

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

In the Matter of:)	
)	
Neighborhood Restaurant Group, XV LLC)	Case Nos.: 14-CMP-00706
t/a Red Apron Butchery/The Partisan)	License No: 90742
)	Order No: 2015-452
Holder of a)	
Retailer's Class CR License)	
)	
at premises)	
709 D Street, N.W.)	
Washington, D.C. 20004)	

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

ALSO PRESENT: Neighborhood Restaurant Group, XV LLC, t/a Red Apron Butchery/The Partisan, Respondent

Stephanie Babin, Designated Representative, on behalf of the Respondent

Christine Gephardt, Assistant Attorney General
Office of the Attorney General for the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

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

INTRODUCTION

The Alcoholic Beverage Control Board (Board) finds Neighborhood Restaurant Group, XV LLC, t/a Red Apron Butchery/The Partisan, (hereinafter “Respondent” or “Red Apron”) in violation of District of Columbia Official Code § 25-726. Specifically, the Board finds that Red Apron failed to take reasonable measures to prevent the accumulation of trash and litter in the alley neighboring its establishment in violation of § 25-726(a) on October 22, 2014.

Procedural Background

This case arises from the Notice of Status Hearing and Show Cause Hearing (Notice), which the Board executed on April 22, 2015. *ABRA Show Cause File No., 14-CMP-00706*, Notice of Status Hearing and Show Cause Hearing, 2 (Apr. 22, 2015). The Alcoholic Beverage Regulation Administration (ABRA) served the Notice on the Respondent, located at premises 709 D Street, N.W., Washington, D.C., on May 1, 2015, along with the Investigative Report related to this matter. *ABRA Show Cause File No., 14-CMP-00706*, Service Form. The Notice charges the Respondent with one violation, which if proven true, would justify the imposition of a fine, as well as the suspension or revocation of the Respondent’s license.

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

Charge I: **[On October 22, 2014,] [y]ou failed to take reasonable measures to ensure that the immediate environs of your establishment, including adjacent alleys, sidewalks, or other public property immediately adjacent to the establishment, are kept free of litter in violation of D.C. Official Code § 25-726**

*Notice of Status Hearing and Show Cause Hearing, 2.*¹

The parties proceeded to a Show Cause Hearing and argued their respective cases on September 9, 2015.

¹ The original notice incorrectly indicates that the charged offense occurred on July 14, 2014, not October 22, 2014. *Notice of Status Hearing and Show Cause Hearing, 2*. During opening statements, the Government indicated that the offense occurred on October 22, 2014, without objection. *Tr.*, 9/9/2015 at 7. Case Report No. 14-CMP-00706, which was provided to Red Apron before the hearing, indicates in the summary and in the details section that the offense occurred on October 22, 2014; as a result, Red Apron had actual notice of the correct date before the hearing. *Case Report No. 14-CMP-00706*; see also D.C. Official Code § 25-832 (directing ABRA to send investigative reports to licensees). Therefore, based on pre-trial notice of the correct date, the lack of prejudice and the failure to object, the Board deems the erroneous date in the show cause notice as matter of form, rather than substance, and permits the prosecution to proceed. See *Hall v. United States*, 697 A.2d 1225, 1228 (D.C. 1997) (“We adopt the reasoning of these various federal and state courts and hold that amending the date alleged in an indictment is generally a matter of form rather than substance and is thus permissible.”).

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. Red Apron holds a Retailer's Class CR License at 709 D Street, N.W., Washington, D.C. ABRA License No. 90742. In addition to "Red Apron Butchery," the establishment uses the "The Partisan" as a second trade name. *Id.*

II. ABRA Investigator Earl Jones

2. ABRA Investigator Earl Jones visited Red Apron on October 22, 2014, at around 1:30 a.m. *Transcript (Tr.)*, September 9, 2015 at 9. The area was being monitored by ABRA due to frequent complaints about trash and litter in the area. *Id.* at 9-10. Investigator Jones noted that when establishments permit trash to accumulate, or leave their dumpsters open, it attracts rodents and other vermin. *Id.* at 14.

3. Investigator Jones observed that Red Apron neighbors a narrow alley with six to seven dumpsters. *Id.* at 10-11; *Exhibit Nos.* 1-2. He observed that a number of dumpsters had their tops "wide open" with trash "overflowing." *Tr.*, 9/9/15 at 11. He saw rodents in the alley and around the establishment's dumpster. *Id.* at 14-15. He also observed that the establishment's dumpster was left open and had litter under the dumpster. *Id.* at 13, 16. Finally, he noticed that trash and litter were strewn about the floor of the alley. *Id.* at 17.

4. After observing the alley, Investigator Jones entered Red Apron and spoke with Peter Koll, the establishment's general manager. *Id.* at 16. During their conversation, Mr. Koll identified the establishment's dumpsters. *Id.* at 26-27, 29. Mr. Koll also stated that the establishment would attempt to use a locking mechanism or similar device on the dumpster in the future. *Id.*

5. Investigator Jones visited the establishment a second time, on October 25, 2014, and noticed rats in the alleyway. *Id.* at 18, 20. He spoke to Mr. Koll again and reminded him of their conversation on October 22, 2014. *Id.* at 19. Investigator Jones then informed Mr. Koll that he was citing the establishment for violating Title 25's litter provision on October 22, 2014. *Id.* Mr. Koll told the investigator that other establishments were placing trash in their dumpster. *Id.* at 19, 28.

III. Peter Koll

6. Peter Koll serves as one of the general managers of Red Apron. *Id.* at 32. Red Apron is broken into two parts: the Red Apron Butchery and The Partisan restaurant. *Id.* at 32-33. Both the butchery and the restaurant were operational by April 2014. *Id.* at 33. Mr. Koll testified that prior to October 22, 2014, Red Apron took the following measures to ensure that its environs

were free of litter: it pointed out to staff which receptacles were theirs; made sure everyone was diligent about keeping trash solely in the orange and recycling in the green one; made sure all boxes had to be broken down and flattened; made sure all trash made it into the receptacles, that it was not left on the ground or outside the door to the restaurant; and made sure everything was closed and the dumpsters were pushed up against the wall. *Id.* at 124-25.

7. Mr. Koll indicated that there were two large green recycling bins and three trash dumpsters in the alley neighboring Red Apron. *Id.* at 34. Red Apron uses one recycling and one trash dumpster. *Id.* The other dumpsters belong to other businesses. *Id.* The establishment has trash pickup five or six days per week. *Id.* at 61, 115.

8. Mr. Koll noted that the establishment does not generally use the following items: prepackaged corn bread items, Pabst Blue Ribbon beer, Bells Ice Cream, and white and brown bags. *Id.* at 36.

9. Mr. Koll indicated that Red Apron regularly disposes its trash at the end of the night. *Id.* at 38-39. The establishment's employees fill the trash and recycling receptacles and then close the lids. *Id.* at 39. The establishment regularly puts trash in the dumpsters after breakfast, lunch, and dinner service. *Id.* at 54-55. Mr. Koll has observed that on many occasions, the trash and recycling receptacles are filled and overflowing with trash that does not belong to the establishment. *Id.* Nevertheless, Mr. Koll indicated that the establishment may have occasionally thrown Red Apron's trash and recycling into other establishment's dumpsters. *Id.* at 86, 94.

10. Mr. Koll indicated that Red Apron has taken steps to maintain the cleanliness of the area. First, the establishment's employees attempt to keep the lids closed. *Id.* at 40. Second, Red Apron has approached the management of other businesses to discuss the use of the trash receptacles, although not all of the neighboring businesses were cooperative or responsive. *Id.* at 40, 42.

11. After the incident, the establishment took steps to curb the trash and litter issue in the alley. *Id.* at 41. Specifically, the establishment labeled its dumpsters and obtained metal dumpsters with a lid. *Id.* Mr. Koll indicated that Red Apron opposes locking the dumpsters because the risk of losing keys and opening the lock frequently would interfere with the trash disposal. *Id.* at 43.

CONCLUSIONS OF LAW

12. 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. Official 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 the Board determines "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. Official Code § 25-447.

I. RED APRON VIOLATED § 25-726 ON OCTOBER 22, 2014.

13. The Board finds that on October 22, 2014, Red Apron violated § 25-726(a).

14. Under § 25-726(a), “[t]he licensee under a retailer's license shall take reasonable measures to ensure that the immediate environs of the establishment, including adjacent alleys, sidewalks, or other public property immediately adjacent to the establishment, or other property used by the licensee to conduct its business, are kept free of litter.” D.C. Official Code § 25-726(a). It is commonly understood that litter means a “[a] disorderly accumulation of objects [and] . . . carelessly discarded trash.” *Webster’s II New College Dictionary*, 640 (2001) (litter).

15. During the hearing, it was undisputed that the alley neighbored Red Apron, and the establishment used the alley to store its trash receptacles. *Supra*, at ¶¶ 3-4. On October 22, 2014, Investigator Jones entered the alley and observed that various dumpsters in the alley were left wide open and overflowing with trash. *Supra*, at ¶ 3. In addition, he observed that Red Apron’s dumpster was left wide open and had litter underneath. *Id.*

16. During the hearing, Mr. Koll indicated that Red Apron’s management was well aware that other businesses were using Red Apron’s dumpster and causing trash, litter, and vermin to accumulate in the alley. *Supra*, at ¶¶ 5, 9. Despite being aware of this issue, Red Apron did not take reasonable steps to deter the improper use of the establishment’s dumpsters. *Id.* The Board is not persuaded that on or before October 22, 2014, Red Apron lacked a reasonable means of ensuring its trash area remained free of litter; specifically, nothing prevented Red Apron from locking its trash container (with a combination lock, if a key was too burdensome), obtaining another dumpster, or cleaning the area around its dumpster once or twice per day when the business was operating. Moreover, an establishment that keeps its dumpsters’ lid open while the dumpster is not in use is acting unreasonably, because such an action violates the city’s regulations regarding the use of trash containers. 21 DCMR § 707.11 (West Supp. 2015) (“Waste container lids shall be kept closed at all times other than when the container is being filled or emptied The area where the waste [container] is stored shall be kept free of spilled waste at all times”). As such, the Board finds that Red Apron failed to take reasonable measures to prevent the accumulation of trash and litter in the alley neighboring its establishment in violation of § 25-726(a) on October 22, 2014.

II. THE MERE FACT THAT TRASH AND LITTER IS CREATED BY A THIRD PARTY DOES NOT PROVIDE A DEFENSE UNDER § 25-726(a).

17. The Board does not agree with Red Apron’s argument that it should not be held accountable for the litter and trash found in the alley, because the trash belonged to others. The Board has never held that § 25-726 only applies to trash or litter deposited by the license holder or their agents. In fact, in the 2011 *Capitol Food Mart* protest, the Board considered trash and litter issues. *In re MZI Trading, LLC, t/a Capitol Food Mart*, Board Order No. 2011-448, ¶¶ 15, 21 (D.C.A.B.C.B. Oct. 19, 2011). Specifically, the Board found an adverse impact, where, among other issues, it was shown that individuals with no direct connection to the license holder were depositing beer cans on private property, the street, and a public playground. *In re MZI*

Trading, LLC, t/a Capitol Food Mart, Board Order No. 2011-448, at ¶¶ 12, 15, 21-22.² Based on this precedent and the language of § 25-726(a), the only relevant issue is the establishment's measures to keep the area around the establishment clean. Therefore, the mere fact that the cause of the trash or litter at issue is a third party, does not prevent the Board from finding a licensee in violation of § 25-726(a).

ORDER

Therefore, the Board, on this 28th day of October 2015, finds that Neighborhood Restaurant Group, XV LLC, t/a Red Apron Butchery, guilty of the offense described in Charge I. The Board imposes the following penalty on Red Apron Butchery:

- (1) For the violation described in Charge I, Red Apron Butchery shall pay a fine of \$250.

IT IS FURTHER ORDERED that the Respondent must pay all 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.

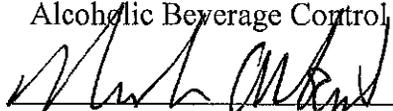
IT IS FURTHER ORDERED, in accordance with 23 DCMR § 800.1, the violation found by the Board in this Order shall be deemed a first level secondary tier offense.

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.

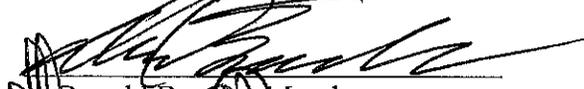
The ABRA shall deliver copies of this Order to the Government and the Respondent.

² These facts would also be relevant under the overconcentration criteria, which allows for the consideration of the impact of third party establishments on the neighborhood when considering an application for a new license. D.C. Official Code §§ 25-101(35A), 25-314(a)(4).

District of Columbia
Alcoholic Beverage Control Board



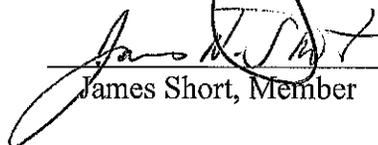
Nick Alberti, Member



Donald Brooks, Member



Herman Jones, Member

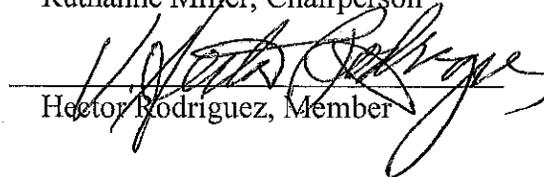


James Short, Member

We concur as to the determination of liability, but dissent as to the penalty imposed by the Board. In our view, the Respondent merits a warning for the offense.



Ruthanne Miller, Chairperson



Hector Rodriguez, Member

I dissent from the majority of the Board, and believe that the Respondent should have received a verbal or written warning from the Investigator.

The Respondent argues that the trash overflowing his dumpster came from a neighboring licensed establishment, whose employees illegally placed it not in their dumpster, but in his. He provided photographs showing that clear plastic trash bags, filled with items - including ice cream - that his establishment does not carry, could be found in his dumpster.

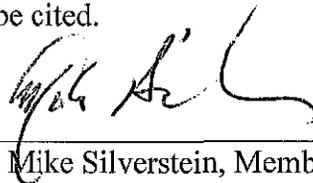
There was no evidence to refute the Respondent's claim. In fact, the Board became aware in a follow-up case (15-CMP-0059) that the neighboring establishment was, indeed, using the Respondent's dumpster.

Investigator Jones testified that he told the Respondent that he spoke ". . . with the other establishment . . . [a]nd . . . they admitted they were dumping -- just dumping trash" in Red Apron's dumpster. (15-CMP-0059 at 27).

So we have a new licensed establishment with a perfectly clean ABRA record that has a neighboring establishment illegally dumping trash in its dumpster. And the neighboring establishment admits to the ABRA investigator that this is the case. In such a situation, the Respondent merited a warning from the investigator to take reasonable steps to secure the dumpster and keep the area free of litter. They should have received a warning and a notice to cure.

The purpose of trash containers and dumpsters is to collect trash so that it can safely, cleanly and efficiently be removed in a manner that does not endanger the health of District residents. In certain cases, that may involve securing or locking the dumpster or trash can. But to require that every single ABRA licensed establishment lock or secure every single trash can or dumpster would place an undue burden on those who pick up the trash.

And yet the Board's decision sets the precedent that any licensee can be found guilty of violation when any neighbor illegally dumps trash in their dumpster -- that sets the standard for "reasonable steps" so high that every establishment must lock or otherwise secure their trash cans and dumpsters to be certain they will not be cited.



Mike Silverstein, 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).