

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

In the Matter of:)

2461 Corporation, LLC)
t/a Madam's Organ)
Holder of a)
Retailer's Class CT License)

Case No.: 14-CMP-00325
License No.: ABRA-025273
Order No.: 2015-293

at premises)
2461 18th Street, NW)
Washington, D.C. 20009)

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

ALSO PRESENT: Richard Bianco, Esq. on behalf of 2461 Corporation, LLC
t/a Madam's Organ (Respondent)

Fernando Rivero, Assistant Attorney General,
on behalf of the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

INTRODUCTION

In this case the Board finds that the Respondent guilty of violating its Settlement Agreement in violation of D.C. Official Code § 25-446(e). Accordingly, the Board imposes a fine of \$500.00 payable within thirty (30) days of the date of this Order. The board's reason is explained in greater detail below.

Procedural Background

This case arises from a Notice of Status Hearing and Show Cause Hearing that the Alcoholic Beverage Control Board executed on January 2, 2015. The Alcoholic Beverage Regulation Administration (ABRA) served the Notice on the Respondent, located at premises 2461 18th Street, N.W. on January 28, 2015.

The Notice charged the Respondent with one violation, which if proven true, would justify the imposition of a fine, suspension, or revocation of the Respondent's ABC-license.

Specifically, the Notice charged the Respondent with the following violation:

Charge I: [On June 22, 2014,] the Respondent violated its Settlement Agreement by not keeping windows of the establishment closed after 12:30 a.m. when live music is being played in violation of D.C. Official Code § 25-446(e).

...

ABRA Show Cause File No., 14-CMP-00325, Notice of Status Hearing and Show Cause Hearing, 2 (January 2, 2015).

The Office of the Attorney General (OAG) and Respondent both appeared at the Show Cause Status Hearing on February 25, 2015. Both parties then appeared at the Show Cause Hearing for this matter on April 1, 2015 and argued their respective cases before the Board.

FINDINGS OF FACT

The Board having considered the evidence contained in the record, the testimony of witnesses, and the documents comprising the Board's official file, makes the following findings:

I. BACKGROUND

1. The Respondent holds a Retailer's Class CT License, ABRA License No. 025273. *ABRA Licensing File No. ABRA-025273*. The establishment's premises are located at 2461 18th Street, N.W., Washington, D.C. *Id.*
2. The Respondent's Retailer's Class CT License, ABRA License No. 025273, has the following endorsements attached to its license: Cover Charge, Dancing, Entertainment, and Summer Garden. *Id.*
3. On February 6, 2008, the Respondent entered into a Settlement Agreement with Advisory Neighborhood Commission 1C (ANC 1C) which was approved by the Board on May 21, 2008. *In re 2461 Corp. t/a Madam's Organ Restaurant*, Case No. 35287-07/025P, Board Order No. 2008-202 (D.C.A.B.C.B. May 21, 2008). The Board later amended this Agreement between the parties on January 14, 2015, but maintained that the 2008 Settlement Agreement would remain in full force and effect. *In re 2461 Corp. t/a Madam's Organ Restaurant*, Case No. 14-PRO-00007, Board Order No. 2015-005 (D.C.A.B.C.B. Jan. 14, 2015).

4. The Respondent's Settlement Agreement, in relevant part states:

4. Noise/Music/Dancing

b) Except when persons are in the act of using the door for ingress to or egress from the premises, the doors and windows of the establishment will remain closed from 12:30 a.m. until closing when live music is being played or a sound amplification device other than the loud speaker referenced in paragraph (d), below is being employed in the premises.

In re 2461 Corp. t/a Madam's Organ Restaurant, Case No. 14-PRO-00007, Board Order No. 2015-005 (D.C.A.B.C.B. Jan. 14, 2015), *Settlement Agreement*, 3 § 4.

II. THE TESTIMONY ABRA INVESTIGATOR EARL JONES

5. ABRA Investigator Earl Jones testified on behalf of the Government. *Transcript (Tr.)*, 04/01/15 at 5-21. Investigator Jones has worked as an investigator for ABRA since September of 2009. *Id.* at 5. During his tenure with ABRA, Investigator Jones has monitored the establishment on prior occasions. *Id.* at 6.

6. On June 22, 2014, Investigator Jones arrived to the establishment between 1:30 and 1:33 a.m. with other members of the Noise Task Force. *Id.* at 7. At that time, he observed that there was a live band performing directly in front of one of the establishment's ground floor windows. *Id.*

7. Investigator Jones immediately identified himself to the Respondent's staff and requested to speak to the Alcoholic Beverage Control (ABC) Manager on duty, Mr. Carlos Wilcox. *Id.* at 8. Upon meeting with Mr. Wilcox, Investigator Jones explained that the music, being played by the band in front of an open window, produced a noise that emanated onto the street level. *Id.*

8. Investigator Jones then requested that Mr. Wilcox go and retrieve ABRA records of the establishment including the Respondent's ABC license, Certificate of Occupancy, Settlement Agreement and invoices. *Id.* at 9. Mr. Wilcox returned with the records shortly thereafter. *Id.* After a review of the records, Investigator Jones explained to Mr. Wilcox that the establishment's Settlement Agreement required that windows and doors were to be closed while having a live band playing. *Id.*; *See also* Protest Report Exhibit 4. Soon thereafter, Mr. Wilcox acquiesced and closed the window. *Tr.*, 04/01/15 at 12.

III. THE TESTIMONY OF WILLIAM DUGGAN

9. Mr. Duggan is the President and Owner of Madam's Organ. *Tr.*, 04/01/15 at 47. His establishment features live music every night that typically begins at 9:30 p.m. *Id.* at 48. The bands typically perform seventy minute sets. *Id.* After the first set, the establishment's policy is to close the windows to comply with its Settlement Agreement. *Id.* Moreover, it is the general

manager's responsibility to double-check to ensure that the windows are closed each evening. *Id.* at 66.

10. Mr. Duggan was not present at the establishment on the evening of the alleged violation. *Id.* at 60.

IV. THE TESTIMONY OF CARLOS WILCOX

11. Mr. Wilcox is the General Manager of Madam's Organ. *Id.* at 72. In this capacity at Madam's Organ, Mr. Wilcox is familiar with the operations of the establishment, including the windows closing policy per the establishment's Settlement Agreement. *Id.* at 72-73.

12. On the evening of the alleged violation, Mr. Wilcox personally closed the windows during the performer's first break of the night. *Id.* at 74. He later learned that during the course of the evening, the band's drummer needed air and cracked open the window at the front of the establishment. *Id.* at 78.

13. Once Investigator Jones brought the open window to Mr. Wilcox's attention later that evening, he closed the window again. *Id.* at 77.

CONCLUSIONS OF LAW

14. The Board has the authority to fine, suspend, or revoke the license of a licensee who violates any provision of Title 25 of the District of Columbia Official Code pursuant to District of Columbia Official Code § 25-823(1). D.C. Code § 25-830 ; 23 DCMR § 800, *et seq.* (West Supp. 2015). Furthermore, after holding a Show Cause Hearing, the Board is entitled to impose conditions if we determine "that the inclusion of the conditions would be in the best interests of the locality, section, or portion of the District in which the establishment is licensed." D.C. Code § 25-447.

I. THE RESPONDENT VIOLATED § 25-446(e) WHEN IT VIOLATED THE TERMS OF ITS SETTLEMENT AGREEMENT BY LEAVING A WINDOW OPEN AFTER 12:30 A.M.

15. The Board finds that on June 22, 2014, the Respondent violated § 25-446 (e) when it failed to ensure that all windows of the establishment were closed as mandated by the Respondent's Settlement Agreement. Under § 25-446(e), "upon a determinate that a licensee has violated a settlement agreement, the Board shall penalize the licensee according to the provisions set forth for violations of a license in Chapter 8 of this title." D.C. Official Code § 25-446 (e). The Respondent's Settlement Agreement requires that "the doors and windows of the establishment will remain closed from 12:30 a.m. until closing when live music is being played..." *Supra*, at ¶ 4.

16. In the instant case, the Board finds that there is sufficient evidence in the record to support this charge. Investigator Jones approached the establishment between 1:30 and 1:33 a.m. to inform the Respondent that one of the establishment's front windows were open while the

band was performing live music. *Supra*, at ¶¶ 6-8. In his testimony, Mr. Wilcox admitted to closing the window after it had been opened by a performer on the night in question per the instruction of Investigator Jones. *Supra*, at ¶¶ 12-13. Accordingly, there is no dispute that the establishment's ground floor window was open while a live band was performing at the establishment. Further, it is clear that this occurrence is in direct violation of the Respondent's Settlement Agreement. *Supra*, at ¶¶ 4, 15.

17. For the foregoing reasons, the Board finds the Respondent guilty of violating its Settlement Agreement in violation of § 25-446(e).

ORDER

Therefore, based on the foregoing findings of fact and conclusions of law, the Board, on this 17th day of June, 2015, finds that 2461 Corporation, LLC t/a Madam's Organ violated D.C. Official Code § 25-446(e).

The Board hereby **ORDERS** that:

(1) The Respondent shall pay a \$500.00 fine for the violation described in Charge I.

IT IS FURTHER ORDERED that the Respondent must pay the fines imposed by the Board within thirty (30) days from the date of this Order, or its license shall be immediately suspended until all amounts owed are paid.

IT IS FURTHER ORDERED that this violation shall be deemed a secondary tier violation.

The ABRA shall deliver copies of this Order to the Government and the Respondent.


District of Columbia
Alcoholic Beverage Control Board



Nick Alberti, Member



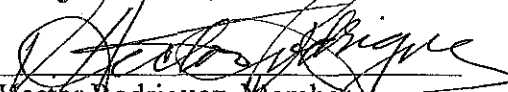
Donald Brooks, Member



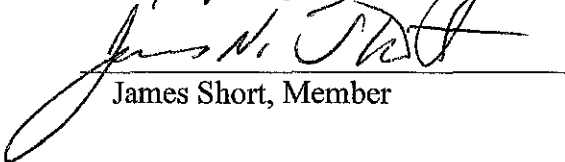
Herman Jones, Member



Mike Silverstein, Member



Hector Rodriguez, Member



James Short, Member

I concur with the majority's finding of liability in this case, but I dissent as to the penalty imposed. I would issue a warning.

In my view, the evidence shows that a window was open at approximately 1:30 a.m. when the band was playing, in violation of the literal reading of the settlement agreement. *Supra*, at ¶ 6. However, I find no evidence to support the maximum penalty allowed under the statute that the majority has imposed, nor does the majority provide any rationale for such a penalty. To the contrary, I find that the following mitigating factors warrant a warning:

(1) This establishment has a long record of compliance with both the ABRA laws and regulations and the establishment's settlement agreement with ANC 1C. *ABRA Licensing File No. ABRA-025273*, Investigative History; *In re 2461 Corp. t/a Madam's Organ Restaurant*, Case No. 35287-07/025P, Board Order No. 20008-202. This was the Respondent's first secondary tier violation.

(2) The establishment was cooperative when the open window was brought to Mr. Wilcox's attention. *Supra*, at ¶¶ 8, 13.

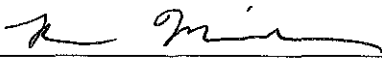
(3) There is no evidence that the window was open for more than five minutes. *Supra*, at ¶¶ 1-13.

(4) It appears that the opening of the window was contrary to the instructions and knowledge of the establishment. *Supra*, at ¶ 9, 11.

(5) There was no adverse impact associated with the partially opened window. No one, not even the ANC, who is the party to the Settlement Agreement, registered a complaint of excessive noise during the time that the window was open on the night of this violation.

(6) Despite the language in the Settlement Agreement stating that the window remain closed, it is not unimaginable nor unreasonable that a window may be opened briefly for air as in this case, by a third party other than the establishment.

Accordingly, in light of the de minimis nature of the violation, and the positive and reasonable actions by the establishment, I am of the opinion that a warning, not a maximum penalty, is warranted in this matter.



Ruthanne Miller, Chairperson

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, 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, 430 E Street, N.W., Washington, D.C. 20001; (202/879-1010). 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).