

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

In the Matter of:)	
)	
Zhou Hospitality, LLC)	Case Number: 10-PRO-00155
t/a Muse Nightclub and Lounge)	License Number: 079224
)	Order Number: 2011-352
Application to Renew a)	
Retailer's Class CN License)	
)	
at premises)	
717 6th St., N.W.)	
Washington, D.C. 20001)	
)	

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

ALSO PRESENT: Zhou Hospitality, LLC, t/a Muse Nightclub and Lounge, Applicant

Emanuel Mpras, Esq., on behalf of the Applicant

Terrell Carter, Board Member, Downtown Neighborhood Association (DNA), Protestant

Dolph Sand, on behalf of A Group of Five or More Individuals, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

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

Zhou Hospitality, LLC, t/a Muse Nightclub and Lounge (Applicant), filed an Application to renew its Retailer's Class CN License (Application) at premises 717 6th St., N.W., Washington, D.C. A protest was filed by A Group of Five or More Individuals, represented by Dolph Sand, and the Downtown Neighborhood Association (DNA), represented by Terrell Carter (collectively the "Protestants"). The Application came before the Alcoholic Beverage Control Board (Board) for a Roll Call Hearing on November 11, 2010, and a Status Hearing on January 26, 2011. The Applicant and the Protestants were unsuccessful in negotiating a Voluntary Agreement before the Protest Hearing at a mediation session held on January 21, 2011. The Protest Hearing was held on April 27, 2011.

Pursuant to D.C. Code § 25-313(a) (2001) and 23 DCMR § 400.1(a), the protest issues are whether the Application adversely impacts the neighborhood's peace, order, and quiet. 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 Applicant submitted an Application to renew its Retailer's Class CN License. *ABRA Licensing File No. 079224.*
2. The Applicant's establishment is located at 717 6th Street, N.W., which is located in a C-2-C zone. *ABRA Protest File No. 11-PRO-00155, Protest Report, 3.* There are 69 other ABC-licensed establishments within 1,200 feet of the establishment. *Protest Report, 4.* There are no schools, recreation centers, public libraries, or day care centers located within 400 feet of the establishment. *Protest Report, 7.*
3. An ABC-licensed establishment has been located at 717 6th Street, N.W., for the past ten years. *Transcript (Tr.), April 27, 2011 at 50.* Wei Zhou is one of the current owners of the establishment and Charles Zhou serves as a managing member. *Tr., 4/27/11 at 49, 85.* Mr. Zhou purchased the current establishment three years ago from the establishment's previous owner. *Tr., 4/27/11 at 50.* The establishment has three floors, each containing its own bar and DJ booth. *Tr., 4/27/11 at 12.* The establishment is open four nights per week: Thursday, Friday, Saturday, and Sunday. *Tr., 4/27/11 at 80.* The establishment closes at 2:00 a.m. on Thursday and 3:00 a.m. on Friday and Saturday. *Tr., 4/27/11 at 80-81.*
4. In the past two years, the Metropolitan Police Department (MPD) has received 30 calls for service at the Applicant's address. *Tr., 4/27/11 at 14.* MPD reports that within the past two years, 20 calls for service at the address were related to disorderly conduct incidents. *Tr., 4/27/11 at 14.* MPD has received eight calls related to simple assaults and two calls were related to ABC violations. *Tr., 4/27/11 at 14.*
5. The Board takes administrative notice that the Applicant's establishment was previously suspended by the Chief of Police on May 19, 2010, because a malicious disfigurement occurred at the establishment. *See ABRA License No. 079224, Investigative History.* The Board later allowed the summary suspension to expire. *Investigative History.*
6. MPD Officer Michael Farris testified that he has worked on the club zone overtime detail that services the establishment and patrols the area surrounding the establishment. *Tr., 4/27/11 at 27-28.* Officer Farris indicated that there are occasional assaults at the establishment; however, he has never witnessed unconscious and intoxicated patrons or customers vomiting from over intoxication. *Tr., 4/27/11 at 31-32.* Officer Farris believes that the establishment's management is responsive to customers and helps move people away from the front of the establishment after closing. *Tr., 4/27/11 at 30, 39.*
7. As indicated by Mr. Wei Zhou, the establishment usually only has DJs on all three floors on Friday and Saturday nights. *Tr., 4/27/11 at 81.* The establishment has multiple

speakers on each floor. *Tr.*, 4/27/11 at 18. The speakers are not located directly against the wall shared with the neighboring condominium building, the Cosmopolitan. *Tr.*, 4/27/11 at 11, 18. The establishment usually keeps its bass sounds at negative six, which is the lowest the bass sounds can go without being turned off. *Tr.*, 4/27/11 at 77, 102.

8. The Applicant admitted that the establishment has speakers mounted on the establishment's roof. *Tr.*, 4/27/11 at 125. The loudspeakers are connected to a CD player. *Tr.*, 4/27/11 at 128.

9. The Applicant soundproofed the establishment after purchasing the nightclub. *Tr.*, 4/27/11 at 52. The walls shared by the establishment and the Cosmopolitan have been coated with THX and QuietRock. *Tr.*, 4/27/11 at 19, 50, 52-54; *Licensee's Exhibit No. 2-3*. Further, the establishment also surrounded its bass boxes with soundproofing materials in order to avoid having the boxes directly touch the building and transfer additional vibrations. *Tr.*, 4/27/11 at 106. The establishment also placed foam into gaps in the wall in order to provide additional soundproofing. *Tr.*, 4/27/11 at 107. The establishment has spent approximately \$7,000.00 soundproofing the establishment. *Tr.*, 4/27/11 at 57.

10. Mr. Wei Zhou admitted that he has not soundproofed the floors, walls, and ceilings adjacent to the shared wall with the Cosmopolitan. *Tr.*, 4/27/11 at 76, 107. The establishment has not soundproofed the ceiling because the ceiling has many air ducts. *Tr.*, 4/27/11 at 107-08. The Applicant claims that the entire ceiling would have to be rebuilt in order to soundproof the ceiling. *Tr.*, 4/27/11 at 107. Further, the Applicant claims that the ceiling is only eight feet high and adding anything to the ceiling would lower the ceiling below the legal requirements. *Tr.*, 4/27/11 at 121-22. The Board notes that the documents related to the Applicant's soundproofing states, "A building structure could also spread air and structure borne sound. Lowering the unwanted sound coming through a common wall may require extending coverage to the adjacent hard floor, walls and ceilings." *Tr.*, 4/27/11 at 76; *Licensee's Exhibit No. 2*.

11. Alcoholic Beverage Regulation Administration (ABRA) Investigator Jabriel Shakoor was assigned to investigate the protest against the Application. *Transcript (Tr.)*, April 27, 2011, at 9. Investigator Shakoor observed a noise test conducted by the Applicant and the Protestants on January 29, 2011. *Tr.*, 4/27/11 at 12, 15. The test consisted of the Applicant playing music on each of its floors at various volumes and bass levels and monitoring the noise heard in the condominium units. *Tr.*, 4/27/11 at 12-13. The test determined that when the bass is turned off completely and the music was lowered on the third floor of the establishment, the noise in Unit 205 decreased and the vibration noise in Unit 504 ceased entirely. *Tr.*, 4/27/11 at 13, 17. Investigator Shakoor believes that the noise is a problem in the neighboring dwellings because the Cosmopolitan and the establishment are physically connected to each other. *Tr.*, 4/27/11 at 17.

12. Mr. Wei Zhou stated that on one occasion that he conducted an additional sound test with one of the neighbors in the Cosmopolitan. *Tr.*, 4/27/11 at 67. The establishment played its music and bass at various levels and tried to determine what sounds could be heard in the neighbor's condominium unit. *Tr.*, 4/27/11 at 67. During the test, no matter the sound level, Mr. Wei Zhou "could always feel the vibration coming through." *Tr.*, 4/27/11 at 67. As a result, if the establishment plays any bass sounds, at any level, then those sounds and vibrations will be heard and felt in the Cosmopolitan. *Tr.*, 4/27/11 at 70.

As such, in order for the establishment to completely eliminate the vibrations observed in the Cosmopolitan, it must completely turn off the bass. *Tr.*, 4/27/11 at 79.

13. The establishment's sound engineer stated that the noise problem in the Cosmopolitan is caused by the establishment's building being connected to the condominium's building. *Tr.*, 4/27/11 at 116-17. The connection between the buildings allows the vibrations to be transferred from one building to the other. *Tr.*, 4/27/11 at 117.

14. Based on his experience working in the club zone detail outside the establishment, Officer Farris believes that the noise is not related to the establishment's patrons but comes from the construction and design of the Applicant and Protestants' buildings. *Tr.*, 4/27/11 at 40. Officer Farris has observed that the establishment's music can only be heard outside the establishment when the establishment's door is open. *Tr.*, 4/27/11 at 40.

15. Mr. Charles Zhou admitted that the establishment has received noise complaints from the residents of the Cosmopolitan. *Tr.*, 4/27/11 at 85. Nevertheless, the establishment has never been cited for noise violations by the District of Columbia Department of Consumer and Regulatory Affairs. *Tr.*, 4/27/11 at 87.

16. Maha Farah is the Senior Community Manager of the Avalon at Gallery Place apartment building, which is located at 770 5th Street, N.W. *Tr.*, 4/27/11 at 150. The apartment building is located behind the Applicant's building and contains 204 separate apartments. *Tr.*, 4/27/11 at 151. Ms. Farah has received various complaints from her residents. *Tr.*, 4/27/11 at 204. Specifically, residents complain about noise and loitering in the alley that separates the apartment building from the establishment's building. *Tr.*, 4/27/11 at 152-53. In addition, there are occasional fights in the alley and, on occasion, the establishment's patrons urinate or vomit on the Avalon's property. *Tr.*, 4/27/11 at 152. According to Ms. Farah, the apartment building has been forced to allow two people to break their leases and to reduce the rent of 30 apartments that face the alley because of disturbances related to the Applicant's establishment. *Tr.*, 4/27/11 at 154, 163, 166.

17. Ms. Farah has observed that the establishment occasionally places a tent in the back of the establishment and uses the back of the establishment as a VIP entrance. *Tr.*, 4/27/11 at 152. The tent is often set up so that it is covering a portion of the alley, even though the alley is only big enough for approximately two cars to pass through it. *Tr.*, 4/27/11 at 157-58, 160. As indicated by Ms. Farah, the establishment occasionally leaves its back door open when it uses the back door as an entrance. *Tr.*, 4/27/11 at 152. Consequently, when the establishment's back door is left open, the Avalon's residents are able to hear the establishment's music. *Tr.*, 4/27/11 at 153.

18. Elizabeth Keats-Webb lives in the Cosmopolitan, which is located at 715 6th Street, N.W., in Apartment 205. *Tr.*, 4/27/11 at 168-69. Ms. Keats-Webb has lived in her apartment since the end of August 2010. *Tr.*, 4/27/11 at 169. She stated that when she first moved into the apartment she paid \$2500.00 per month in rent. *Tr.*, 4/27/11 at 169. However, the landlord reduced her rent by 10 percent when she threatened to move out because she was being disturbed by the noise being produced by the Applicant's establishment. *Tr.*, 4/27/11 at 170. As indicated by Ms. Keats-Webb, the wall of her apartment shares a wall with the Applicant's establishment. *Tr.*, 4/27/11 at 170. Consequently, Ms. Keats-Webb's walls regularly shake from the noise and vibrations

emanating from the Applicant's establishment on Thursday, Friday, Saturday, and Sunday. *Tr.*, 4/27/11 at 170, 214.

19. Kevin Wilsey is the treasurer of the Downtown Neighborhood Association. *Tr.*, 4/27/11 at 198. Mr. Wilsey has received approximately seven complaints about the establishment from the residents of the Cosmopolitan, the Myrene, and the management of the Avalon over the past year. *Tr.*, 4/27/11 at 199, 202-03.

20. We take administrative notice of the following provisions found in the Applicant's Voluntary Agreement:

7. Coyote Ugly shall fully comply with all applicable noise regulations, guidelines and provisions in the D.C. Code. Notwithstanding the previous sentence, if noise from the establishment is a source of complaint by neighbors living and working near the Building, Coyote Ugly shall meet with the Protestors and the neighbors to agree upon steps to ameliorate the source of the unacceptable noise.

Raise the Bar, LLC, t/a Coyote Ugly, Board Order No. 2004-5, 4 (D.C.A.B.C.B. Oct. 22, 2003).

9. Coyote Ugly shall only be permitted to use the roof deck in accordance with this paragraph. The roof deck shall not be used for any purpose after 9:00 p.m. except that Coyote Ugly shall have the right to use the roof deck until 11:00 pm [sic] on the one evening of each year that the annual 4th of July is celebrated by the city with a fireworks display. There shall be no dancing, yelling, howling, or the use of microphones or loudspeakers on the roof deck at any time. Coyote Ugly shall not permit patrons using the roof deck to act in a manner that would be offensive to the neighbors in the nearby residences. Music played on the roof deck shall not be loud enough to be heard by the residents in the nearby residences. Lighting on the roof deck shall be installed so that it does not shine into the windows of the nearby residences. No flood-lights or spot-lights will be used on the roof top deck. Lighting on the roof top deck, other than emergency lighting required by DC code [sic] or regulation, shall be no later than 9:30 pm [sic].

Raise the Bar, LLC, t/a Coyote Ugly, Board Order No. 2004-5 at 5.

CONCLUSIONS OF LAW

21. Pursuant to D.C. Official Code § 25-313(a) and 23 DCMR § 400.1(a), an Applicant must demonstrate to the Board's satisfaction that the establishment for which an Application to renew a Retailer's Class CN License is sought is appropriate for the neighborhood in which it is located. The Protestants challenged the Application on the grounds that it will adversely impact the peace, order, and quiet of the neighborhood.

22. We find that the Applicant, by generating unacceptable noise is having an adverse impact on the neighborhood's peace, order, and quiet. Before the Board renews the Applicant's ABC-license, the Applicant must address, through the conditions outlined by the Board, the noise issues being caused by the establishment.

23. The Board recognizes that pursuant to D.C. Official Code § 1-309.10(d) (Supp. 2010) and D.C. Official Code § 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, no ANC submitted a recommendation at least seven days before the Protest Hearing under § 25-609 and, therefore, the great weight requirement is inapplicable in this matter.

24. We find that the Applicant is at risk of violating the District's new disorderly conduct law, which the Board can enforce against licensees under D.C. Code § 25-823(2). According to the new law, "It is unlawful for a person to make an unreasonably loud noise between 10:00 p.m. and 7:00 a.m. that is likely to annoy or disturb one or more other persons in their residences." D.C. Code § 22-1321(d) (Supp. 2011). The Board has stated that "noise generated by an establishment cannot be "unreasonable" if a licensee has taken commercially reasonable steps to soundproof its establishment and is not otherwise in violation of the District of Columbia's noise laws." Krakatoa, Inc., t/a Chief Ike's Mambo Room, Board Order No. 2011-205, para. 35 (D.C.A.B.C.B. May 18, 2011).

25. It is undisputed that vibrations and noise from the Applicant's establishment is being heard and felt in the nearby condominiums. Specifically, the vibrations and noise from the establishment shake the walls of Ms. Keats-Webb's residence. Supra, at para. 18. Further, as indicated by Ms. Farah, her building has been forced to reduce the rent on some of its units and has had to release tenants from their leases due to the noise problems related to the Applicant's establishment. Supra, at para. 16. Finally, even the Applicant admitted that if it plays any bass sounds, at any level, those sounds will be heard in the neighboring condominium units. Supra, at para. 12.

26. Although the Applicant has made efforts to soundproof the establishment, the record shows that these efforts are insufficient and unreasonable. The Applicant admitted that it has only soundproofed the walls shared with the condominium. However, documents related to the Applicant's soundproofing efforts specifically state that: "Lowering the unwanted sound coming through a common wall may require extending coverage to the adjacent hard flooring, walls and ceilings." Supra, at para. 10. We are not convinced by the Applicant's assertions that further soundproofing of the ceiling and other areas is impractical. As such, before renewing the Applicant's license, we are requiring the Applicant to make greater efforts to soundproof the establishment.

27. Furthermore, the record makes clear that the Applicant cannot play bass sounds on the third floor without severely disturbing its neighbors. As observed by Investigator Shakoor, when the bass is turned off completely and the music was lowered on the third floor of the establishment, the noise in Unit 205 decreased and the vibration noise in Unit 504 ceased entirely. Supra, at para. 11. As such, it is unreasonable to continue to allow the Applicant to continue to amplify any bass sounds on the third floor.

28. We also find that the Applicant's usage of the rear portion of its property adversely impacts the peace, order, and quiet of the neighborhood. It is an unreasonable practice for the Applicant to leave its rear door open and disturb the Avalon's residents with the establishment's music. Supra, at para. 17. Furthermore, we are also concerned that the

establishment's patrons are regularly urinating and vomiting on the Avalon's property, which is located in the same alley as the establishment's rear entrance. Supra, at para. 16, para. 17. For these reasons, we are forbidding the Applicant from using the rear portion of the establishment for the normal ingress and egress of its customers. In addition, we also require that the Applicant keep its rear door closed, except for emergencies and escorting patrons out of the establishment.

29. Finally, although we agree with the Protestants' arguments that the Applicant is disturbing the peace, order, of quiet and the neighborhood, we only partially agree with the Protestant's arguments regarding the Voluntary Agreement.

30. First, we agree with the Protestants that the establishment should not be playing amplified music on its roof that can be heard by any nearby residents. Section 9 of the Voluntary Agreement states: "There shall be no dancing, yelling, howling, or the use of microphones or loudspeakers on the roof deck at any time." Supra, at 20. We think the term "loudspeakers" is broadly drafted to include any device that plays amplified sound. As such, the CD player and speaker shall not be used by the Applicant on its roof. Supra, at 8.

31. Second, we disagree with the Protestants that Section 7 of the Voluntary Agreement requires the Applicant to take any specific actions beyond meeting with complainants on at least one occasion. We note that Voluntary Agreements must be interpreted as if they are contracts. Prospect Dining, LLC, t/a George v. District of Columbia Alcoholic Beverage Control Bd., No. 10-AA-605, 1 (D.C. 2011) (unpublished); citing North Lincoln Park Neighborhood Ass'n v. Alcoholic Beverage Control Bd., 727 A.2d 872, 875 (D.C. 1999). In Obelisk Corp., the Court of Appeals agreed with the lower court that "agreements to agree in the future about the terms of the contract are not enforceable because no way exists to determine what the terms, not yet agreed to, will be or even if there will be agreement to terms at all." Obelisk Corp. v. Riggs Nat. Bank of Washington, D.C., 668 A.2d 847, 855 (D.C. 1995).

32. The Voluntary Agreement states: "Notwithstanding the previous sentence, if noise from the establishment is a source of complaint by neighbors living and working near the Building, Coyote Ugly shall meet with the Protestors and the neighbors to agree upon steps to ameliorate the source of the unacceptable noise." Raise the Bar, LLC, t/a Coyote Ugly, Board Order No. 2004-5 at 4. Here, the parties have agreed to meet at a later date to decide upon remedies that are not specified in the Voluntary Agreement. The provision cited by the Protestants does not give any indication to the Board on what constitutes a breach of this term by the Applicant and what the appropriate remedy is. See Id. at 885 n.8 citing Restatement (Second) of Contracts § 33(2) (1979). As such, because agreements to agree in the future are not binding, the Board finds that Section 7 of the Voluntary Agreement only requires the Applicant to meet once with a complainant, and nothing more.

33. For these reasons, we renew the license subject to the conditions outlined in the Board's Order, found below.

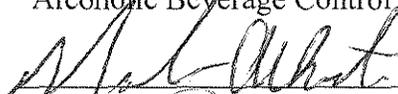
ORDER

Therefore, it is hereby **ORDERED**, on this 3rd day of August 2011, that the Application to Renew a Retailer's Class CN License filed by Zhou Hospitality, LLC, t/a Muse Nightclub and Lounge, at premises 717 6th St., N.W., is hereby **GRANTED**, subject to the following conditions:

- (1) the establishment's back door and any existing windows in the rear of the establishment must remain closed while the establishment is open for business and shall not be used for the regular ingress and egress of its customers. The establishment is permitted to use the rear door in the case of emergencies and for the purposes of escorting patrons out of the establishment;
- (2) the establishment shall not offer amplified music on its roof;
- (3) the establishment shall not utilize bass frequencies, which we define as any sound that falls between 20 Hz to 200 Hz (and typically produced by a subwoofer), on the third floor of the establishment;
- (4) the establishment shall cease playing music on the third floor at 11:00 p.m., Sunday through Thursday, and at 12:00 a.m. on Friday and Saturday;
- (5) the Applicant shall also take commercially reasonable steps to soundproof its establishment. In order to comply with this mandate, the Applicant shall do the following:
 - a. The Applicant shall retain the services of a reputable noise consultant, of its choice, to analyze potential noise issues and answer the following question:
 - i. What lawful measures can be taken to prevent the transmission of sound from the Applicant's establishment to the neighboring condominium building?
 - b. The Applicant shall submit the noise consultant's analysis and recommendations to the Board. As long as a reasonable analysis and proposal is obtained, the Board will deem the Applicant appropriate if the Applicant agrees to and complies with the noise consultant's recommendations;
 - c. The establishment shall provide a copy of the sound consultant's recommendations to the Board and the Protestants once completed; and
 - d. The Board will send an ABRA investigator within the next thirty (30) days to inspect and take pictures of the Applicant's ceilings in order to help the Board verify the Applicant's claims.

Copies of this Order shall be sent to the Applicant and the Protestants.

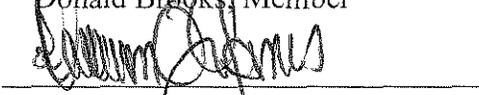
District of Columbia
Alcoholic Beverage Control Board



Nick Alberti, Interim Chairperson



Donald Brooks, Member



Herman Jones, Member



Mike Silverstein, 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).