

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

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In the Matter of:	)	
	)	
Po Boy Jim, LLC	)	Case No.: 15-PRO-00025
t/a Po Boy Jim	)	License No: 87903
	)	Order No: 2016-001
Application for a Substantial Change to a	)	
Retailer's Class CR License	)	
	)	
at premises	)	
709 H Street, N.E.	)	
Washington, D.C. 20002	)	

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**BEFORE:** Donovan Anderson, Chairperson  
Nick Alberti, Member  
Mike Silverstein, Member  
Ruthanne Miller, Member  
James Short, Member

**ALSO PRESENT:** Po Boy Jim, LLC, t/a Po Boy Jim, Applicant

Robert Cooper, Counsel, on behalf of Advisory Neighborhood  
Commission (ANC) 6C, Protestants

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) hereby approves the Application for a Substantial Change to a Retailer's Class CR License filed by Po Boy Jim, LLC, t/a Po Boy Jim, (hereinafter "Applicant" or "Po Boy Jim Jim") for the purpose of adding an entertainment endorsement to the license. The Board conditions approval of the entertainment endorsement on the following conditions in order to minimize potential disturbances: (1) the establishment's entertainment hours shall end at 8:00 p.m. in the summer garden area; (2) the establishment's doors and windows must be closed after 8:00 p.m. when entertainment is provided, except the

doors may be opened for normal ingress and egress; (3) the establishment shall not charge a cover charge; and (4) the establishment's interior entertainment hours shall end at 10:00 p.m., Sunday through Thursday, and midnight on Friday and Saturday.

### ***Procedural Background***

The Notice of Public Hearing advertising Po Boy Jim's Application was posted on March 13, 2015, and informed the public that objections to the Application could be filed on or before April 27, 2015. *ABRA Protest File No. 15-PRO-00025*, Notice of Public Hearing [*Notice of Public Hearing*] (posted Mar. 13, 2015). The Alcoholic Beverage Regulation Administration (ABRA) received protest letters from Advisory Neighborhood Commission (ANC) 6C. *ABRA Protest File No. 15-PRO-00025*, Roll Call Hearing Results.

The parties came before the Board's Agent for a Roll Call Hearing on May 11, 2015, where all of the above-mentioned objector was granted standing to protest the Application. On June 17, 2015, the parties came before the Board for a Protest Status Hearing. Finally, after a number of continuances, the Protest Hearing in this matter occurred on November 18, 2015.

The Board recognizes that an ANC's properly adopted written recommendations are entitled to great weight from the Board. *See Foggy Bottom Ass'n v. District of Columbia Alcoholic Beverage Control Bd.*, 445 A.2d 643, 646 (D.C. 1982); D.C. Official Code §§ 1-309.10(d); 25-609 (West Supp. 2015). Accordingly, the Board "must elaborate, with precision, its response to the ANC[s] issues and concerns." *Foggy Bottom Ass'n*, 445 A.2d at 646. The Board notes that it received a properly adopted written recommendation from ANC 6C. The ANC's issues and concerns shall be addressed by the Board in its Conclusions of Law, below.

Based on the issues raised by the Protestants, the Board may only grant the Application if the Board finds that the request will not have an adverse impact on the peace, order, and quiet 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) (West Supp. 2015).

### **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. Po Boy Jim has submitted an Application for a Substantial Change to a Retailer's Class CR License at 709 H Street, N.E., Washington, D.C. *Notice of Public Hearing*. Po Boy Jim requested an entertainment endorsement with proposed hours of 6:00 p.m. to 10:00 p.m., Sunday through Thursday, and 6:00 p.m. to 2:00 a.m., on Friday and Saturday. *Id.*

2. ABRA Investigator Mark Brashears investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 15-PRO-00025, Protest Report* (Nov. 2015) [*Protest Report*].

3. The proposed establishment is located in a C-2-A zone. *Protest Report*, at 4. Thirteen licensed establishments are located within 1,200 feet of the proposed location. *Id.* at 4-5. There are no schools or public libraries within 400 feet of the establishment. *Id.* at 5.

4. Po Boy Jim's current hours of operation allow the establishment to operate between 10:00 a.m. and 10:00 p.m., on Monday and Tuesday; 10:00 a.m. to 1:00 a.m. on Wednesday; and 10:00 a.m. to 2:00 a.m., between Thursday and Sunday. *Id.* at 7. The establishment's hours of sale, service, and consumption of alcohol beverages, 11:00 a.m. and 10:00 p.m., on Monday and Tuesday; 11:00 a.m. to 1:00 a.m. on Wednesday; 11:00 a.m. to 2:00 a.m., between Thursday and Saturday; and 12:00 p.m. to 2:00 a.m. on Sunday. *Id.* at 7.

5. ABRA investigators monitored Po Boy Jim on fourteen separate occasions between June 25, 2015, and November 12, 2015. *Id.* at 8. Po Boy Jim's investigative history shows that it has failed to file a quarterly report three times in 2015 and operated without a licensed manager on June 12, 2015. *Id.* at 9. ABRA Investigator Mark Brashears further indicated that there were only nine calls for police service at the establishment between January 2015 and July 2015. *Transcript (Tr.)*, Nov. 18, 2015 at 41. The Noise Task Force monitored the establishment on three occasions between January 2015 and November 2015, but did not substantiate any noise complaints or otherwise find a noise violation. *Id.*

6. Investigator Brashears observed the establishment's trash lids open in violation of Po Boy Jim's Settlement Agreement on July 23, 2015. *Id.* at 87; *Protest Report* at Exhibit Nos. 30- 35. He also observed that the establishment's trash bins were open during a follow-up visit the next day. *Tr.*, 11/18/15 at 88. Another ABRA investigator took pictures of open trash lids on July 25, 2015. *Id.* at 91.

## **II. Facts Provided by Rebecca Antoine**

7. Rebecca Antoine owns Po Boy Jim. *Id.* at 4. The establishment's trash dumpsters are located in the alley near the establishment. *Id.* at 93. She noted that the establishment has had trouble ensuring regular trash pick-up due to a large construction project nearby that resulted in frequent alley closures that prevented her trash company from removing the trash. *Id.*

8. Ms. Antoine indicated that the establishment does not intend to have entertainment until 2:00 a.m. on a regular basis. *Id.* at 121. Furthermore, the Po Boy Jim does not intend to have entertainment on a regular or ongoing basis, or otherwise host live entertainment in the summer garden area. *Id.* at 121, 136-37. Entertainment inside the establishment would be provided in the upstairs area. *Id.* at 138.

9. The establishment sometimes keeps its patio windows open when the weather is pleasant. *Id.* at 128-29. Nevertheless, when open, the windows are usually closed by 10:00 p.m. *Id.* at 130.

### **III. Facts Provided by Ian Reid**

10. Ian Reid serves as the establishment's "nighttime manager." *Id.* at 101. The establishment hopes to use the entertainment endorsement to host events at the establishment. *Id.* at 102. Mr. Reid indicated that the establishment would host karaoke, one-person performances during brunch, and disc jockey entertainment in conjunction with alcohol promotions. *Id.* at 102-03; *see also id.* at 115. Mr. Reid indicated that the establishment does not plan to have a dance floor. *Id.* at 103.

11. Po Boy Jim has engaged in some efforts to soundproof the establishment. *Id.* at 104. Specifically, the establishment spent \$8,000 to build two cinderblock walls. *Id.* He further noted that the establishment only has a cheap stereo and that music played inside the establishment cannot be heard in the nearby alley. *Id.* at 106, 108.

12. Mr. Reid indicated that the establishment has low alcohol sales. *Id.* at 105-06. Specifically, the establishment currently makes 80 percent of its revenue from food sales and 20 percent of its revenue from alcohol sales. *Id.* The establishment wants to add entertainment in order to encourage people to remain at the establishment. *Id.*

13. Po Boy Jim has no objections to being required to keep its doors and windows closed when the establishment provides entertainment. *Id.* at 145-46.

### **IV. ANC Commissioner Chris Miller**

14. ANC Commissioner Chris Miller represents Single Member District 6C05. *Id.* at 173. Po Boy Jim is located in 6C05. *Id.*

15. Commissioner Miller has observed that the trash problems at the establishment are ongoing. *Id.* at 177. Even after the construction in the neighborhood finished, he has observed issues with the establishment properly maintaining its dumpsters. *Id.* He further noted that no other establishment in the neighborhood has similar trash problems. *Id.*

### **V. Kimberly Neutzling**

16. Kimberly Neutzling resides on 7th Street, N.E., in the first house located across the alley near the establishment. *Id.* at 201. She has lived in her current home since the end of May of 2014. *Id.* at 203, 205.

17. Ms. Neutzling's home is located directly across from the establishment's trash area. *Id.* at 205. She noted that since the opening of Po Boy Jim, the trash bins have not been secured and rats have begun burrowing into her yard. *Id.* at 205-07, 213-20; *Protestant's Exhibit No. 5-9.* As a result, she has had to hire a pest management company to address the issue. *Id.* at 206-07. She has also observed that the trash collection company is arriving between 7:00 a.m. and 7:45 a.m., which violates the Settlement Agreement provisions that require trash collection to occur no earlier than 9:00 a.m. *Id.* at 212. Ms. Neutzling indicated that Po Boy Jim has recently

improved its trash practices; specifically, trash no longer overflows out of the recycling bin, and when trash does not fit inside the bin, it has been remedied quickly. *Id.* at 237.

18. Ms. Neutzling described her issues regarding noise. *Id.* at 213. She regularly hears music and patron conversations from the establishment in her back yard, in her garage, and in her home, even when the windows and doors are closed. *Id.* at 223-24, 239. Specifically, on April 25, 2015, she heard amplified music on the patio, which turned off at 11:15 p.m. *Id.* Further, on April 30, 2015, she heard music from the patio at around 1:00 a.m. *Id.* at 213. On September 5, 2015, she could hear the words used in the establishment's music from her bed. *Id.* at 244-45. She further indicated that amplified music on the second floor can be heard in the backyards of adjacent homes. *Id.* at 221. Ms. Neutzling has called the establishment to complain about noise and indicated that representatives of the establishment told her to stop calling. *Id.* at 224.

19. Ms. Neutzling indicated that she does not oppose an entertainment endorsement, but would like it to go no later than 10:00 p.m. during the week, and 11:00 p.m. during the weekend. *Id.* at 227.

#### **VI. Alex Ackemann**

20. Alex Ackemann lives two houses south of Ms. Neutzling on 7th Street, N.E. *Id.* at 249. Mr. Ackemann has lived at the same address since approximately February 2008. *Id.* at 250. He indicated that he can hear music and conversations in his back yard from Po Boy Jim when the establishment's windows are open. *Id.* at 252, 254. Similar to Ms. Neutzling, he is bothered by the establishment's trash disposal practices and early trash pick-up. *Id.* at 252-53.

#### **VII. Drew Courtney**

21. Drew Courtney serves as the appointed chair of ANC 6C's Alcoholic Beverage Licensing Committee. *Id.* at 269. Mr. Courtney indicates that the ANC does not totally oppose the issuance of an entertainment endorsement, but wants to ensure that any potential noise problems are addressed. *Id.* at 275.

### **CONCLUSIONS OF LAW**

22. The Board may approve an Application for a New Retailer's Class CR License when the proposed establishment 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) (West Supp. 2015). Specifically, the question in this matter is whether the Application will have a negative impact on the peace, order, and quiet. D.C. Official Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2015).

#### **I. THE ENTERTAINMENT ENDORSEMENT IS APPROPRIATE SUBJECT TO CONDITIONS**

23. In this case, the Board grants less than the requested entertainment, based on the legitimate issues raised by Po Boy Jim's neighbors. Specifically, the Board solely grants the Application subject to the condition that (1) the establishment's entertainment hours shall end at 8:00 p.m. in the summer garden area; (2) the establishment's doors and windows shall remain closed after 8:00 p.m., except for normal ingress and egress; (3) the establishment shall not charge a cover charge; and (4) the establishment's interior entertainment hours shall end at 10:00 p.m., Sunday through Thursday, and midnight on Friday and Saturday.

24. 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 (West Supp. 2015).

25. The appropriateness test has never been limited to mere compliance with the law. *See 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, the "character of the neighborhood," the character of the establishment, and the license holder's future plans. *Donnelly v. District of Columbia Alcoholic Beverage Control Board*, 452 A.2d 364, 369 (D.C. 1982) (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 the Board may consider an applicant's efforts to "alleviate" operational concerns); *Citizens Ass'n of Georgetown, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 410 A.2d 197, 200 (D.C. 1979); *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, 800-801 (D.C. 1970). 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 Regulatory Affairs, 38 (Nov. 12, 1986).

26. "In determining the appropriateness of an establishment, the Board shall consider . . . [t]he effect of the establishment on peace, order, and quiet, including the noise and litter provisions set forth in §§ 25-725 and 25-726." D.C. Official Code § 25-313(b)(2); *see also* D.C. Official Code §§ 25-101(35A), 25-314(a)(4). Among other considerations, the Board is instructed to consider ". . . noise, rowdiness, loitering, litter, and criminal activity." 23 DCMR § 400.1(a) (West Supp. 2015).

27. In *Climax Restaurant & Lounge*, the Board indicated that it may consider whether a licensee is “generating little or no sound.” *In re Solomon Enterprises, LLC, t/a Climax Restaurant & Lounge*, Case No. 13-PRO-00152, Board Order No. 2014-474, ¶ 32 (D.C.A.B.C.B. Nov. 19, 2014). In making this determination, the Board considers the “reasonable expectations of residents” and the government’s interest in protecting residents inside their home and their ability to engage in “basic nighttime activities such as sleep.” *Id.* at ¶¶ 32-33 *citing* D.C. Council, Bill 6-504, the “District of Columbia Alcoholic Beverage Control Act Reform Amendment Act of 1986,” Committee on Consumer and Regulatory Affairs, 38 (Nov. 12, 1986); *In re T.L.*, 996 A.2d 805, 812-3 (D.C. 2010). The Board also may consider any existing or potential “soundproofing features” that could alleviate potential noise concerns. *Id.* at ¶ 36.

28. In this case, the Board credits multiple witnesses that Po Boy Jim has had issues preventing noise and music from inside the establishment from bothering nearby residents inside their homes. *Supra*, at ¶¶ 18, 20. Moreover, it appears that the soundproofing conducted by the establishment is not sufficient. *Compare supra* at ¶ 11 *with* ¶¶ 18, 20. Thus, if the Board were to grant the Application, as requested, it is clear that the establishment’s entertainment would unreasonably disturb nearby residents; therefore, the Board deems granting the Application in full inappropriate. *Supra*, at ¶ 20.

29. Nevertheless, the Board is not persuaded that the Application merits total denial. Under § 25-104(e), the Board is granted the authority to impose conditions on a license when “. . . the inclusion of conditions will be in the best interest of the [neighborhood] . . . .” D.C. Official Code § 25-104(e). “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 license.” *See In re Dos Ventures, LLC, t/a Riverfront at the Ball Park*, Case No. 092040, Board Order No. 2014-512. ¶ 49 (D.C.A.B.C.B. Nov. 13, 2013).

30. In this case, Po Boy Jim does not intend to operate a nightclub or concert venue, and will not even have a dance floor. *Supra*, at ¶¶ 1, 8, 10. Under these circumstances, limited entertainment will not have an adverse impact on the neighborhood, so long as the establishment complies with appropriate conditions that mitigate any potential negative impact. In this vein, in order to prevent likely late night noise disturbances, the Board requires all outdoor live entertainment to end at 8:00 p.m. and all entertainment inside the establishment shall end at 10:00 p.m. between Sunday and Thursday, and at midnight on Friday and Saturday. Furthermore, in order to prevent the establishment from morphing into a nightclub, which would be inappropriate for this specific location, the Board will not grant the establishment the ability to charge a cover charge, which should maintain the establishment’s focus on food sales. *Supra*, at ¶ 12. Finally, in order to prevent further noise issues, the Board requires the establishment’s windows and doors to remain closed when the establishment provides entertainment after 8:00 p.m.

31. Lastly, the Board considered the trash and settlement agreement issues raised by the Protestants, but was not persuaded that these issues merit denial of the Application. The possible potential impact of an entertainment endorsement in relation to peace, order, and quiet are noise

disturbances and safety. In this case, the Board was not convinced that the addition or denial of an entertainment endorsement would add to the trash issues, and the establishment does not appear to be a safety risk. Thus, the Board finds that any continuing trash or settlement agreement issues are better addressed through the enforcement process, rather than the current Application.

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

32. ANC 6C's written recommendation submitted in accordance with D.C. Official Code § 25-609(a) indicated that its protest was based on concerns regarding Po Boy Jim's impact on peace, order, and quiet; residential parking and safety; and real property values. *Letter from Karen Wirt, Chair, ANC 6C, to ABRA Director Fred Moosally* (Apr. 13, 2015). The Board notes that it specifically addressed the concerns regarding trash and noise in Paragraphs 23 through 31 of this Order.

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

33. 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. 2015). 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 6th day of January 2015, hereby **APPROVES** the Application for a Substantial Change to a Retailer's Class CR License, which requests an entertainment endorsement, at premises 709 H Street, N.E. filed by Po Boy Jim, LLC, t/a Po Boy Jim.

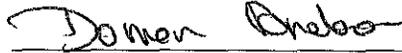
**IT IS FURTHER ORDERED**, under D.C. Official Code § 25-104(e), that the approval is subject to the following conditions:

- (1) the establishment's entertainment hours shall end at 8:00 p.m. in the summer garden area;
- (2) the establishment's doors and windows must be closed after 8:00 p.m. whenever entertainment is provided, except doors may be opened for normal ingress and egress;
- (3) the establishment shall not charge a cover charge; and
- (4) the establishment's interior entertainment hours shall end at 10:00 p.m., Sunday through Thursday, and midnight on Friday and Saturday.

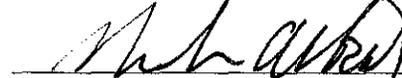
**IT IS FURTHER ORDERED** that the Board's findings of fact and conclusions of law contained in this Order shall be deemed severable. If any part of this determination is deemed invalid, the Board intends that its ruling remain in effect so long as sufficient facts and authority support the decision.

The ABRA shall deliver a copy of this order to the Applicant and ANC 6C.

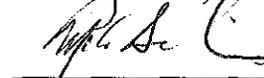
District of Columbia  
Alcoholic Beverage Control Board



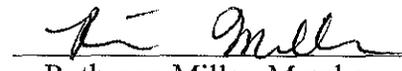
Donovan Anderson, Chairperson



Nick Alberti, Member



Mike Silverstein, Member



Ruthanne Miller, 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).