

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

In the Matter of:	)	
	)	
Brothers Burger Bar, LLC	)	Case No.: 19-PRO-00017
t/a Aroma	)	License No: ABRA-112502
	)	Order No: 2019-527
Application for a New	)	
Retailer's Class CR License	)	
	)	
at premises	)	
707 H Street, N.E.	)	
Washington, D.C. 20002	)	

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

**ALSO PRESENT:** Brothers Burger Bar, LLC, t/a Aroma, Applicant

Jeff Miskiri and Daryl Jones, Owners, on behalf of the Applicant

Joel Kelty, Commissioner, Advisory Neighborhood Commission (ANC)  
6C, 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) approves the Application for a New Retailer's Class CR License filed by Brothers Burger Bar, LLC, t/a Aroma, (hereinafter "Applicant" or "Aroma"); nevertheless, the Board is not convinced that the Applicant is prepared to adequately address the burdens on the community related to late night drinking and entertainment. Consequently, the Board conditions licensure on the Applicant limiting its hours, limiting its occupancy, refraining from charging a cover charge, and resolving all outstanding

issues with the Department of Consumer and Regulatory Affairs (DCRA). This order further address the other legal issues raised during the hearing.

### ***Procedural Background***

The Notice of Public Hearing advertising Aroma's Application was posted on February 8, 2019, and informed the public that objections to the Application could be filed on or before March 28, 2019. *ABRA Protest File No. 19-PRO-00017*, Notice of Public Hearing [*Notice of Public Hearing*]. The records of the Alcoholic Beverage Regulation Administration (ABRA) indicate that Advisory Neighborhood Commission (ANC) 6C has filed a protest against the Application. *ABRA Protest File No. 19-PRO-00017*, Roll Call Hearing Results.

The parties came before the Board's Agent for a Roll Call Hearing on April 8, 2019, where the above-mentioned objector was granted standing to protest the Application. On May 8, 2019, the parties came before the Board for a Protest Status Hearing. Finally, the Protest Hearing in this matter occurred on June 5, 2019.

The Board recognizes that an ANC's properly adopted written recommendations are entitled to great weight from the Board. D.C. Code §§ 1-309.10(d), 25-609; *Foggy Bottom Ass'n v. District of Columbia Alcoholic Beverage Control Bd.*, 445 A.2d 643, 646 (D.C. 1982). 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; residential parking and vehicular and pedestrian safety; and real property values of the area located within 1,200 feet of the establishment. D.C. Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2019).

### **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. Aroma has submitted an Application for a New Retailer's Class CR License at 707 H Street, N.E., Washington, D.C. *Notice of Public Hearing*. The Board takes administrative notice that Daryl Jones is listed in the Application as the sole owner of the business.
2. ABRA Investigator Rhoda Glasgow investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 19-PRO-00017, Protest Report* (May 2019) [*Protest Report*]. The proposed establishment is located in a NC-16 zone. *Protest Report*,

at 3. Twenty-one licensed establishments are located within 1,200 feet of the proposed location. *Id.*

3. According to the public notice, Aroma's proposed hours of operation and hours of sale, service, and consumption, and hours of entertainment are as follows: 11:00 a.m. to 2:00 a.m., Sunday through Thursday, and 11:00 a.m. to 3:00 a.m. on Friday and Saturday. *Id.* at 5. A proposed summer garden will have the same hours as the interior. *Notice of Public Hearing*, Aroma (Feb. 8, 2019).

4. Investigator Glasgow observed that Aroma will operate on two separate floors. *Transcript (Tr.)*, June 5, 2019 at 37. The restaurant is located on a commercial street with many retail and food establishments. *Id.* The summer garden will be on the roof and have a capacity of 30 seats. *Id.* at 25, 37, 77. Aroma has also applied for an entertainment endorsement. *Id.* at 38. As part of the endorsement, Aroma has requested permission to permit a cover charge. *Id.*

5. Investigator Glasgow discussed the availability of public transportation. *Id.* In particular, there are at least one metro bus and streetcar stop near the proposed location. *Id.* No public parking lots or garages appear to be located nearby. *Id.* However, there is some street parking for permit holders. *Id.*

6. Investigator Glasgow was not able to inspect the summer garden area because it was still pending approval and not safe to access at the time of the investigator's inspection. *Id.* at 47-48. She indicated that most summer gardens in the neighborhood closed around midnight during the week and 1:00 a.m. during the weekend. *Id.* at 59.

7. The investigator further observed that residents share an alley with Aroma. *Id.* at 49. The residences along the alley face the establishment's rear. *Id.* at 60.

## **II. Daryl Jones**

8. Daryl Jones is the owner of the business. *Id.* at 63. He indicated that the business is new and has no prior violation history. *Id.* While he has never operated a restaurant, he has six years of experience operating a catering business. *Id.* at 66, 68. He indicated that the business will serve Caribbean and American style food. *Id.* at 69. The summer garden will be located on the roof. *Id.* at 76. He further noted that the establishment will not charge a cover charge on a nightly basis. *Id.* at 74. Mr. Jones indicated that he had no objection to the issuance of the license without an entertainment endorsement or cover charge endorsement. *Id.* at 76.

## **III. Jeff Miskiri**

9. Jeff Miskiri is Mr. Jones' business partner. *Id.* at 83, 141. He has twenty years of experience in the restaurant business and is affiliated with Po Boy Jim, which is located nearby. *Id.* at 84, 97. He noted that the second floor is not yet ready for occupation as of the date of the hearing. *Id.* at 90. He indicated that the establishment will operate as a full-service restaurant and only offer entertainment to remain competitive with other businesses in the area. *Id.* at 92.

The current certificate of occupancy for the premises allows use of the first floor and an occupancy of 59 people. *Id.* at 108, 111.

#### IV. ANC Commissioner Joel Kelty

10. ANC Commissioner Joel Kelty discussed the ANC's opposition to the application. *Id.* at 115. First, Commissioner Kelty has seen DCRA records showing that the Applicant has registered the name "Felicity Lounge," which casts doubt on whether the Applicant intends to operate as a restaurant. *Id.* at 118, 123-25. Second, Commissioner Kelty believed the Applicant misstated the distances of nearby daycare centers and misidentified a nearby school. *Id.* at 120. Third, the ANC has asked the Board to consider the record of Mr. Miskiri due to his ownership of Po Boy Jim, which has had a number of enforcement actions taken against it. *Id.* at 121. Fourth, the ANC has referred the Board to a number of enforcement actions taken against the Applicant for illegal construction and the revocation of its building permits and certificates of occupancy. *Id.* at 121, 125. Commissioner Kelty indicated that DCRA is presently inspecting the premises for compliance and there are currently holds for illegal construction. *Id.* at 126, 127.

11. In the five years preceding the hearing, Po Boy Jim, which holds ABRA License No. 087903, and affiliated with Mr. Miskiri, had several violations for failing to file quarterly reports, failed to have a licensed manager or owner on the premises while the business was in operation, failed to control litter, and failed to follow its settlement agreement. *Investigative History*, Po Boy Jim, ABRA License No. 087903 (Mar. 29, 2019).

12. Commissioner Kelty further discussed his concerns regarding the impact of the establishment on the community. *Tr.*, 6/5/19 at 128. First, a residential zone faces the establishment and is solely divided from the establishment by an alley. *Id.* at 128.<sup>1</sup> Second, the ANC believes that full hours are inconsistent with other establishments in the neighborhood, because many close before midnight and only two establishments have full hours. *Id.* at 131-32. Third, the ANC is concerned that the Applicant's business plan requires the use of promoters. *Id.* at 134. Fourth, the ANC is concerned that the roof deck will generate noise because it faces the residents in the alley. *Id.* at 136.

#### CONCLUSIONS OF LAW

13. 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. Code §§ 25-104, 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2019). 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. Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2019).

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<sup>1</sup> The Board will not consider the ANC's overconcentration argument because it was not properly noticed in the ANC's initial protest letter under D.C. Official Code § 25-602. D.C. Code § 25-602(a) (requiring objections to be stated during the protest period); *Letter from Karen Wirt, Chair, Advisory Neighborhood Commission (ANC) 6C, Fred Moosally, ABRA Director* (Mar. 15, 2019).

## I. The Establishment is Appropriate for the Neighborhood Subject to Conditions.

14. 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. 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. 2019). The substantial evidence standard requires the Board to rely on “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Clark v. D.C. Dep’t of Employment Servs.*, 772 A.2d 198, 201 (D.C. 2001) citing *Children’s Defense Fund v. District of Columbia Dep’t of Employment Servs.*, 726 A.2d 1242, 1247 (D.C.1999).

15. In determining appropriateness, the Board must consider whether the applicant’s future operations will satisfy the reasonable expectations of residents to be free from disturbances and other nuisances—not just whether the Application complies with the minimum requirements of the law. 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); 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.”). As part of its analysis, the Board should evaluate each “unique” location “according to the particular circumstances involved” and attempt to determine the “prospective” effect of the establishment on the neighborhood. *Le Jimmy, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 433 A.2d 1090, 1093 (D.C. 1981). Furthermore, the analysis may also 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).

### a. The establishment will have a negative impact on peace, order, and quiet unless it operates with conditions.

16. “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. Code § 25-313(b)(2); see also D.C. 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. 2019).

17. In general, a well-run restaurant that focuses on food service is not a burden on the community. Nevertheless, a large portion of the Applicant's business plan focuses on providing entertainment and operating as a lounge. *Supra*, at ¶¶ 9-10, 12. While there is nothing inherently wrong with nightclub activity, late night-entertainment and drinking can impose burdens on the surrounding community and the quality of life of residents. Nevertheless, the Applicant has presented no plan to mitigate these concerns, such as soundproofing or adequate security measures, or demonstrated that its management is prepared to manage such an establishment. *Supra*, at ¶¶ 8-11. As a result, while the Board finds a food-service oriented restaurant appropriate, the Board will impose restrictions on nightclub and entertainment-related activities.

18. In light of the Board's findings regarding appropriateness, the Board finds it necessary to impose conditions on the Applicant's 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) (saying "[i]n 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"). 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. Code § 25-104(e).

19. The Board imposes the following conditions to prevent noise and prevent the transformation of the premises into a nightclub. First, the operational hours of the interior shall be limited to 1:00 a.m. during the week and 2:00 a.m. during the weekend. Second, the establishment's summer garden hours shall be limited to 10:00 p.m. during the week and 11:00 p.m. on Friday and Saturday. Third, the occupancy of the premises shall be limited to the number stated on the Applicant's most recent valid certificate of occupancy. Fourth, the establishment is not permitted to charge a cover charge. And finally, no license shall be issued to the Applicant until all pending and publicly noticed DCRA actions, including stop work orders, are resolved at the property at the time of issuance.

**b. The Application will not have a negative impact on residential parking needs and vehicular and pedestrian safety.**

20. "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. Code § 25-313(b)(3); *see also* D.C. Code §§ 25-101(35A), 25-314(a)(4). Among other considerations, the Board is instructed to consider the availability of both private and public parking, any parking arrangements made by the establishment, whether "[t]he flow of traffic . . . will be of such pattern and volume as to . . . increase the [reasonable] likelihood of vehicular [or pedestrian] accidents . . ." 23 DCMR § 400.1(b), (c) (West Supp. 2019). In this case, the neighborhood has sufficient public transportation resources. *Supra*, at ¶ 5. As a result, the Board has no reasonable basis for finding that the proposed establishment will have a negative impact on parking or traffic-related safety.

**c. The Application will not have a negative impact real property values.**

21. In determining whether an establishment is appropriate, the Board must examine whether the establishment is having a negative effect on real property values. D.C. 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). In this case there is no evidence of blight or poor management of the property. Therefore, the Board has no reasonable basis for finding that the establishment will have a negative impact on real property values.

**II. Any Failure of the Applicant to Have All Required Certificates, Permits, or Licenses Does Not Prevent Approval of the Application Under D.C. Official Code § 25-311(c).**

22. The Board recognizes that the ANC has alleged that the Applicant should not receive a license under D.C. Official Code § 25-311. *Tr.*, 6/5/19 at 136. Under this statute,

(c) No license . . . shall be issued to an applicant unless the applicant has a valid certificate of occupancy for the premises in which the establishment is located and has all other licenses and permits required by law or regulation for its business.

D.C. Code § 25-311(c). The Board notes that under § 25-311(c), in the case of an applicant that lacks a certificate of occupancy and other business licenses, the Board is only prohibited from issuing a license, not approving one. In the case of missing licenses, ABRA's Licensing Division will withhold the alcohol license until all required licenses are obtained by the Applicant. As a result, § 25-311 does not prevent the Board from approving the license in this Order.

**III. Any Failure of the Applicant to Comply with the Construction Code Does Not Prevent the Board from Issuing a License.**

23. The Board further recognizes that the ANC alleges that the Applicant is in violation of the District's Construction Code. *Tr.*, 6/5/19 at 127-28.

24. Under § 25-335(1),

Notwithstanding any other provision of this title, the Board shall deny a license if the evidence reasonably shows that:

(1) The establishment for which the license is sought is in violation of one or more of the Construction Codes for the District contained in Title 12 of the District of Columbia Municipal Regulations, or any other law or rule of the District intended to protect public safety.

D.C. Official Code § 25-335(1). As the Board previously noted in *Alibi*,

Based on the phrase “is in violation,” the Board does not interpret § 25-335(1) as requiring the denial of an application for a premise that was previously in violation of the Construction Codes or other public safety rule in the past. Instead, the more sensible interpretation is that the Board cannot issue a license for premises that has current violations of the relevant rules. Moreover, when faced with these types of violations, § 25-335(1) does not prevent the Board from approving the application, but conditioning issuance on the applicant fixing or resolving the violations in a satisfactory manner.

*In re HRH Services, LLC, t/a The Alibi*, Case No. 15-PRO-00096, Board Order No. 2016-280 (D.C.A.B.C.B. May 18, 2016). Based on the showing by the ANC that there may currently exist various violations of the Construction Code related to illegal construction, the Board will condition licensure on resolving all outstanding issues with DCRA pending the issuance of the license.

**IV. The Board Does Not Find Any Errors Contained in the Application to Mandate Denial of the Application.**

25. The Board considered the ANC’s contention that the application potentially contains erroneous distance measurements. *Supra*, at ¶ 10. Nevertheless, the Board does not find these potential errors determinative for three reasons. First, in issuing the license the Board considered information provided by the Geographic Information System, which accounts for the presence of schools and daycare centers. *Protest Report* at Exhibit 14 (GIS Map). Second, the ANC had the opportunity to present evidence of negative impact related to these facilities; yet, there is no evidence that the establishment’s operations will impact any nearby daycares or schools. Third, there is no indication that they are intentional; instead, they just appear to be careless mistakes. As a result, the Board does not find that any potential errors are material or necessitate the denial of the license.

**V. Daryl Jones is the Sole Owner of the Applicant.**

26. The Board is further aware that Mr. Miskiri claimed to be an owner and partner of the Applicant even though the Application lists Mr. Jones as the sole owner. *Supra*, at ¶¶ 1, 9. Based on the submitted Application, the Board solely recognizes Mr. Jones as the Applicant. Mr. Jones is advised to submit an appropriate application if it intends to share profits or have Mr. Miskiri own a portion of the business.

**VI. The Board Has Satisfied the Great Weight Requirement by Addressing ANC 6C’s Issues and Concerns.**

27. ANC 6C’s written recommendation submitted in accordance with D.C. Code § 25-609(a) indicated that its protest was based on concerns regarding Aroma’s impact on peace, order, and quiet; residential parking and vehicular and pedestrian safety; and real property values. The Board notes that it specifically addressed these concerns in its Conclusions of Law.



## VII. The Application Satisfies All Remaining Requirements Imposed by Title 25.

28. 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. 2019). 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 10th day of July 2019, hereby **APPROVES** the Application for a New Retailer’s Class CR License at premises 707 H Street, N.E., filed by Brothers Burger Bar, LLC, t/a Aroma, subject to the following **CONDITIONS**:

1. The licensed hours of operation shall be limited to 1:00 a.m., Sunday through Thursday, and 2:00 a.m. on Friday and Saturday;
2. The licensed hours of operation of the summer garden shall be limited to 10:00 p.m., Thursday through Sunday, and 11:00 p.m. on Friday and Saturday;
3. The occupancy of the premises shall be limited to the number stated on the Applicant’s most recent valid certificate of occupancy as of the date of this hearing, June 5, 2019, until the license holder submits a new valid certificate of occupancy and an application for a substantial change that is approved by the Board;
4. The license holder is not permitted to charge a cover charge; and
5. No license shall be issued to the Applicant until all pending and publicly noticed DCRA actions, including stop work orders, are resolved at the property at the time of issuance.

**IT IS FURTHER ORDERED** that, based on the Application, Daryl Jones is the sole owner of the business. The Applicant and Mr. Miskiri are advised that Mr. Miskiri is not deemed a license holder, owner, or part of the license under Title 25 of the D.C. Official Code. Therefore, he cannot superintend the business by himself unless Mr. Miskiri holds an ABC manager’s license. The Applicant is further advised that should it seek to add Mr. Miskiri to the license, then it should file an appropriate application to do so.

**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 Parties.

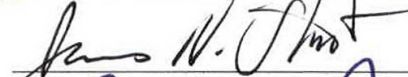
District of Columbia  
Alcoholic Beverage Control Board



Donovan Anderson, Chairperson



Mike Silverstein, Member



James Short, Member



Bobby Cato, 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. 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. 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).