tr.*, 4/6/11 at 37. His condominium building is directly across the street from the establishment. *Tr.*, 4/6/11 at 38; *Petitioner's Exhibit No. 1*. Mr. Melvin has owned his condo since August 2008. *Tr.*, 4/6/11 at 39. His condo overlooks the front of the Petitioner's establishment. *Tr.*, 4/6/11 at 40.

8. Mr. Melvin is a news anchor for NBC 4 in Washington, D.C. *Tr.*, 4/6/11 at 41. As part of his job, Mr. Melvin usually returns home between 11:30 p.m. and midnight. *Tr.*, 4/6/11 at 42. Consequently, Mr. Melvin has observed the establishment's patrons leaving the establishment on a regular basis. *Tr.*, 4/6/11 at 42. According to Mr. Melvin, in the two years that he has lived in his condo, he has never observed disorderly behavior at the establishment and has never been disturbed by the Petitioner's operations. *Tr.*, 4/6/11 at 40, 43.

9. Bryan Firvida lives at 1218 W Street, N.W., and has lived at that address for the past 10 years. *Tr.*, 4/6/11 at 61. Mr. Firvida is active in the community and, among other activities, participated in the Third District Crime Advisory Committee and the 14th and the U Street Neighborhood Association. *Tr.*, 4/6/11 at 62. He believes that Mr. Duffy, the Petitioner's owner, "is an excellent operator" and has never heard any complaints about the Petitioner's business. *Tr.*, 4/6/11 at 66, 73. As indicated by Mr. Firvida's testimony, Mr. Duffy has been transparent about his plans for his establishment. *Tr.*, 4/6/11 at 67. Mr. Firvida is pleased that Mr. Duffy, the owner of the establishment, has regularly participated in the neighborhood's clean-up days and gardening efforts, donated to neighborhood causes, and provided space for community meetings. *Tr.*, 4/6/11 at 67.

10. Tucker Gallagher lives in a condominium in The Rhapsody. *Tr.*, 4/6/11 at 100. Mr. Gallagher's living room and bedroom overlooks the Petitioner's establishment. *Tr.*, 4/6/11 at 100. Mr. Gallagher supports the Petition because he believes that Mr. Duffy is a responsible business owner. *Tr.*, 4/6/11 at 101.
11. Alcoholic Beverage Regulation Administration (ABRA) Investigator Illeana Corrales was assigned to investigate this matter on behalf of ABRA. *Tr.*, 4/6/11 at 25. ABRA investigators monitored the establishment on 17 separate occasions from March 1, 2011, to March 29, 2011. *Tr.*, 4/6/11 at 28. During this period, ABRA investigators did not observe loitering, excessive noise, or any other alcoholic beverage control (ABC) violations. *Tr.*, 4/6/11 at 28.
12. The Metropolitan Police Department (MPD) has received two calls for service at 2106 Vermont Avenue, N.W., between March 31, 2010, and March 31, 2011. *Tr.*, 4/6/11 at 28. None of the calls received by MPD led to a referral to ABRA or an ABC violation. *Tr.*, 4/6/11 at 28.
13. Officer Caleb Willis has worked for MPD for approximately seven years. *Tr.*, 4/6/11 at 11. Officer Willis has been assigned to the Third District, where the Petitioner is located, since 2004. *Tr.*, 4/6/11 at 12-13. Officer Willis believes the establishment gives patrons of the 9:30 Club a place to go and prevents them from congregating in the street. *Tr.*, 4/6/11 at 15, 18. Officer Willis further believes that the neighborhood has become more peaceful since 2004 and that the establishment has "been good for the neighborhood." *Tr.*, 4/6/11 at 19.
14. Karen Polis lives at 2120 Vermont Avenue, N.W., in The Rhapsody. *Tr.*, 4/6/11 at 77-78; *Petitioner's Exhibit No. 1*. Ms. Polis supports the termination of the Voluntary Agreement because she wants outdoor seating available near her home. *Tr.*, 4/6/11 at 79. Finally, Ms. Polis believes that allowing the Petitioner to be open later will encourage more people to be on the street and make the neighborhood safer. *Tr.*, 4/6/11 at 79-81.
15. Eartha Clark, who has lived at 2021 Vermont Avenue, N.W., for the past 25 years, has observed patrons, on two previous occasions, leave the establishment arguing. *Tr.*, 4/6/11 at 189. Further, the establishment's patrons gather outside the establishment and talk loudly enough to disturb Lorraine White, who lives next to the establishment, in her home. *Tr.*, 4/6/11 at 218-19.
16. In addition, the Petitioner's patrons often smoke outside the establishment. *Tr.*, 4/6/11 at 36. Lorraine White, the establishment's neighbor, cannot open her front windows without experiencing secondhand smoke. *Tr.*, 4/6/11 at 219, 227. Indeed, Ms. White's vestibule "reeks of smoke" and cigarette butts from the establishment's patrons are found on her property. *Tr.*, 4/6/11 at 126, 218; *Protestant's Exhibit No. 1*.
17. Nevertheless, Mr. Duffy has made efforts to alleviate problems related to smoking experienced by Ms. White. Mr. Duffy installed a rope line that keeps the establishment's patrons at least three feet from Ms. White's fence. *Tr.*, 4/6/11 at 127-28; *Petitioner's Exhibit Nos. 3-4*. The establishment's doormen also ensure that people do not smoke near Ms. White's fence and

encourage patrons to congregate near the bike racks by the front window. *Tr.*, 4/6/11 at 107, 123; *Petitioner's Exhibit No. 3*. The establishment also has an employee sweep up cigarette butts on the sidewalk at least once or twice per week. *Tr.*, 4/6/11 at 126.

18. Parking in the area near the establishment is limited to off-street two hour parking. *Tr.*, 4/6/11 at 27. The U Street Metro stop is located half a block away from the establishment. *Tr.*, 4/6/11 at 32-33. In addition, the establishment has a bike rack in front of the establishment that was installed in 2007. *Tr.*, 4/6/11 at 129, 142.

19. Investigator Corrales observed that the area surrounding the Petitioner's establishment does not experience heavy pedestrian and automobile traffic. *Tr.*, 4/6/11 at 31. Indeed, most of the Petitioner's patrons walk or take the Metro to travel to the establishment. *Tr.*, 4/6/11 at 114.

20. Parking in the area is limited. As indicated by Ms. Clark, it is difficult to find parking in the neighborhood because of the popularity of local businesses. *Tr.*, 4/6/11 at 179. Ms. Clark, who drives a taxi cab, stated that she sometimes has to wait two to three hours to find a parking spot. *Tr.*, 4/6/11 at 179. Furthermore, Charles White testified that he has trouble finding parking when he visits his mother, Ms. White. *Tr.*, 4/6/11 at 221. The establishment is also often frequented by MPD officers, who park in the neighborhood. *Tr.*, 4/6/11 at 143. Finally, one of the Petitioner's employees drives to the establishment and parks on the street. *Tr.*, 4/6/11 at 144.

21. Mr. Duffy has never received a noise complaint from Ms. White, even when the establishment had a large bagpipe band playing at the establishment. *Tr.*, 4/6/11 at 121. As Mr. Duffy noted, the establishment usually posts a doorman outside the establishment five days a week, who is tasked with "mak[ing] sure people are not leaning on [Ms. White's] fence . . . or being too loud." *Tr.*, 4/6/11 at 112.

22. In addition, Mr. Duffy has taken steps to soundproof the establishment. *Tr.*, 4/6/11 at 117. A sound wall made of drywall was installed between the establishment's wall and Ms. White's wall. *Tr.*, 4/6/11 at 117-18; *Petitioner's Exhibit No. 2*. Mr. Duffy also ensures that the volume of music played by the establishment cannot be heard outside when the establishment's door is closed. *Tr.*, 4/6/11 at 117. Finally, the establishment has turned off the bass in the speakers in the front of the establishment. *Tr.*, 4/6/11 at 117-18.

23. The evidence also indicates that the neighborhood's property values will not be adversely impacted by terminating the Voluntary Agreement. Joyce Chandler-Blount has been a real estate agent for the past 24 years and has sold homes in the area surrounding the establishment. *Tr.*, 4/6/11 at 209. As indicated by Ms. Chandler-Blount, Ms. White's property would be quite valuable as commercial property. *Tr.*, 4/6/11 at 209. Further, as demonstrated by the Petitioner, the residential property at 2110 Vermont Avenue, N.W., which neighbors the Petitioner's establishment, had a sale price of \$259,000.00 in 2002 and sold for 323,333.00 in 2010. *Tr.*, 4/6/11 at 211-12, *Petitioner's Exhibit Nos. 10-11*. As a result, from 2002 to 2010, after the Petitioner opened for business, the property value of 2110 Vermont Avenue, N.W., has increased

significantly. *Tr.*, 4/6/11 at 212.

24. Mr. Duffy testified that if the Voluntary Agreement is terminated, the Petitioner would adjust the establishment's operations. *Tr.*, 4/6/11 at 115. Specifically, the establishment would also stay open later and offer live entertainment. *Tr.*, 4/6/11 at 115-16. Mr. Duffy stated that the establishment has no plans to offer music outdoors and will only utilize the patio for outdoor seating. *Tr.*, 4/6/11 at 115, 156, 161.

25. As indicated by Mr. Duffy, the Voluntary Agreement is having a negative impact on Mr. Duffy's business. Business slows at the establishment after 10:15 p.m. *Tr.*, 4/6/11 at 132. Further, the business cannot take advantage of patrons exiting the 9:30 Club around 11:30 p.m., unlike other nearby establishments. *Tr.*, 4/6/11 at 132, 139. In addition, Mr. Duffy often has to close before major sporting events end, which harms his business. *Tr.*, 4/6/11 at 132-33. Finally, the establishment cannot offer outdoor seating, which hurts the business during the warmer months. *Tr.*, 4/6/11 at 159.

26. The Board takes administrative notice of the Voluntary Agreement. See generally AM Duffy, LLC, t/a Duffy's Irish Restaurant, Board Order No. 2006-016 (D.C.A.B.C.B. Mar. 8, 2006).

CONCLUSIONS OF LAW

27. Pursuant to D.C. Code §§ 25-602(a) and 25-446, a Petitioner must demonstrate to the Board's satisfaction that the establishment for which a Petition to Terminate a Voluntary Agreement is submitted is appropriate for the neighborhood in which it is located and does not adversely impact the peace, order, quiet, residential parking, vehicular and pedestrian safety, and property values in the neighborhood under D.C. Code §§ 25-313 and 25-314. Jaime T. Carillo, t/a Don Jaime, Board Order No. 2011-143 at para. 58-59. We find in favor of the Petitioner so long as the establishment operates in accordance with the following conditions: (1) no amplified noise generated by the Petitioner shall be heard in a private residence; and (2) the establishment's patrons shall not smoke within eight (8) feet of Ms. White's property.

28. The Board recognizes that pursuant to D.C. Code §§ 1-309.10(d) and 25-609 (2001), an ANC's properly adopted written recommendations are entitled to great weight from the Board. See Foggy Bottom Ass'n v. District of Columbia ABC Bd., 445 A.2d 643 (D.C. 1982). Accordingly, the Board "must elaborate, with precision, its response to the ANC issues and concerns." Foggy Bottom Ass'n, 445 A.2d at 646. Here, ANC 1B recommended that the Board maintain the Voluntary Agreement but remove the restrictions on the establishment's indoor hours. We disagree with ANC 1B's recommendation and will terminate the Voluntary Agreement.

29. Contrary to the Protestant and ANC 1B's recommendation, so long as the Petitioner's amplified music does not create noise that can be heard in a private residence, the Board finds that terminating the Voluntary Agreement will not have an adverse impact on the

neighborhood's peace, order, quiet, residential parking, vehicular and pedestrian safety, and property values.

30. First and foremost, terminating the Voluntary Agreement will not negatively impact the neighborhood's peace, order, and quiet. Nothing in the current Voluntary Agreement protects Ms. White from litter deposited by the Petitioner's patrons or prevents the Petitioner's patrons from smoking near her property. As such, the protection provided by § 25-726 is sufficient to guarantee the cleanliness of the establishment's immediate environment. D.C. Code § 25-726 (2001) (controlling litter). Further, any issues regarding unruly patrons can be addressed by MPD through the new disorderly conduct law. See D.C. Code § 22-1321(d) (Supp. 2011). As such, because the Voluntary Agreement does not address any of the Protestant's concerns, there is no reason to maintain the current Voluntary Agreement.

31. The Board also notes that terminating the Voluntary Agreement will not adversely impact the residential parking and vehicular and pedestrian safety of the neighborhood. "In determining the appropriateness of an establishment, the Board shall consider . . . *[t]he effect of the establishment* upon residential parking needs and vehicular and pedestrian safety." D.C. Code § 25-313(b)(3) (2001) (emphasis added). Thus, the standard the Board must use emphasizes that the establishment must be the cause of the negative impact.

32. Here, although the Protestant has established that finding parking in the neighborhood is sometimes difficult, the Protestant has not proven that the Petitioner is the cause of this problem. Supra, at para. 20. In the Board's view, the termination of the Voluntary Agreement will only potentially lead to the Petitioner having an additional one to two hours to remain open. As such, based on this fact, the Board finds that terminating the Voluntary Agreement will not significantly impact the demand for parking in the neighborhood.

33. Finally, the Board is not convinced that terminating the Voluntary Agreement will negatively impact the neighborhood's property values. The Petitioner's submissions demonstrated that property values in the neighborhood have increased significantly between 2002 and 2010 and the value of Ms. White's property, as commercial property, will not be diminished. Supra, at para. 23.

34. Nevertheless, given the proximity of the establishment to private dwellings, the Board is concerned that allowing the establishment greater entertainment privileges will disturb the Applicant's neighbors. As such, the Board finds that the Petitioner must be prohibited from allowing its amplified music from being heard in private residences or risk violating the District of Columbia's disorderly conduct law and committing an ABC violation. See D.C. Code § 22-1321(d) (Supp. 2011); D.C. Code § 25-823(2) (2001).

35. Finally, although terminating the Voluntary Agreement will not impact the presence of smoke near Ms. White's property, the Board is concerned that the secondhand smoke is a detriment to Ms. White's peace, order, and quiet. As the testimony at the Protest Hearing revealed, Ms. White is unable to open her windows without experiencing secondhand smoke, her

property reeks of smoke, and it is consistently covered with cigarette butts. Supra, at 16. Rather than maintain the Voluntary Agreement, which has no impact on smoking outside the establishment, the Board finds that keeping patrons who choose to smoke outside the establishment at least eight (8) feet away from Ms. White's property will alleviate any peace, order, and quiet issues.

For these reasons, the Board finds that terminating the Voluntary Agreement subject to the conditions discussed above, will not adversely impact the Petitioner's neighborhood.

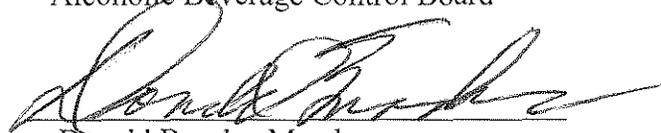
ORDER

Therefore, this 6th day of July 2011, it is hereby **ORDERED** that the Petition to Terminate a Voluntary Agreement submitted by AMDuffy, LLC, t/a Duffy's Irish Restaurant, at premises 2106-2108 Vermont Avenue, N.W., Washington, D.C., is hereby **GRANTED**, subject to the conditions that:

- (1) no amplified noise or music generated by the establishment shall be audible in a private residence; and
- (2) the establishment's patrons shall not be permitted to smoke within eight (8) feet of Ms. White's property line.

Copies of this order shall be sent to the Petitioner, the Protestant, and ANC 1B.

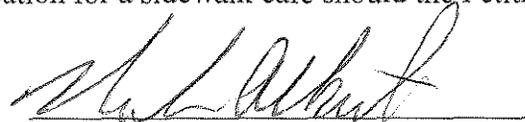
District of Columbia
Alcoholic Beverage Control Board



Donald Brooks, Member

I concur in the judgment of the Board.

The parties should note that the Board's decision in this case is no indication as to what the Board's position would be on an application for a sidewalk café should the Petitioner apply for the use of the outdoor space.



Nick Alberti, Interim Chairperson

I concur in the judgment of the Board.

I concur that the Petitioner has met the tests set forth in § 25-446 for terminating the Voluntary Agreement. D.C. Code § 25-446 (Supp. 2011). The additional steps ordered by this Board will ensure that amplified noise from inside the establishment will not be heard inside the nearby residential properties.

Although it is clear the neighborhood has changed in recent years, one thing has not changed in more than eight decades: that is the presence of a next-door neighbor who has lived there for all of her 85 years.

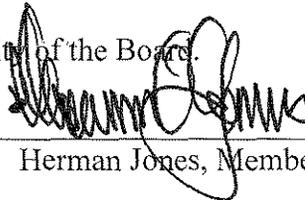
While the Petitioner spoke during the hearing of his hopes for a sidewalk cafe, such a change would require a separate application. I would employ strict scrutiny of the peace, order, and quiet provisions of Title 25 to any case involving a sidewalk cafe application featuring a next-door residential neighbor. The fact that the neighbor is 85 years old and in frail health only underscores the need for the licensee to make every effort to limit late night noise following the termination of this Voluntary Agreement.

I am convinced by the testimony in this case that the Petitioner has been a good neighbor. I urge him to continue to work constructively with his residential neighbors in his current business operations and in any future changes he may seek as he moves forward.



Mike Silverstein, Member

I dissent from the position taken by the majority of the Board.



Herman Jones, 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, 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 (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).