

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

In the Matter of:

Top Shelf, LLC  
t/a Penn Quarter Sports Tavern

) Case No.: 17-PRO-00009  
) License No.: 076039  
) Order No.: 2017-335  
)

Application for Substantial Change  
To Retailer's Class CT License  
(Summer Garden with 49 Seats)

at premises  
639 Indiana Ave., N.W.  
Washington, D.C. 20004

**BEFORE:** Donovan Anderson, Chairperson  
Mike Silverstein, Member  
James Short, Member

**ALSO PRESENT:** Andrew Kline, Counsel, on behalf of Top Shelf, LLC, t/a Penn Quarter Sports Tavern, Applicant

Kevin Wilsey, on behalf of ANC 2C, Protestant

Martha Jenkins, General Counsel  
Alcoholic Beverage Regulation Administration

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

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**INTRODUCTION**

The Alcoholic Beverage Control Board (Board) finds that the Application for a Substantial Change to a Retailer's Class CT License (Summer Garden with 49 Seats) filed by Top Shelf, LLC, t/a Penn Quarter Sports Tavern ("hereinafter "Applicant" or "Penn Quarter") is appropriate for the neighborhood, so long as the establishment ends its hours of operations, sales, service, and consumption on the rooftop deck at 1:00 a.m., Sunday through Thursday, and 2:00 a.m., Friday and Saturday.

### ***Procedural Background***

The Notice of Public Hearing advertising Penn Quarter's Application for a Substantial Change to a Retailer's Class CT (Summer Garden with 49 Seats) was posted on December 23, 2016, and informed the public that objections to the application could be filed on or before February 6, 2017. *ABRA Protest File No. 17-PRO-00009; Notice of Public Hearing [Notice]* (posted December 23, 2016). The Alcoholic Beverage Regulation Administration (ABRA) received a protest letter from Advisory Neighborhood Commission (ANC) 2C (Protestant), on the grounds that the establishment will have an adverse impact on (1) peace, order, and quiet; (2) residential parking needs and vehicular and pedestrian safety; and (3) real property values. *ABRA Protest File No. 17-PRO-00009; Protestant's Protest Letter*, at 1 (February 2, 2017).

The parties came before the Board's Agent for a Roll Call Hearing on February 6, 2017, where ANC 2C was granted standing. The Parties proceeded to a Protest Status Hearing on March 22, 2017, and to a Protest Hearing on April 26, 2017.

### **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. Penn Quarter submitted an Application for a Substantial Change to Retailer's Class CT License (Application) for 639 Indiana Avenue, N.W. *ABRA Licensing File, Summer Garden/Sidewalk Café Endorsement Application*, at 1; *Notice*, at 1
2. The Application sought to add a summer garden with 49 seats. *ABRA Licensing File, Summer Garden/Sidewalk Café Endorsement Application*, at 1; *Notice*, at 1.
3. The proposed hours of operation for the summer garden are 6:30 a.m. to 2:30 a.m., Sunday through Thursday. *ABRA Licensing File, Summer Garden/Sidewalk Café Endorsement Application*, at 1; *Notice*, at 1. The proposed hours of sales, service, and consumption are 11:00 a.m. to 1:30 a.m., Sunday through Thursday, and 11:00 a.m. to 2:30 a.m., Friday and Saturday. *ABRA Licensing File, Summer Garden/Sidewalk Café Endorsement Application*, at 1; *Notice*, at 1.

#### **II. ABRA Investigator Torren Fox**

4. ABRA Investigator Torren Fox investigated the Application and prepared the Protest Report that was submitted to the Board. *ABRA Protest File No. 17-PRO-00009; Protest Report* (April 2017) [*Protest Report*].
5. Penn Quarter is located at 639 Indiana Avenue, N.W. *Protest Report*, at 2 and 6. The establishment's licensed hours of operation for the interior of the building are 6:30 a.m. to 2:00

a.m., Sunday through Thursday, and 6:30 a.m. to 3:00 a.m., Friday and Saturday. *Id.* at 7. The establishment's hours of sales, service, and consumption for the interior of the building is 11:00 a.m. to 2:00 a.m., Sunday through Thursday, and 11:00 a.m. to 3:00 a.m., Friday and Saturday. *Id.*

6. Penn Quarter currently has three endorsements on its license: (a) Entertainment; (b) Cover Charge; and (c) Sidewalk Café. *Investigator's Exhibit # 5*. The hours of entertainment in the interior of the tavern are 6:00 p.m. to 1:30 a.m., Sunday through Thursday, and 6:00 p.m. to 2:00 a.m., Friday and Saturday. *Protest Report*, at 7. The hours of operation, sales, service, and consumption on the sidewalk café are 11:00 a.m. to 11:00 p.m., Sunday through Thursday, and 11:00 a.m. to 12:00 a.m., Friday and Saturday. *Id.*

7. Penn Quarter is located in a Downtown Development DO1 C-4 Zone. *Transcript [Tr.]* at 38; *Protest Report* at 4. The Downtown Development (DO) Overlay District includes several areas in northwest Washington, D.C., including the Penn Quarter neighborhood. *Protest Report*, at 4. The DO Overlay District serves numerous purposes, including fostering growth opportunities for and the retention of small businesses. *Tr.* at 38-39; *Protest Report*, at 4. The C-4 Zone refers to the downtown core of the District of Columbia and allows for office space, retail, housing, and mixed uses. *Protest Report*, at 4.

8. Penn Quarter is a tavern consisting of a sidewalk café, two dining areas, and two bars. *Id.* at 7. The establishment's sidewalk café with 48 seats is located in the front side of the establishment and it consists of both unenclosed and enclosed sections with tables and chairs. *Tr.* at 39-40; *Protest Report, Exhibits 10 and 11*. The enclosed portion of the sidewalk café, which leads to the main entrance, is covered in plastic and contains two television sets. *Id.* at 40; *Investigator's Exhibit # 12*.

9. Penn Quarter is located on Indiana Avenue, N.W., an area that has a lot of pedestrian and vehicular traffic during the day but less so at night. *Id.* at 25 and 31; *Protest Report* at 6 and 8. There are crosswalks at each corner. *Tr.* at 20. In the vicinity of the establishment, there are several businesses, including law offices in the building abutting Penn Quarter. *Protest Report, Exhibits 18 and 19*. There are also several retail shops and restaurants, including Fiola, an ABC licensed establishment, Grand Turks and Pot Belly. *Tr.* at 28 and 34-35; *Investigator Exhibit # 10 and 11*.

10. There are few residences near Penn Quarter. *Tr.* at 23. Investigator Fox could not verify that someone lived above Grand Turks in the building adjacent to Penn Quarter. *Id.* When Investigator Fox inquired as to whether anyone lived above them, Grant Turks staff stated that they did not believe anyone lived there. *Tr.* at 35. Attempts to reach someone in the unit above Grand Turks were unsuccessful. *Id.* at 23 and 36-37.

11. The next closest residence to Penn Quarter is the condominiums located at 601 Pennsylvania Avenue, N.W. *Tr.* 22-23. This building is located across the street at the end of the block from the establishment. *Tr.* at 22-23, and 42-43; *Investigator Exhibit # 9*.

12. A Metro station is located within 30 to 40 feet from the establishment. *Tr.* at 61; *Protest Report* at 9-10, *Exhibits 20 and 21*. There is a bus stop a short distance away as well. *Protest Report* at 9-10, *Investigator's Exhibit # 20 and 21*.
13. There are 31 licensed establishments located within 1,200 feet of the Penn Quarter. *Protest Report* at 5.
14. There is one daycare, Just Us Kids Child Development Center, that is located within 400 feet establishment. *Protest Report*, at 6.
15. ABRA Investigators monitored the establishment 14 times between March 31, 2017, and April 13, 2017, and during that time did not observe any ABRA violations. *Tr.* at 21; *Protest Report*, at 7. The Investigators also did not receive any noise complaints during this time or observe patrons who were there watching televised sporting events engage in unruly behavior either inside of the establishment or on the sidewalk café. *Tr.* at 19-22, and 40.
16. The Noise Task Force did not receive any noise complaints concerning Penn Quarter between March 2016 and April 2017. *Protest Report* at 9. MPD, however, received 23 calls involving incidents in the vicinity where Penn Quarter is located. *Tr.* at 57; *Investigator Exhibit # 17*.
17. The establishment does not have its own parking, but parking did not appear be a concern during the times that the Investigators monitored the establishment. *Tr.* at 19; *Investigator Exhibit # 8 and 9*.

### **III. Dr. Ray Adelman**

18. Dr. Ray Adelman, testifying on behalf of the Applicant, resides at 601 Pennsylvania Avenue, N.W. *Tr.* at 64. Dr. Adelman's unit has a terrace that overlooks Indiana Avenue, N.W., and would face the establishment's rooftop deck. *Id.*
19. Dr. Adelman regularly eats outside on the terrace between 7:30 p.m. and 8:00 p.m. and has not had any concerns with the level of noise from the establishment. *Id.*
20. Dr. Adelman has lived at his address for 10 years and during this time, he has witnessed how Penn Quarter has benefited the neighborhood. *Id.* at 65. Mr. Brand, the establishment's owner, worked with the District to address the neighborhood's rodent problem. *Id.* Additionally, Mr. Brand also helped to beautify the neighborhood by planting flowers on both sides of the street. *Id.* at 66.
21. Dr. Adelman does not believe the addition of the rooftop deck would have an adverse effect on real property values. *Id.* at 67. It is his opinion the market value of his residence has increased four to five percent over the last 10 years. *Id.*
22. In addition to his current residence at 601, Dr. Adelman owns a condominium in the Lafayette, a residential building behind Penn Quarter on D Street, N.W. *Id.* According to a

survey Lafayette's management conducted, the majority of the residents in the building are not concerned about noise emanating from the establishment. *Id.*

#### **IV. Suzanne Hilding**

23. Suzanne Hilding, testifying on behalf of the Applicant, resides on the fifteenth floor of 601 Pennsylvania Avenue, N.W. *Tr.* at 79 and 83. Ms. Hilding has lived in her residence, which has a terrace that faces Indiana Avenue and overlooks the establishment, since 1999. *Id.* Prior to moving into her current residence, Ms. Hilding lived in another unit in 601 which was on the other side of the building. *Id.* at 80.

24. In Ms. Hilding's opinion, the establishment has had a positive impact on the neighborhood because the owner has taken the requisite steps for cleaning the area and addressing the rat infestation problem. *Id.* at 81. Additionally, Ms. Hilding is pleased with the beautification measures Mr. Brand has instituted, including installing planters, as well as hiring good employees. *Id.* at 81 and 87.

25. Ms. Hilding and her husband utilize the unit's terrace quite often for dinner or when they want to relax. *Id.* at 82. Ms. Hilding has not often heard noises emanating from the establishment even when there have been a large number of patrons at the establishment watching televised sporting events. *Id.* at 82 and 83. In her opinion, the noise stemming from the establishment is consistent with any other noises one hears in the city (*e.g.*, fire trucks and loud cars) and no more disturbing than persons in the building who are on the rooftop deck. *Id.* at 82 and 84-85.

26. Although Ms. Hilding does not drive, persons visiting her have not had difficulties finding parking along Indiana Avenue, N.W. so long as they arrive after 5:00 p.m. *Id.* at 91.

#### **V. Admiral Earl Gay**

27. Admiral Earl Gay, testifying on behalf of the Applicant, resides on the fourth floor of 601 Pennsylvania Avenue, N.W. *Id.* at 94. Admiral Gray's residence is faces Indiana Avenue and is located up the block and across the street from the establishment. *Id.* at 94-95.

28. Admiral Gay, who has owned his unit for twelve years, does not have any concerns with Penn Quarter adding a rooftop deck or with the hours it is seeking. *Id.* at 95 and 99. During the twelve years he has lived in the neighborhood, he has noticed the increased vibrancy of the neighborhood which he attributes, in part, to the establishment. *Id.* at 95.

29. In Admiral Gay's opinion, the addition of the rooftop deck would make Penn Quarter more competitive and would not reduce the real property values of neighboring residences. *Id.* at 96 and 97.

## VI. Michael Brand

30. Michael Brand owns the establishment, Penn Quarter, which opened in 2004. *Id.* at 107. The legal hours of operation for the inside of the establishment are from 6:30 a.m. to 2:00 a.m., Sunday through Thursday, and 6:30 a.m. to 3:00 a.m., Friday and Saturday. *Id.* at 140. The establishment, however, opens at 11:00 a.m. and generally closes at 11:00 p.m., Sunday through Thursday, and midnight or 12:30 a.m. on Friday and Saturday. *Id.* at 141. The hours of operation on the sidewalk café are to 11:00 p.m., Sunday through Thursday, and midnight on Friday and Saturday. *Id.* at 142.

31. The establishment has grown significantly since opening in 2004. The establishment started with three employees and now has 38 employees. *Id.* at 108-109. John Scherr is the establishment's General Manager. *Id.* at 109. In this capacity, Mr. Scherr has assisted the establishment in fostering positive relationships with the community and neighboring businesses. *Id.*; *Applicant's Exhibits 3-10.*

32. Penn Quarter is a three-story building that sits between two buildings. *Id.* at 108 and 120. One building houses Grand Turks and the other Pot Belly. *Id.*; *Applicant's Exhibits 1(f)-1(g).* To Mr. Brand's knowledge, the closest residents are located at 601 Pennsylvania Avenue, N.W. which is where he also resides *Id.* at 118 and 121. Although the building has three floors, the establishment is only operating on the first and second floors and the sidewalk café. *Id.* at 108. The establishment intends to add a rooftop deck and extend the third floor; thereby, nearly doubling its space. *Id.* at 108-109.

33. The rooftop deck would be on the back side of the establishment and accessible via stairs on the third floor. *Id.* at 112 and 114; *Applicant's Exhibit 1(a).* The deck will not be visible to Pennsylvania Avenue due to its being on the back side of the establishment. *Id.* at 118. There would be a brick wall adjacent to the rooftop deck; thereby, creating a natural sound barrier. *Id.* at 118 and 150-151.

34. The rooftop deck will consist of a small bar with tables and chairs. *Id.* at 114; *Applicant's Exhibits 1(a)-1(e).* A portion of the rooftop deck will be partially enclosed and the other portion will be unenclosed. *Id.* at 114; *Applicant's Exhibits 1(a)-1(e).* The establishment will install television sets in the partially enclosed section of the rooftop deck. *Id.* at 161.

35. Mr. Brand envisions being able to utilize the rooftop deck year-round since the partially enclosed area could be fully closed. *Id.* at 114; *Applicant's Exhibits 1(b)-1(e).* Since the partially enclosed area can be cordoned off, the establishment is seeking the full legal hours of operation consistent with the interior of the establishment. *Id.* at 142 and 144. Admittedly, Mr. Brand acknowledges that the establishment's business is based primarily on the sports calendar; so there will be days when it may want to stay open later or close earlier. *Id.* at 167-169. As such, he would like the flexibility to remain open longer if needed. *Id.*



36. The establishment will not have entertainment or loud music on the rooftop deck. *Id.* at 151. Like the rest of the establishment, moderate music will be played on the rooftop deck but not at loud volumes. *Id.* at 153.

37. Above the rooftop deck will be an area where Mr. Brand will grow plants and herbs which will serve a practical purpose as well as beautify the neighborhood. *Id.* at 113; *Applicant's Exhibit 1(a)*. In addition to those plants, he will camouflage the air conditioning and heating equipment, which are currently visible on the roof, by painting them a uniform color and placing planter boxes around them. *Id.* at 117-118.

38. Mr. Brand has invested a substantial amount of money in the community as both a business owner and a homeowner. *Id.* He is confident that his business will continue to grow; thereby, providing jobs for the community and beautifying the neighborhood. *Id.* at 129. Despite the business' growth over the last 13 years, Mr. Brand believes adding the rooftop deck will make it more competitive with other downtown establishments, some of which have rooftop decks. *Id.* at 130 and 159.

## **VII. John Scherr**

39. John Scherr, the Penn Quarter's General Manager, testified on behalf of the Applicant. *Id.* at 170.

40. In his role as the General Manager, Mr. Scherr handles the day-to-day operations of the establishment. *Id.* Mr. Scherr also addresses the complaints the establishment may receive from patrons or the community. *Id.* at 171. During his tenure at Penn Quarter, the establishment has received very few complaints. *Id.* The majority of the complaints the establishment receives are from patrons complaining about the service they received. *Id.* The establishment has not received any complaints from neighbors. *Id.* at 171-172.

41. Although the establishment is open twelve months out the year, business is heaviest from late March to late November. *Id.* at 173. In March and April, business picks up because there is more foot traffic from tourists. *Id.* During this time, they tend to turn away people because the establishment does not have enough seats. *Id.* Adding the rooftop deck would increase the establishment's seating capacity and make them more competitive with the new restaurants opening in and around the establishment. *Id.* at 173-174.

42. Presently, staff inform patrons sitting on the sidewalk café that they may have to move inside of the establishment if they are still out there when a night game starts and it will go past the sidewalk café's operating hours. *Id.* at 180. The establishment has not received many complaints about this, but it believes that their patrons would enjoy the opportunity to remain outside longer if they could. *Id.*

43. Bar Deco, an ABC-licensed establishment, is the closest establishment to the establishment that has a rooftop deck. *Id.* at 176. In addition to Bar Deco, 601 also has a rooftop deck atop its residential building. *Id.* Fiola, a restaurant near Penn Quarter Sports Bar, uses

601's rooftop deck for outdoor events. *Id.* Mr. Scherr did not know the hours of operation of the establishments' rooftop decks but testified that he has seen persons out there past midnight. *Id.*

### **VIII. Ray Mundle**

44. Ray Mundle, testifying on behalf of the Protestant, resides on the second floor of 601 Pennsylvania Avenue, N.W. *Id.* at 185. His unit is on the Indiana Avenue, N.W. side of the building, in front of the establishment. *Id.* at 185-186.

45. Mr. Mundle hears persons at Penn Quarter inside his unit. *Id.* at 186. In his experience, the later it gets, the louder the noise becomes, particularly after 10:00 p.m. *Id.* at 186, 188, and 195-196. This is of particular concern during football and baseball seasons when the crowds tend to be larger. *Id.* at 187.

46. Mr. Mundle has lived in his unit for 20 years. *Id.* When he first moved in, the area was very quiet. *Id.* Since then, noise in the area has increased substantially with the addition of the Verizon Center, new restaurants in the area, and more people utilizing the Metro. *Id.* at 187-188 and 193-194.

47. Mr. Mundle is concerned about Penn Quarter erecting a rooftop deck with a capacity of 49 seats. In his opinion, this would have a significant adverse impact on the community by causing an increase in the amount of noise in the area. *Id.* at 189.

### **IX. Dominick Cardella**

48. Dominick Cardella, a witness for the Protestant, owns the building adjacent to Penn Quarter located at 641 Indiana Avenue, N.W. *Id.* at 203. Mr. Cardella testified that he lives in a unit in the building and has tenants there as well. *Id.* at 204. He further testified that he has resided at that address since 1972. *Id.*

49. Mr. Cardella has been awakened at night due to the loud noises emanating from Penn Quarter. *Id.* at 205. On occasion, he has contacted the Metropolitan Police Department (MPD) with noise complaints but nothing was done to address his concerns. *Id.*

50. Mr. Cardella, a property owner and landlord, believes Penn Quarter's plans to add a rooftop deck would cause a decrease in the property values of the homes in the area because the increased noise emanating from the establishment would deter people from moving into the neighborhood. *Id.* at 212 and 227.

51. In addition to his District of Columbia residence, Mr. Cardella owns a lakefront property in Virginia. *Id.* at 215-216 and 219-224. Mr. Cardella considers both homes to be his residence, but that the District is his primary residence. *Id.* at 123. According to Mr. Cardella, he only stays at the lake front property on weekends. *Id.* at 215-216. Additionally, Mr. Cardella possesses District of Columbia license plates on his car and votes in District. *Id.* at 222. Mr. Cardella considers his home in the District as his primary residence; not his home in Virginia. *Id.* at 223.



**X. Donna Ari**

52. Donna Ari, a 20-year resident of 601 Pennsylvania Avenue, N.W., testified on behalf of the Protestant. *Id.* at 241-242. Her unit is on the Indiana Avenue side closest to the establishment and it has two balconies. *Id.* at 241.

53. Ms. Ari believes that Penn Quarter is an asset to the neighborhood and that Mr. Brand has done his part in keeping the area in good condition. *Id.* at 242. She and the residents in the building have supported the establishment's continued growth and expansion. *Id.* at 242-243. Ms. Ari, however, does not support the addition of the rooftop deck and its proposed hours of operation, sales, service, and consumption. *Id.* at 246.

54. Presently, Ms. Ari is able to hear the establishment's customers in her unit when they are on the sidewalk café as well as the television sets airing the sporting events. *Id.* at 243-244; 247. She is concerned that the addition of the rooftop deck with longer hours would result in additional noise disturbances in the neighborhood. *Id.* at 246.

55. On one occasion, Ms. Ari was awakened after 1:00 a.m. to loud noises coming from the establishment. *Id.* at 248. In the past, Ms. Ari has contacted MPD for purposes of filing a noise complaint against the establishment, but she has never contacted ABRA. *Id.* at 248-249.

**XI. David Nagel**

56. David Nagel lives at 601 Pennsylvania Avenue, N.W. *Id.* at 253. His unit faces C Street, N.W., rather than Indiana Avenue, N.W. *Id.* He has resided at this address since 2009 and currently serves as president of the Residential Executive Committee. *Id.* at 253 and 257.

57. On one occasion while visiting a friend who also lives in the building and while sitting on their balcony, Mr. Nagel was able to hear noises coming from Penn Quarter. *Id.* at 255.

58. In Mr. Nagel's opinion, adding an outdoor area with 49 additional seats, plus televisions, would cause a great disturbance to the residents in the building, particularly at night. *Id.* at 256, 265, and 268.

**CONCLUSIONS OF LAW**

59. The Board may approve an Application for a Substantial Change to a Retailer's Class CT License when the proposed substantial change will not have an adverse impact on the neighborhood. D.C. OFFICIAL CODE §§ 25-104, 25-313(B); 23 DCMR §§ 1607.2; 1607.7(B). Specifically, the question in this matter is whether the Application will have a negative impact on the peace, order, and quiet; residential parking and vehicular and pedestrian safety; and real property values of the area located within 1,200 feet of the establishment. D.C. OFFICIAL CODE § 25-313(B); 23 DCMR §§ 1607.2; 1607.7(B).

60. Under the appropriateness test, “. . . , the applicant shall bear the burden of proving to the satisfaction of the Board that the establishment for which the license is sought is appropriate for the locality, section, or portion of the District where it is to be located . . .” D.C. OFFICIAL CODE § 25-311(A). The Board shall only rely on “reliable” and “probative evidence” and base its decision on the “substantial evidence” contained in the record. 23 DCMR § 1718.3.

61. The appropriateness test has never been limited to mere compliance with the law. *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.”). It has been said that each location where an establishment is located is “unique,” which requires the Board to evaluate each establishment “. . . according to the particular circumstances involved.” *Le Jimmy, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 433 A.2d 1090, 1093 (D.C. 1981). Under this test, the Board must consider the “prospective” effect of the establishment on the neighborhood. *Id.* Among other considerations, this may include the Applicant’s efforts to mitigate or alleviate operational concerns,<sup>1</sup> the “character of the neighborhood,”<sup>2</sup> the character of the establishment,<sup>3</sup> and the license holder’s future plans.<sup>4</sup> Thus, the appropriateness test seeks to determine whether the applicant’s future operations will satisfy the reasonable expectations of residents to be free from disturbances and other nuisances. D.C. Council, Bill 6-504, the “District of Columbia Alcoholic Beverage Control Act Reform Amendment Act of 1986,” Committee on Consumer and Regularly Affairs, 38 (No. 12, 1986).

**I. THE ADDITION OF THE SUMMER GARDEN/ROOFTOP DECK WITH FORTY-NINE SEATS WOULD NOT ADVERSELY AFFECT THE PEACE, ORDER, AND QUIET OF THE NEIGHBORHOOD, RESIDENTIAL PARKING NEEDS AND VEHICULAR AND PEDESTERIAN SAFETY, NOR REAL PROPERTY VALUES**

62. When deciding to approve an Application, whether it is for a new license, a license renewal, or as in the present case, an application for a substantial change to operations, the Board “may require that certain conditions be met” if doing so “will be in the best interest of the locality, section, or portion of the District where the establishment is to be located.” D.C. Official Code § 25-104(e); see *In re Dos Ventures, LLC, t/a Riverfront at the Ball Park*, Case No. 13-

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<sup>1</sup> *Donnelly v. D.C. Alcoholic Beverage Control Bd.*, 452 A.2d 364, 369 (D.C. 1982) (citation removed)(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 that the Board may consider an applicant’s efforts to “alleviate” operational concerns).

<sup>2</sup> *Citizens Ass’n of Georgetown, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 410 A.2d 197, 200 (D.C. 1979).

<sup>3</sup> *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, 801 (D.C. 1970).

<sup>4</sup> *Sophia’s Inc.*, 268 A.2d at 800.

PRO-00088, Board Order No. 2013-512, ¶ 49 (D.C.A.B.C.B. Nov. 13, 2013)(“In 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 licensee.”).

63. The Board finds that Penn Quarter’s Application to add the rooftop deck with 49 seats is appropriate for the neighborhood. The hours of operation, sales, service, and consumption, however, shall end at 1:00 a.m., Sunday through Thursday, and 2:00 a.m., Friday and Saturday.

#### **A. Peace, Order, and Quiet**

64. The law requires that the Board consider “[t]he effect of the establishment on peace, order, and quiet, including noise. .” when deciding whether to approve a licensee’s request for a substantial change to its operations. D.C. OFFICIAL CODE § 25-313(B)(2).

65. The Board finds that the addition of the rooftop deck with a Certificate of Occupancy of 49 seats will not adversely affect the peace, order, and quiet of the neighborhood so long as the hours of operation, sales, service, and consumption end at 1:00 a.m., Sunday through Thursday, and 2:00 a.m., Friday and Saturday. The Board is imposing these conditions on the hours of operation, sales, service, and consumption because doing so will be in the best interest of the locality, section, or portion of the District where the establishment is located. D.C. OFFICIAL CODE § 25-104(E).

66. Penn Quarter is in a C-4 zone, which allows for office space, retail, housing, and mixed uses. *Supra* at ¶ 7. Over the years, the Penn Quarter neighborhood has become its own downtown area with a plethora of businesses, retail shops, and restaurants. *Supra* at ¶ 9. The area has change from a quiet residential area to a much livelier one, especially at night. *Supra* at ¶ 47.

67. In the vicinity near the establishment, there are few residential properties. *Supra* at ¶ 10. However, there is a residential property located at 601 Pennsylvania Avenue, which is at the end of the block and across the street from the establishment. *Supra* at ¶ 11. The Board credits the Protestant’s witnesses’ testimony that they can hear noises from the establishment in their homes, particularly at night. *Supra* at ¶¶ 46, 50, and 55.

68. The Board, however, also finds that there are other licensed establishments in the area with late night hours, as well as the Verizon Center and a nearby Metro station which all contribute to noise in the neighborhood. *Supra* at ¶¶ 9, 12.

69. The Board credits Mr. Brand’s testimony regarding the measures he has taken to make improvements to the neighborhood. Mr. Brand has worked with the District to rid the area of rodents. *Supra* at ¶ 20. He has taken steps to beautify the area by installing planters and plans on continuing to do so. *Supra* at ¶¶ 20, 24, and 38. The Board also credits the testimony of residents in the community regarding Mr. Brand’s efforts to address peace, order, and quiet. *Supra* at ¶¶ 20, 24, 32, and 54 ;*Applicant’s Exhibits 3-10*.

70. In further support of the Board's findings, the Board notes that during the time in which ABRA Investigators monitored the establishment, they did not notice any ABRA violations. *Supra* at ¶ 15. Between March 2016 and April 2017, the Noise Task Force did not receive any noise complaints concerning the establishment. *Supra* at 16. Lastly, a review of the establishment's Investigative History revealed that the establishment has not had any noise complaint violations filed against it. *ABRA Licensing File, Investigative History*, at 1.

71. The Board also finds that because the rooftop deck will be on the back side of the building facing Indiana Avenue, N.W., patrons on the rooftop deck will cause less of a disturbance to persons living at 601 Pennsylvania Avenue. *Supra* at ¶ 34. The record further reflects, that the owner of the building closest to the rooftop deck submitted a letter supporting the establishment's Application. *Applicant's Exhibit # 9*.

72. Furthermore, the Board finds that the brick wall adjacent to the rooftop deck will act as a natural sound barrier to noise emanating from the establishment. *Supra* at ¶ 34.

73. Notwithstanding Mr. Brand's efforts to improve the community, the Board finds that allowing the establishment to operate its rooftop deck until 2:00 a.m. and 3:00 a.m. would not be in the best interest of the community.

74. The Board does not agree with Mr. Brand's position that the rooftop deck is simply an extension of the third floor that should be treated the same as the interior portion of the building. The Board finds the rooftop deck, an exterior addition to the establishment, to be more comparable to the establishment's sidewalk café. Both exterior areas allow for outdoor seating which can be disruptive to the community. Furthermore, and unlike the sidewalk café, the establishment may utilize the enclosed portion of the rooftop deck year-round; thus, contributing to the noise levels in the community. *Supra* at ¶ 36.

75. Finally, there are not many establishments with rooftop decks in the area. The closest licensed establishment with a rooftop deck is Bar Deco. *Supra* at ¶ 44. The Board takes administrative notice that Bar Deco's hours of operation, sale, service, and consumption end at 1:00 a.m., Sunday through Thursday, and 2:00 a.m., Friday and Saturday. *ABRA Licensing File, Bar Deco's ABC License* at 1.

76. The Board finds that it would be in the best interest of the community for the Penn Quarter's hours of operation, sales, service, and consumption be consistent with Bar Deco's hours.

## **B. Residential Parking Needs and Vehicular and Pedestrian Safety**

77. "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. Official Code § 25-313(b)(3). The Board does not find that the addition of the rooftop deck would have an adverse effect on residential parking needs and vehicular and pedestrian safety.

78. The Board credits Investigator Fox's testimony that vehicle and pedestrian traffic is heavier during the day than it is at night. *Supra* at ¶ 9. During the Investigator's monitoring of the area in the evening, she observed ample parking spaces. *Supra* at ¶ 17; Investigator's Exhibit # 8 and 9. Additionally, Ms. Hilding also testified that her visitors do not have difficulty finding parking if they arrive after 5:00 p.m. *Supra* at ¶ 27.

79. The Board's findings are further supported by the presence of a Metro Station which offers alternative means to getting to the establishment. *Supra* at ¶ 12; Investigator's Exhibit # 20 and 21. Furthermore, a vast majority of the establishment's foot traffic during the day is from tourists who generally are not driving to the tavern. *Supra* at ¶ 41.

80. Lastly, pedestrian safety is not a concern given that there are crosswalks at each corner; thereby, allowing for pedestrians to safely transgress in the vicinity. *Supra* at ¶ 9.

### **C. Real Property Values**

81. "In determining the appropriateness of an establishment, the Board shall consider . . . [t]he effect of the establishment . . . on real property values." D.C. Official Code § 25-313(b)(1). The Board has noted in the past that the absence of blight may indicate that the establishment will satisfy § 25-313(b)(1) and not have a negative impact on real property values. *In re Inner Circle 1223, LLC, t/a Dirty Martini Inn Bar/Dirty Bar*, Case No. 13-PRO-00172, Board Order No. 2014-507, ¶ 50 (D.C.A.B.C.B. Dec. 10, 2014); *see also In re Historic Restaurants, Inc., t/a Washington Firehouse Restaurant, Washington Smokehouse*, Case No. 13-PRO-0031, Board Order No. 2014-107, ¶ 48 (D.C.A.B.C.B. Apr. 2, 2014) *citing In re Rail Station Lounge, LLC, t/a Rail Station Lounge*, Case No. 10-PRO-00153, Board Order No. 2011-216, ¶ 62 (D.C.A.B.C.B. Jun. 15, 2011). The Board finds nothing in the record which supports the idea that the addition of a rooftop deck would blight the area to the extent that it would adversely affect real property values.

82. The Board credits Mr. Brand's testimony that not only has he invested a substantial amount of money into his business, but he also invested money in the Penn Quarter neighborhood where he lives and works. *Supra* at ¶ 39. Mr. Brand has used his financial resources to beautify the neighborhood by adding planters and ridding the area of rodents. *Supra* at ¶ 20. Furthermore, Mr. Brand, like the protestant's witnesses, also resides at 601 Pennsylvania Avenue. *Supra* at ¶ 38. The Board doubts that he would make business decisions that would adversely affect his own real property interest.

## **II. THE BOARD HAS SATISFIED THE GREAT WEIGHT REQUIREMENT BY ADDRESSING ANC 6C'S ISSUES AND CONCERNS.**

83. ANC 2C's written recommendation submitted in accordance with D.C. Official Code § 25-609(a) indicated that its protest was based on concerns regarding Penn Quarter's impact on (1) peace, order, and quiet; (2) residential parking needs and vehicular and pedestrian safety; and (3) real property values. *ABRA Protest File No. 17-PRO-00009, Protestant's Protest Letter*, at 1 (February 2, 2017). The Board notes that it specifically addressed these concerns in the Board's Conclusions of Law, above.

### **III. THE APPLICATION SATISFIES ALL REMAINING REQUIREMENTS IMPOSED BY TITLE 25.**

84. 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).

85. 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 7<sup>th</sup> day of June 2017, hereby **APPROVES** the Application for Substantial Change (adding a rooftop deck with 49 seats) to the Retailer’s Class CT License to Renew a Retailer’s Class CR License at premises 639 Indiana Avenue, N.W., filed by Top Shelf, LLC, t/a Penn Quarter Sports Tavern.


**IT IS FURTHER ORDERED** that the hours of operation for the rooftop deck shall end at 1:00 a.m., Sunday through Thursday, and 2:00 a.m., Friday and Saturday.

**IT IS FURTHER ORDERED** that the hours of sales, service, and consumption shall end at 1:00 a.m., Sunday through Thursday, and 2:00 a.m., Friday and Saturday.

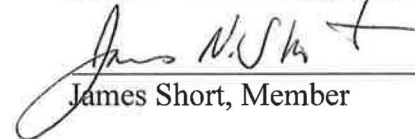
The ABRA shall deliver a copy of this order to the Andrew Kline, Counsel for the Licensee, and Commissioner Kevin Wilsey, Designated Representative for ANC 2C, Protestant.



District of Columbia  
Alcoholic Beverage Control Board

  
Donovan Anderson, Chairperson

  
Mike Silverstein, Member

  
James Short, Member

Pursuant to D.C. Official Code § 25-433(d)(1), 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, 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 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).