

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

In the Matter of:)		
)	Case No.:	14-PRO-00095
Spo-dee-o-dee, LLC)	License No:	ABRA-89186
t/a The Showtime)	Order No:	2015-273
)		
Application for a Substantial Change to)		
Retailer's Class CT License)		
(Sidewalk Café with Six Seats))		
)		
at premises)		
113 Rhode Island Avenue, NW)		
Washington, D.C. 20001)		

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

ALSO PRESENT: Spo-dee-o-dee, LLC t/a The Showtime, Applicant

Rosemarie Salguero, Esq., on behalf of the Applicant

Dr. Paul Collins, Abutting Property Owner, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

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

INTRODUCTION

The Alcoholic Beverage Control Board (Board) finds that the Application for a Substantial Change to a Retailer's Class CT (Sidewalk Café with Six Seats) License filed by Spo-dee-o-dee, LLC t/a The Showtime, (hereinafter "Applicant" or "Showtime") is appropriate for the neighborhood, so long as the establishment abides by the following conditions: (1) the

establishment's entrance shall not block egress and ingress; (2) there shall be a fixed barrier to define the boundaries of the sidewalk café; and (3) there shall be no smoking within twenty-five (25) feet of the entrance of the establishment.

Procedural Background

The Notice of Public Hearing advertising The Showtime's Application was posted on October 10, 2014, and informed the public that objections to the Application could be filed on or before November 24, 2014. *ABRA Protest File No. 14-PRO-00095*, Notice of Public Hearing [*Notice of Public Hearing*]. The Alcoholic Beverage Regulation Administration (ABRA) received a timely filed protest letter from the Dr. Paul Collins, Abutting Property Owner (hereinafter "Protestant"). *ABRA Protest File No. 14-PRO-00095*, Roll Call Hearing Results.

The parties came before the Board's Agent for a Roll Call Hearing on December 8, 2014, where the above-mentioned objector was granted standing to protest the Application. On February 4, 2015, the parties came before the Board for a Protest Status Hearing. Finally, the Protest Hearing in this matter occurred on March 11, 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. Code §§ 1-309.10(d); 25-609 (West Supp. 2015). However, the Board notes that it has not received a written recommendation from the ANC in this matter.

Based on the issues raised by the Protestant, 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; 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) (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. The Applicant and the Protestant previously entered a Settlement Agreement dated August 6, 2012 and approved by the Board on October 10, 2012. *Spo-dee-o-dee, LLC t/a The Showtime*, Case No. 12-PRO-00040, Board Order No. 2012-381 (D.C.A.B.C.B. Oct. 10, 2012). The Settlement Agreement is silent as to the operations of a sidewalk café. *Settlement Agreement*, 1-4.
2. The Applicant has applied for a sidewalk café endorsement with an occupancy load of six (6) seats. *Protest Report*, at 6; *see also Notice of Public Hearing*. The Applicant's proposed

hours of the sidewalk café are as follows: 2:00 p.m. to 11:00 p.m., Sunday through Thursday; and 2:00 p.m. to 12:00 a.m., Friday and Saturday. *Protest Report*, at 6; *See also* Notice of Public Hearing.

3. The Board takes administrative notice of three nearby licensed establishments that have Sidewalk Café endorsements. El Camino, ABRA License No. 094426, located at 108 Rhode Island Ave. N.W., has the following Sidewalk Cafe Hours of Operation and Sales: 11:00 a.m. to 1:00 a.m., Sunday through Thursday; and 11:00 a.m. to 2:00 a.m. Friday and Saturday. *ABRA Licensing File No. 094426*. Boundary Stone Public House, ABRA License No. 083980, located at 116 Rhode Island Ave. N.W., has the following Sidewalk Café Hours of Operation and Sales: 9:00 a.m. to 2:00 a.m., Sunday through Thursday, and 9:00 a.m. to 3:00 a.m. Friday and Saturday. *ABRA Licensing File No. 083980*. Rustik Tavern, ABRA License No. 085617 located at 84 T Street, N.W., has the following Sidewalk Café Hours of Operation and Sales: 10:00 a.m. to 11:00 p.m., Sunday through Thursday, and 10:00 a.m. to 12:00 a.m. on Friday and Saturday. *ABRA Licensing File No. 085617*.

II. Testimony of ABRA Investigator Shawn Townsend

4. ABRA Investigator Shawn Townsend investigated the Application and prepared the Protest Report submitted to the Board. *Transcript [Tr.] 3/11/15* at 19; *ABRA Protest File No. 14-PRO-00095, Protest Report [Protest Report]*. The protest was filed on the basis of peace, order and quiet; pedestrian safety; and real property values. *Tr.*, at 19-20.

5. The establishment has been approved for a public space permit from the District Department of Transportation (DDOT) for six seats and two tables in the sidewalk café area outside of the establishment. *Id.* at 21. The Applicant intends to use this space to provide his patrons with an area for smoking and drinking. *Id.*

6. ABRA personnel monitored Showtime on six separate occasions from February 19, 2015 to March 6, 2015. *Tr.*, at 22. During the course of monitoring, Investigator Townsend did not observe any pedestrian or noise issues related to the establishment. *Id.* On March 6, 2015, Investigator Townsend found the Applicant to be in violation of ABRA regulations when it operated a sidewalk café with no sidewalk café endorsement. *Id.*; *see also* D.C. Official Code § 25-113 (a)(b). Also, Investigator Townsend determined that the establishment was over its permitted capacity. *Id.*; *see also* D.C. Official Code § 25-762 (b)(1). The establishment has a Certificate of Occupancy that states that the occupant load is at twenty-five (25). *Tr.*, at 22. However, Investigator Townsend observed approximately eighty patrons inside of the establishment. *Id.* Investigator Townsend further observed that there was no window lettering visible to patrons in violation of D.C. Official Code § 25-711 (b). *Id.*; *see also* D.C. Official Code § 25-711(b).

7. During the monitoring period, ABRA investigators observed light pedestrian and vehicular traffic in the evenings. *Protest Report*, 7. Furthermore, ABRA investigators did not observe the walkway in front of the establishment impeded by patrons. *Id.*

III. Testimony of Robert Lynch

8. Mr. Lynch is a resident who resides directly over the Applicant's establishment. *Id.* at 61. He has resided there for eighteen years. *Id.* Since Showtime has moved into Mr. Lynch's building, he has not found his quality of life to be affected by excessive noise or disruption of peace. *Id.* at 64-65. Accordingly, he supports the Application. *Id.* at 67.

IV. Dr. Paul Collins

9. Dr. Paul Collins has owned the property at 111 Rhode Island Avenue since 1993. *Id.* at 97. It is composed of two three-bedroom apartments, his professional office and a nonprofit organization. *Id.*

10. Dr. Collins has had a negative experience with the establishment's patrons who have blocked the entrance to his apartment building on occasion. *Id.* at 100. The building property management has been called numerous times about cleaning up in front of the nearby church and the apartment building. *Id.* Patrons have gotten sick and vomited at the doorway to the church and at the adjoining Metro bus stop. *Id.* at 100-01. Overall, however, Dr. Collins has found the Applicant to be a good operator. *Id.* at 111.

CONCLUSIONS OF LAW

11. 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) (West Supp. 2015). Specifically, the question in this matter is whether the Application will have a negative impact on the peace, order, and quiet; 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) (West Supp. 2015).

I. THE ADDITION OF A SIDEWALK CAFÉ WITH SIX SEATS WOULD NOT ADVERSELY AFFECT THE PEACE, ORDER, AND QUIET, PEDESTRIAN SAFETY, NOR REAL ESTATE PROPERTY VALUES OF THE NEIGHBORHOOD.

12. The Board finds that the Application is appropriate for the neighborhood, so long as the establishment abides by the following conditions: (1) the establishment's entrance shall not block egress and ingress; (2) there shall be a fixed barrier to define the boundaries of the sidewalk café; and (3) there shall be no smoking within twenty-five feet of the entrance of the establishment.

13. 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).

14. 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,¹ the “character of the neighborhood,”² the character of the establishment,³ and the license holder’s future plans.⁴ 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).

A. Peace, Order and Quiet

15. The law emphasizes that the Board should focus on “[t]he effect of the establishment on peace, order, and quiet. . .” D.C. Official Code § 25-313(b)(2). Among other considerations, the Board is instructed to consider “. . .noise, rowdiness, loitering, litter, and criminal activity.” 23 DCMR § 400.1(a) (West Supp. 2015).

16. In similar cases, the Board has found it necessary to impose conditions to maintain the peace, order and quiet, of the neighborhoods of licensed establishment seeking to have a sidewalk café. For instance, in *Romeo & Juliet*, the Board granted the establishment’s Application for a sidewalk café, but limited the hours of the sidewalk café to 11:00 p.m., Sunday through Thursday and 12:00 a.m. (midnight) on Friday and Saturday based on valid concerns regarding noise. *In re 301 Romeo, LLC t/a Romeo & Juliet*, Case No. 13-PRO-00136, Board Order No. 2014-045 (D.C.A.B.C.B. Jan. 29, 2014). As another example, in *Barcode*, the Board limited the establishment’s outdoor seating area to forty-five (45) patrons at all times of its hours of operation due to the proximity of the establishment to neighborhood residences. *In re*

¹ *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).

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

³ *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).

⁴ *Sophia's Inc.*, 268 A.2d at 800.

Barcode Corporation t/a Barcode, Case Number 13-PRO-00169, Board Order No. 2015-001, (D.C.A.B.C.B. Feb. 4, 2015).

17. The Board finds that the addition of six seats to the sidewalk café will not adversely affect the peace, order, and quiet of the neighborhood so long as the establishment abides by certain operating conditions. Under D.C. Code § 25-104(e), the Board, in issuing licenses, “may require that certain conditions be met if it determines that the inclusion of the conditions will be in the best interest of the locality, section, or portion of the District where the licensed establishment is to be located.” D.C. Official Code § 25-104(e). Here, based on the proximity of residences and professional offices to the establishment as well as the original settlement agreement entered into by the parties in 2012, it is clear that certain conditions must be put in place to ensure that this addition to the establishment’s operation will not adversely affect the surrounding neighborhood. *Supra*, at ¶ 6, 7, 9, 10. Further, based upon the Applicant’s previously unauthorized operation of the sidewalk café that disturbed its neighbor, it is evident that conditions of the sidewalk café’s use must be put into effect. *Supra*, at ¶ 6.

18. As a result, the Board finds it necessary that it imposes the following conditions : (1) the establishment’s entrance shall not block egress and ingress; (2) there shall be a fixed barrier to define the boundaries of the sidewalk café; and (3) there shall be no smoking within twenty-five (25) feet of the entrance of the establishment.

19. The Board first takes administrative notice of the Applicant’s Investigative History which reveals that this operator does not have history of violations that relate to noise or disruption of the neighborhood. *Licensing File No. ABRA-89196, Investigative History*. The Board notes that residents live in close proximity to the establishment. *Supra*, at ¶ 8. For instance, Mr. Lynch lives directly over the establishment in the same property building. *Supra*, at ¶ 7. Also, Showtime is located primarily in a residential district with residences directly beside the establishment. *Protest Report*, 5. Based on the Board’s precedent relating to sidewalk cafes, the close proximity of residents to an unenclosed sidewalk café justifies limiting the establishment’s sidewalk café privileges. *Supra*, at ¶ 16. Therefore, in order to protect neighbors from disturbances by potential crowds, the Board orders the Applicant to prohibit or disallow smoking within twenty-five feet of the establishment’s sidewalk café. In addition, the Applicant must keep its entrance and exit clear of patrons. Finally, a fixed barrier must outline the boundaries of the sidewalk to prevent the overflow of its patrons onto Dr. Collins’ property as well as onto the public space.

B. Pedestrian Safety

20. “In determining the appropriateness of an establishment, the Board shall consider . . . [t]he effect of the establishment on . . . pedestrian safety.” D.C. Official Code § 25-313(b)(3). The Board finds nothing in the operation of the establishment that threatens the safety of patrons or pedestrians while traveling to and from or near the establishment. *Supra*, at ¶ 7. Accordingly, the Board finds the Application will not adversely affect pedestrian safety.

C. Real Estate Values

21. “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 presence of blight may have a negative impact on property values. *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). Here, there is nothing in the record to support that the operation of a sidewalk café would blight the surrounding neighborhood to the extent that the real estate property values would be negatively affected. *See Exhibit 15-17*. Therefore, the Board finds that the Application will not adversely affect real estate property values.

II. THE APPLICATION SATISFIES ALL REMAINING REQUIREMENTS IMPOSED BY TITLE 25.

22. 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). 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 20th day of May 2015, hereby **APPROVES** the Application for a Substantial Change to Retailers’ Class CT License at 113 Rhode Island Avenue, NW filed by Spo-dee-o-dee, LLC t/a The Showtime.

The Board hereby imposes the following conditions:

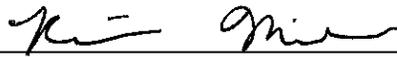
- (1) The establishment’s entrance shall not block egress and ingress;
- (2) There shall be a fixed barrier to define the boundaries of the sidewalk café;
and
- (3) There shall be no smoking within twenty-five feet (25) of the establishment.

IT IS FURTHER ORDERED that the sidewalk café hours shall be from 2:00 p.m. to 12:00 a.m., Sunday through Thursday, and 2:00 p.m. to 12:00 a.m. (midnight) on Friday through 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 the Abutting Property Owner.

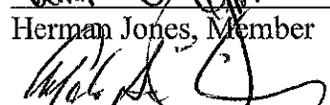
District of Columbia
Alcoholic Beverage Control Board

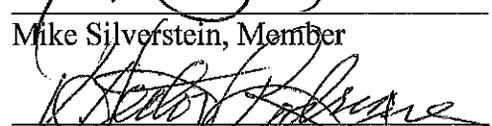

Ruthanne Miller, Chairperson

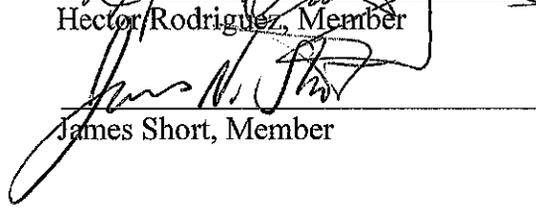
Nick Alberti, Member


Donald Brooks, Member


Herman Jones, Member


Mike Silverstein, Member


Hector Rodriguez, Member


James Short, 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, 2000 14th Street, NW, 400S, Washington, D.C. 20009.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 430 E Street, N.W., Washington, D.C. 20001; (202/879-1010). However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (2008) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. *See* D.C. App. Rule 15(b).