

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

In the Matter of:)		
)		
Eatonville, Inc.)	License Number:	078882
t/a Eatonville)	Case Number:	10-PRO-00082
)	Order Number:	2010-538
Application to Renew a)		
Retailer's Class CR License)		
)		
at premises)		
2121 14th Street, N.W.)		
Washington, D.C. 20010)		

BEFORE: Nick Alberti, Acting Chairperson
 Mital Gandhi, Member
 Donald Brooks, Member
 Herman Jones, Member
 Calvin Nophlin, Member
 Mike Silverstein, Member

ALSO PRESENT: Eatonville, Inc., t/a Eatonville, Applicant

 Stephen J. O'Brien, Esq., on behalf of the Applicant

 William Girardo and Leanne Sedowski, Protestants

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

Eatonville, Inc., t/a Eatonville (Applicant), at premises 2121 14th Street, N.W., Washington, D.C., filed an Application to Renew a Retailer's Class CR License (Application). The Application initially came before the Alcoholic Beverage Regulation Administration (ABRA) for a Roll Call Hearing on July 12, 2010, and a Status Hearing was held on August 11, 2010.

Protests against the Application were timely filed by William Girardo and Leanne Sedowski (Protestants) by letter dated June 30, 2010. *See ABRA Protest File No. 10-PRO-*

00082. The Protestants, who reside at 2121 14th Street, N.W., were granted standing as abutting property owners under D.C. Code § 25-601 (2007).

The parties did not agree to amend the existing Voluntary Agreement between the Applicant and the Protestants before the Protest Hearing. The Protest Hearing was held on September 23, 2010.

Pursuant to D.C. Official Code § 25-602(a) (2009), the protest issues are whether the renewal of the license would adversely impact the peace, order, and quiet.

FINDINGS OF FACT

1. The Protestants' Protest Information Form lists noise emanating from the establishment as the sole basis of their protest. *ABRA Protest File No. 10-PRO-00082, Protestant's Protest Information Form.*

2. The Applicant's establishment is located at 2121 14th Street, N.W. *ABRA Licensing File No. 078882.* It is located within a C-3-A zone. *ABRA Protest File No. 10-PRO-00082, Protest Report, 3.* There are 46 ABC licensed establishments within 1200 feet of the Applicant. *ABRA Protest File No. 10-PRO-00082, Protest Report, 4.* Finally, there are no schools, recreation centers, public libraries, or day care centers located within 400 feet of the establishment. *ABRA Protest File No. 10-PRO-00082, Protest Report 6.*

3. The existing Voluntary Agreement, dated July 21, 2009, which is binding on the Applicant states:

Noise. Applicant acknowledges familiarity with and will comply with noise-control provisions of the District of Columbia law and regulations, including preventing emissions of sound, capable of being heard outside the premises, by any musical instrument or amplification device or other device or source of sound or noise in accordance with DCMR 20. All noise played in the premises will be in accordance with DCRA requirements. Live music will be permitted inside the business only, and performances must be completed by 10PM. No music will be permitted in summer garden. The entrance door and windows (excluding the summer garden) of the premises will be kept closed at all times during business hours when music is being played or any sound amplification device is being employed in the premises, except when persons are in the act of using the door for ingress to or egress from the premises. Applicant agrees to implement additional measures to aid in the mitigation of noise from the premises, monitor music levels and keep the soundboard in accordance with DCMR 20. *See ABRA Licensing File No. 078882.*

4. The Board called ABRA Investigator Jabriel Shakoor to testify. *Transcript (Tr.), September 23, 2010,* at 12. Investigator Shakoor noted that the Protestants' residence was located directly above the Applicant's establishment. *Tr., 9/23/10* at 20. Investigator Shakoor

stated that he had entered the Protestants' residence on various occasions. *Tr.*, 9/23/10 at 18. On April 17, 2010, Investigator Shakoor heard amplified string music in the Protestants' residence at 8:05 p.m. *Tr.*, 9/23/10 at 18. He also noted that he heard amplified string music in the Protestants' residence on May 23, 2010, at 9:30 p.m. *Tr.*, 9/23/10 at 18. Investigator Shakoor also heard jazz music in the Protestants' residence on August 11, 2010. *Tr.*, 9/23/10 at 18. On the occasions Investigator Shakoor heard music in the Protestant's residence, he noted that the music could be heard emanating from the floor. *Tr.*, 9/23/10 at 19. He stated that the noise could be heard if there was no other noise in the vicinity but could not be heard if the radio was on or people were engaged in normal conversation. *Tr.*, 9/23/10 at 19.

5. As part of the protest proceedings, Investigator Shakoor monitored the establishment from August 17, 2010, to September 2, 2010. *Tr.*, 9/23/10 at 15. He stated that the Applicant was in compliance with the Voluntary Agreement and that the noise heard in the Protestants' residence does not violate the agreement because the Applicant was not in violation of the District of Columbia's noise laws contained in the District of Columbia Municipal Regulations. *Tr.*, 9/23/10 at 20, 29.

6. Investigator Shakoor noted that noise is usually heard when the Applicant provides live music. *Tr.*, 9/23/10 at 21. He stated that the Applicant has a two-person band play and the band utilizes a small amplifier. *Tr.*, 9/23/10 at 21. Investigator Shakoor stated that when the volume was at "1.5" he could not hear music in the Protestants' residence. *Tr.*, 9/23/10 at 21.

7. The Applicant paid a \$500.00 fine as part of an offer in compromise with the Office of Attorney General for a noise complaint received by ABRA on September 4, 2009. *ABRA Protest File No. 10-PRO-00082, Protest Report 10.*

8. The Applicant called Anas Shallal to testify. *Tr.*, 9/23/10 at 34. Mr. Shallal is the president of Eatonville, Inc. *Tr.*, 9/23/10 at 34. Mr. Shallal stated that he employs music in his establishment in order to provide background music. *Tr.*, 9/23/10 at 35-36. He generally employs a two or three piece band, which usually plays the bass and the keyboard. *Tr.*, 9/23/10 at 36. Mr. Shallal stated that the band plays two evenings per week and during the Sunday brunch. *Tr.*, 9/23/10 at 36.

9. The Applicant stated that he previously concluded a Voluntary Agreement with the Protestants which prevented his establishment from playing music after 10:00 p.m. *Tr.*, 9/23/10 at 36.

10. Mr. Shallal stated that he has been responsive to the Protestants' complaints. *Tr.*, 9/23/10 at 37. He stated that he has rearranged seating areas and adjusted the music and visited the Applicant's establishment on one occasion. *Tr.*, 9/23/10 at 37-38. In addition, he testified that the establishment had a sound test conducted and paid \$9,750.00 to install a second ceiling in the area of the establishment below the Protestants' apartment in January. *Tr.*, 9/23/10 at 41-43, 82; *ABRA Protest File No. 10-PRO-00082, Applicant Exhibit No. 1.* He also stated that the establishment installed insulation that has sound proofing properties. *Tr.*, 9/23/10 at 79.

Furthermore, he stated that the establishment also wrapped pipes that penetrated the ceiling with insulation to prevent sound transmission. *Tr.*, 9/23/10 at 89. Finally, the Applicant stated that he hired a person to caulk corners in the restaurant just in case there were cracks in the slab that were transmitting sound. *Tr.*, 9/23/10 at 90.

11. The Protestants called Ms. Leanne Sedowski to testify. *Tr.*, 9/23/10 at 94. Ms. Sedowski stated that her condo is located over the Applicant and shares the same wall with Yes Organic Market. *Tr.*, 9/23/10 at 94. She stated that before moving into her condo the developer of the building assured her that there were no sound transmission issues. *Tr.*, 9/23/10 at 96.

12. Ms. Sedowski stated that problems with noise emanating from the establishment began in March 2009. *Tr.*, 9/23/10 at 98. During the establishment's opening party she heard bass sounds in her condo coming from the establishment from 11:00 p.m. to 1:00 a.m. *Tr.*, 9/23/10 at 99-100. She stated that she heard bass sounds in her apartment for the first few months after the restaurant opened. *Tr.*, 9/23/10 at 101. Ms. Sedowski stated that Mr. Girardo had to call frequently to tell the Applicant to turn its music lower. *Tr.*, 9/23/10 at 101.

13. Ms. Sedowski stated that when jazz music is played on the mezzanine she hears the music in her condo if there is no other sound in the background. *Tr.*, 9/23/10 at 102. She stated that she can often hear the bass, the melody, and identify the instruments when noise is audible in her residence. *Tr.*, 9/23/10 at 102. She stated that the sound is continuous from 7:30 p.m. to 9:45 p.m. *Tr.*, 9/23/10 at 103.

14. Ms. Sedowski also testified that the music is louder in her bathroom because of the tile and piping. *Tr.*, 9/23/10 at 124. She testified that sound in her bathroom makes it appear that there is a "cocktail party" in the bathroom. *Tr.*, 9/23/10 at 124.

15. Ms. Sedowski stated that she wanted the Applicant to move the band from the second floor to the first floor and keep the music volume at "1.5." *Tr.*, 9/23/10 at 103-04, 122. Ms. Sedowski stated that she was not requesting that the Board prevent the Applicant from playing music in his establishment. *Tr.*, 9/23/10 at 105.

16. Ms. Sedowski stated that, at the time she bought her residence, she was unaware that a restaurant was going to be located below her condo. *Tr.*, 9/23/10 at 108.

17. Ms. Sedowski does not contend that the Applicant is in violation of the Voluntary Agreement or the District of Columbia's noise laws. *Tr.*, 9/23/10 at 113, 118.

18. Ms. Sedowski testified that her bedroom has wall to wall carpeting but the living room does not. *Tr.*, 9/23/10 at 126. According to Ms. Sedowski, there is no difference in the music heard in either room. *Tr.*, 9/23/10 at 126.

19. Ms. Sedowski testified that a sound engineer recommended that they purchase one-half inch spacers to raise the condo's floors. *Tr.*, 9/23/10 at 127. According to the engineer, this would create an air pocket that would trap the vibrations. *Tr.*, 9/23/10 at 127.

20. The Protestants called Mr. William Girardo to testify. *Tr.*, 9/23/10 at 131. Mr. Girardo stated that he lives with Ms. Sedowski in the condo above the Applicant. *Tr.*, 9/23/10 at 134. He stated that he worked on the existing Voluntary Agreement that the Applicant entered into. *Tr.*, 9/23/10 at 135. He stated that he requested that their ANC file a protests against the Application. *Tr.*, 9/23/10 at 136. He testified that he sent a notice to cure to the Applicant in September 2009 but that the Applicant did not cure the problem until January 2010. *Tr.*, 9/23/10 at 136.

21. Mr. Girardo further testified that a sound test occurred with ABRA officials, members of the Union Row Condominium Board, and members of the Applicant's management team present. *Tr.*, 9/23/10 at 137. He stated that during the sound test the Applicant had the band move near the entrance of the restaurant, on the first floor, to play. *Tr.*, 9/23/10 at 140. He stated that when this occurred no music could be heard in his residence. *Tr.*, 9/23/10 at 140. However, after approximately two days, music could be heard again in the apartment. *Tr.*, 9/23/10 at 141. According to Mr. Girardo, the band was playing on the second floor again. *Tr.*, 9/23/10 at 141. According to Mr. Girardo, when he complained to the Applicant, Mr. Shallal stated that the establishment intended to continue playing music on the second floor. *Tr.*, 9/23/10 at 141. Mr. Girardo testified that, based on Mr. Shallal's response, it appeared that the Applicant misled everyone at the sound test. *Tr.*, 9/23/10 at 141, 147-48.

22. Mr. Girardo testified that the noise in his condo is loudest when music is played on the second floor of the Applicant's establishment. *Tr.*, 9/23/10 at 142.

23. Mr. Girardo stated that the Applicant never adheres to the agreements it makes with the residents of the condominiums above the establishment. *Tr.*, 9/23/10 at 144. According to Mr. Girardo, the Applicant previously agreed to place rubber mats under the band and isolate the speakers underneath the apartment but this never occurred. *Tr.*, 9/23/10 at 145-46.

24. The Protestants called Ms. Bonnie Retus to testify. *Tr.*, 9/23/10 at 167. She testified that she lives across the hall from the Protestants. *Tr.*, 9/23/10 at 168. She stated that she hears noise from the applicant in her condo. *Tr.*, 9/23/10 at 169.

CONCLUSIONS OF LAW

25. Pursuant to D.C. Official Code § 25-313(a) (2009) and 23 DCMR § 400.1(a) (2008), an Applicant must demonstrate to the Board's satisfaction that the establishment for which an Application to Renew a Retailer's Class CR License is sought is appropriate for the neighborhood in which it is located. The Board concludes that the Application is appropriate and that its approval will not adversely impact peace, order, and quiet.

26. The sole basis of the protest is noise created by the Applicant.

27. The ABC laws of the District of Columbia state that “The licensee under an on-premises retailer’s license shall not produce any sound, noise, or music of such intensity that it may be heard in any premises other than the licensed establishment” except if the premises are located “within a C-1, C-2, C-3, C-4, C-M, or M zone, as defined in the zoning regulations for the District.” D.C. Code § 25-724(a), (b)(3) (2001). In addition, “licensees under this subchapter shall comply with the noise level requirements set forth in Chapter 27 of Title 20 of the District of Columbia Municipal Regulations.” § 25-724(c). Further, in Dolan, the Supreme Court stated that under the Takings Clause there must be an “essential nexus” between the government’s legitimate interests and the conditions exacted by a locality for a permit. Dolan v. City of Tigard, 512 U.S. 374, 386 (1994) *citing* Nollan v. Cal. Coastal Com., 483 U.S. 825, 837 (1987).

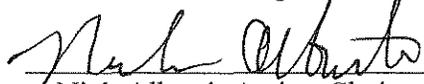
28. The Board finds that the Applicant has met its burden of proof and that the Protestant has not stated an issue which the Board may remedy. The Board notes that the Applicant, at its own expense, has taken many steps to sound proof its property. Moreover, the evidence presented at the hearing did not show that the Applicant is in violation of the District of Columbia’s noise laws. The Board notes that the Protestant’s property is located in a C-3-A zone and, as such, is exempted from the noise protections found in § 25-724(a). Further, the absence of a sound level reading in the evidence prevents the Board from finding against the Applicant for violating § 25-724(c), which requires a sound measurement. Finally, there is no evidence that the Applicant is violating the terms of its existing Voluntary Agreement. Consequently, under the ABC laws, the Protestant is entitled to produce the noise that is currently audible in the Protestant’s residence.

29. Indeed, as discussed in Dolan, if the Board imposed conditions on the license, it may violate the Takings Clause because there is no governmental interest in preventing an activity that is permitted by law. Simply put, the Board has no power to provide a remedy to the Protestant’s complaint under the ABC laws. As such, the Board grants the Application for Renewal of a Retailer’s Class CR License.

ORDER

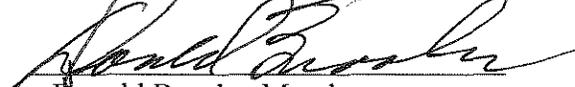
Therefore, it is hereby **ORDERED** on this 27th day of October 2010, that the Application to Renew a Retailer’s Class CR License filed by Eatonville, Inc., t/a Eatonville, at premises 2121 14th Street, N.W, Washington, D.C., is hereby **GRANTED** and the terms and conditions of the existing Voluntary Agreement remains in full force and effect.

District of Columbia
Alcoholic Beverage Control Board



Nick Alberti, Acting Chairperson

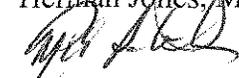
Mital M. Gandhi, Member



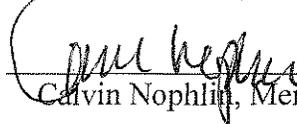
Donald Brooks, Member



Herman Jones, Member



Mike Silverstein, Member



Calvin Nophlin, Member

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 the 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 (April 2004) 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).