

**THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE AND CANNABIS BOARD**

In the Matter of:)	
)	
)	
Southeast Restaurant Group, LLC)	Case No.: 23-PRO-00001
t/a DCity Smokehouse)	License No.: ABRA-98368
)	Order No.: 2023-359
Application to Renew a)	
Retailer's Class CT License)	
)	
at premises)	
203 Florida Avenue, N.W.)	
Washington, D.C. 20001)	

BEFORE: Donovan Anderson, Chairperson
James Short, Member
Bobby Cato, Member
Jeni Hansen, Member
Edward S. Grandis, Member

ALSO PRESENT: Southeast Restaurant Group, LLC, t/a DCity Smokehouse, Applicant

Richard Bianco, Counsel, on behalf of the Applicant

Corey N. Brown and Jacqueline Schumacher-Cutten, Abutting Property Owners, Protestants

Martha Jenkins, General Counsel
Alcoholic Beverage and Cannabis Administration

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

INTRODUCTION

The Alcoholic Beverage and Cannabis Board (Board) approves the Application to Renew a Retailer's Class CT License filed by Southeast Restaurant Group, LLC, t/a DCity Smokehouse (hereinafter "Applicant" or "DCity Smokehouse"). The Board recognizes the hardship faced by the abutting property owners in this case but is persuaded that the specific noise at issue; namely, noise emanating from a licensed establishment into residences located in the same building does not rise to the level of an appropriateness violation where (1) the Applicant's business model

does not focus on providing loud music or entertainment on a regular basis and there is no evidence of amplified music played at an unreasonable or excessive level; (2) the noise at issue is emanating from and into locations exempt from consideration under § 25-725; namely, an exempt mixed-use zone and from within the same building; (3) there is no evidence of a decibel violation under Chapter 27; and (4) there is no evidence that the Applicant is engaging in unreasonable noise making activity or otherwise intending to annoy or harass residents in violation of the disorderly conduct law.

The Board emphasizes that this decision solely reflects the determination of the Board based on the laws and regulations the Board administers, the Board's limited jurisdiction over licensees, and the record specific to this case. This decision is not intended to have any bearing or influence on the merits of any potential related private legal claims that may be filed against various parties, including claims related to a breach of the lease or other contractual document, inappropriate construction, or private nuisance.

Procedural Background

The Notice of Public Hearing advertising DCity Smokehouse's Application was posted on October 14, 2022, and informed the public that objections to the Application could be filed on or before November 28, 2022. *ABCA Protest File No. 23-PRO-*, Notice of Public Hearing [*Notice of Public Hearing*]. The records of the Alcoholic Beverage and Cannabis Administration (ABCA) indicate that Abutting Property Owners Corey N. Brown and Jacqueline Schumacher (collectively, the "Protestants") have filed a protest against the Application. *ABCA Protest File No. 23-PRO-00001*, Roll Call Hearing Results.

The parties came before the Board's Agent for a Roll Call Hearing on December 19, 2022, where all of the above-mentioned objectors were granted standing to protest the Application. On March 8, 2023, the parties came before the Board for a Protest Status Hearing. Finally, the Protest Hearing in this matter occurred on April 5, 2023.

In most cases, the Board may only grant the Application if 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. 2023). Nevertheless, based on the objections and other documents filed by the Protestants before the hearing, and as a matter of compliance with the requirements of due process and appropriate notice, the sole remaining issue before the Board is the impact of the establishment on noise and compliance with D.C. Official Code § 25-315. *Transcript (Tr.)*, April 5, 2023 at 32-33; *Protest Letter*, at 1; D.C. Code § 2-509.

FINDINGS OF FACT

The following statements represent the Board's findings of fact based on the evidentiary record. In reaching its determination, the Board considered the evidence, the testimony of the witnesses, the arguments of the parties, and all documents comprising the Board's official file. The Board credits all testimony and evidence identified or cited below unless otherwise stated.

I. Background

1. DCity Smokehouse has submitted an Application to Renew a Retailer's Class CT License at 203 Florida Avenue, N.W., Washington, D.C. *Notice of Public Hearing*.
2. ABCA Investigator Tavrill Prout investigated the Application and prepared the Protest Report submitted to the Board. *ABCA Protest File No. 23-PRO-00001, Protest Report* (Mar. 2023) [*Protest Report*].
3. The proposed establishment is in a MU-4 zone. *Id.* at 4. Sixteen licensed establishments are located within 1,200 feet of the proposed location. *Id.* at 5. There are no schools, recreation centers, public libraries, or day care centers located within 400 feet of the establishment. *Id.*
4. The establishment's hours of operation are as follows: 11:00 a.m.-1:00 a.m., Sunday through Thursday, and 11:00 a.m. to 2:00 a.m. on Friday and Saturday. *Id.* at 7. The establishment's proposed hours of alcoholic beverage sales, service, and consumption are the same. *Id.* The establishment's hours of entertainment operate from 5:00 p.m. to 8:00 p.m., Monday through Thursday, and until 9:00 p.m., Friday through Sunday. *Id.*
5. ABCA investigators visited the establishment on three separate occasions between March 8, 2023 and March 23, 2023. *Id.* at 8. The investigators report observing no violations. *Id.* The establishment's investigative history for the past three years reveals two violations for failing to comply with specific emergency rules related to the pandemic. *Id.* at 8.
6. The protest report discussed the availability of public transportation and parking. *Id.* at 7. Specifically, there is minimal street parking, but the establishment is located near the Shaw-Howard Green Line metro station. *Id.* at 7. In addition, the 90 and 92 bus lines run near the business. *Id.*
7. The protest report further discussed the establishment's trash practices. *Id.* The trash is collected twice per week. *Id.* at 7-8.
8. The business is on the first floor of a three-story building. *Id.* at 7. It has a sidewalk café that wraps around the front and extends to the rear of the building. *Id.* Investigator Prout was present at the establishment on several occasions as part of his duties. *Tr.*, 4/5/23 at 57. He observed that the business offered dine-in, carryout, and takeout food service and that people patronized the establishment to listen to music. *Id.* at 57-58. He did not observe a dance floor or live entertainment on the premises. *Id.* at 58. He further noted that the building has multiple condominium units above the business. *Id.* at 60.

II. Teri Janine Quinn

9. Teri Janine Quinn lives next door to the establishment, but her property does not abut the establishment. *Id.* at 74-75, 85. She has never heard noise coming from DCity Smokehouse in

her home. *Id.* at 76. Based on her interactions with the business regarding various community issues, she has found the ownership very responsive and helpful. *Id.* at 80-81, 88.

III. Melvin Hines

10. Melvin Hines owns DCity Smokehouse. *Id.* at 95-96. The establishment has operated at its current location since January 1, 2017. *Id.* at 96. The business generally operates from 11:00 a.m. to 11:00 p.m. during the week and until midnight on Saturday and Sunday. *Id.* at 97. Most of the establishment's sales are people "picking up and leaving." *Id.* at 108.

11. The layout of the establishment features a menu board, a seating area, a customer ordering area, and a cash register area. *Id.* at 98. The establishment does not offer table service. *Id.* at 99. The business also has additional outdoor seating areas. *Id.* at 100. One of the outdoor areas is enclosed by cloth, plastic, and steel poles. *Id.*

12. The establishment provides recorded music on the premises. *Id.* at 108. The business has a four-speaker system controlled by an "iPad" or "iPhone." *Id.* at 108, 110. The speakers are spread throughout the premises. *Id.* at 113. Mr. Hines noted that only the managers and himself have access to the volume controls. *Id.* at 152.

13. The establishment has taken various steps to mitigate noise. First, the establishment has exterior signage reminding customers to respect nearby residents. *Id.* at 102. Second, the establishment ceased using the built-in speaker system in the ceiling to address the complaints of the abutting property owner. *Id.* at 109. Third, staff are instructed to turn down the music at 10:00 p.m. and then later, in February 2023, turned the music off at 10:00 p.m. using an automatic function of the speaker system. *Id.* at 111-12. Fourth, the business has been installing insulation as it makes repairs to the ceiling due to an ongoing leak issue since 2022. *Id.* at 112. Fifth, the establishment had four layers of drywall installed to mitigate noise from the operations of the business. *Id.* at 113. Mr. Hines admitted that no sound engineer has been consulted regarding the noise situation at the establishment. *Id.* at 128.

14. Mr. Hines also purchased a condominium in the building. *Id.* at 114. As part of the purchase process he received the condominium's bylaws. *Id.* at 114-15. The bylaws allow the Board of Directors for the condominium to make special rules for the commercial tenant, which is DCity Smokehouse, but as of the date of the hearing, the building has not issued any special rules for the business. *Id.* at 116; *see also id.* at 186. Furthermore, the condominium association for the building has not instituted any legal actions against the business related to noise. *Id.* at 117; *see also id.* at 186. The bylaws further provide that the playing of musical instruments, radio, television, record player, tape recorder, or the like between the hours of 11:00 p.m. and the following 8:00 a.m. is prohibited if such activity disturbs or annoys other occupants. *Id.* at 118.

15. Mr. Hines indicated that a sound test was performed by the District Government in April 2022. *Id.* at 122-23. The test indicated that the noise generated by the business fell below the legal threshold. *Id.* at 122.

IV. Chris Pennachio

16. Chris Pennachio serves as the general manager of DCity Smokehouse. *Id.* at 159. He is aware of the noise complaints filed by the Protestants. *Id.* at 160. He indicated that no employees have control over the volume of the sound system. *Id.* at 159. He was further present when police officers and other government officials came to investigate the noise complaints and is not aware of any violations being reported or filed against the establishment or otherwise related to its operations. *Id.* at 161-62. He was also present when the District Government conducted a noise test in April 2022 and found no noise violations. *Id.* at 162, 164. The noise test did not include a measurement of the noise inside the building. *Id.* at 166.

V. Jacqueline Schumacher-Cutten

17. Jacqueline Schumacher-Cutten serves as the condominium Board president and lives in the condominiums located above the establishment. *Id.* at 168. She moved into the building in December of 2016. *Id.* She only lived in her unit for four months because she works overseas. *Id.* Currently, she rents her unit, which abuts the establishment. *Id.* at 169. As a landlord, she has noticed that her tenants remain in the condominium for only one to two years. *Id.* Her unit became vacant for approximately nine months in 2022. *Id.* She noted that potential buyers cited noise as a concern. *Id.* at 173.

18. In her experience as a former resident and the experience of her tenant, music from the restaurant can be clearly heard in her unit from approximately 11:00 a.m. to 11:00 p.m. *Id.* at 175-176. The music appears to emanate through the floor and through the windows from the speakers located inside and outside the premises in the outdoor seating area. *Id.* Ms. Schumacher-Cutten also indicated that the voices of patrons also come through the windows. *Id.* at 176. She also has made complaints to various managers of the establishment when she was a resident. *Id.* at 177. She noted that the music would be turned down when she called, but the problem would always return the next day. *Id.* at 178.

19. Ms. Schumacher-Cutten indicates that before buying or moving into the condominium she did not have an independent sound analysis related to her unit performed. *Id.* at 183. She further indicated that at the time of her purchase of the condominium she was aware that a restaurant could occupy the commercial space below her unit. *Id.* at 185.

20. Ms. Schumacher-Cutten noted that the Board of the condominium building has not taken any action against the restaurant as of the date of the hearing. *Id.* at 188-89. She further admitted that the building has had many structural and maintenance issues that have drained the building's finances. *Id.* at 189. She noted that these past issues were remedied but the condominium association has taken no action to remediate the noise in her unit. *Id.* at 190-91. She noted that only the abutting property owners in the case have complained about noise related to the establishment and she is not aware of any other resident having a similar noise issue. *Id.* at 202.

VI. John McCue

21. John McCue is the fiancé of Cory Brown and lived in their condominium unit above the establishment between May 2021 and September 2022. *Id.* at 205-06. He indicated that while residing in the unit they had noise issues stemming from the operations of the restaurant. *Id.* at 206. Frequently, inside their unit, they would hear music emanating from the establishment and could distinguish the words of the music and observed bass causing vibrations. *Id.* at 209. He also noticed a disc jockey on one occasion on September 4, 2021. *Id.* He noted that usually the amplified sounds could be observed up until between 11:00 p.m. and 1:00 a.m. depending on the day. *Id.* at 211. He further noted that sounds related to the use of the kitchen, music from the kitchen, and the establishment's phone could be heard in their residence starting at 6:30 a.m. *Id.* at 211-12. He also observed that they could hear patrons yelling in the indoor portion of the establishment at times. *Id.* at 213, 235. On August 25, 2023, he heard music from an outdoor event where speakers were used. *Id.* at 217.

22. Mr. McCue indicated that he complained to various government agencies and to the establishment but the noise issue has not been resolved. *Id.* at 221-23.

VII. Cory Brown

23. Cory Brown owns a condominium unit above the restaurant. *Id.* at 237. He moved into the unit in May of 2021. *Id.* at 237. Upon moving into the unit, the noise issue became apparent, and he communicated the issue of music and other sounds from the establishment coming into his unit to the ownership and management of the DCity Smokehouse. *Id.* at 238. Nevertheless, the issue was never resolved. *Id.* at 239. He also added that he is not aware that the establishment has ever utilized the services of a sound engineer or installed appropriate soundproofing. *Id.* at 242.

CONCLUSIONS OF LAW

24. The Board may approve an Application to Renew a Retailer's Class CT 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. 2023). 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. 2023). The Board further recognizes that the Protestants raised the issue of the Applicant's compliance with § 25-315.

I. The Burden of Proof Lies with the Applicant to Prove its Case Through Substantial Evidence.

25. The burden of proof in this matter is assigned to the Applicant. D.C. Code § 25-311(a). “. . . [T]he Applicant in meeting its burden may rely on the record as a whole, which includes information provided in the Protest Report and the Protestant's case, and not just what the Applicant presents during its case-in-chief.” *In re The New 7307, t/a Premier Lounge*, Case No.

22-PRO-000222, Board Order No. 2022-701, ¶ 1 (D.C.A.B.C. B. Oct. 19, 2022) citing *Esgar Corp. v. Commissioner of Internal Revenue*, 744 F.3d 648, 655 (10th Cir. 2014); see also *Washington Metro. Area Transit Auth. v. Dist. of Columbia Dept. of Employment Services*, 992 A.2d 1276, 1283 (D.C. 2010) citing *Dale v. S & S Builders, LLC*, 188 P.3d 554, 561 (Wyo. 2008) (saying in determining whether a party met its burden during an administrative hearing the court will look at the “record as a whole”). The Board further notes that where there is an “absence of evidence on an essential point [this] supports denial rather than granting of an application.” *Conrad v. Dist. of Columbia Alcoholic Beverage Control Bd.*, 21-AA-748, 2023 WL 163964, at *5 (D.C. Jan. 12, 2023).

II. The Establishment is Appropriate for the Neighborhood.

26. 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). 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 noise experienced by the condominium owners in the same building from DCity Smokehouse does not constitute a violation of peace, order, and quiet under the law .

27. In this case, the Board is persuaded that the specific noise at issue; namely, noise emanating from a licensed establishment into residences located in the same building does not rise to the level of an appropriateness violation where (1) the business model does not focus on providing loud music or entertainment on a regular basis and there is no evidence of amplified

music played at an unreasonable or excessive level; (2) the noise at issue is emanating to and from locations exempt from consideration under § 25-725; namely, an exempt mixed-use zone and from within the same building; (3) there is no evidence of a decibel violation under Chapter 27; and (4) there is no evidence that the Applicant is engaging in unreasonable noise making activity or otherwise intending to annoy or harass residents in violation of the disorderly conduct law.

28. “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. 2023).

29. In this case, the DCity Smokehouse primarily operates a dine-in and carryout food service establishment. *Supra*, at ¶ 8. The business does not rely primarily on alcohol sales, offer late-night live entertainment, or offer a dance floor for patrons. *Id.* Customers buying food or drink from the business may sit inside or in the outdoor seating area. *Supra*, at § 11. DCity Smokehouse offers recorded music both inside and outside the business from four speakers located both inside and outside the premises. *Supra*, at ¶ 12. There is no evidence that the establishment regularly plays background music at a level typical for a music concert or dance club or that the music is played above a conversational level or at such a volume that people must shout or speak loudly to be heard. The Board further notes that the establishment’s entertainment hours end at the latest at 9:00 p.m.; nevertheless, there is no indication that DCity Smokehouse provides live entertainment on a regular or consistent basis despite offering DJ entertainment on at least one occasion. *Supra*, at ¶ 21. Therefore, such activity if it occurs, is unlikely to occur during normal sleeping hours. Therefore, the Board is persuaded that the business is merely offering background music at a reasonable and expected volume for a commercial establishment.

30. The Board emphasizes that it credits the testimony of the abutting property owners that various sounds from the establishment may be heard in their condominium units, including amplified music, patron voices, kitchen noises, and the use of the establishment’s phone. *Supra*, at ¶¶ 18, 21. Nevertheless, none of these sounds constitutes a legal violation for various reasons. Specifically, as part of the appropriateness test, the Board considers the noise laws and regulations applicable to a licensed establishment, which include (1) D.C. Official Code § 25-725; (2) the decibel limits set by Chapter 27 of Title 20 of the D.C. Municipal Regulations; (3) conditions created by settlement agreements or Board Orders; and (4) the disorderly conduct law. D.C. Code § 25-313(b)(2); 25-823(a)(1)-(2). The Board notes that no settlement agreement terms or Board conditions are present in this case; therefore, these are not a relevant factor in this case.

31. The Board distinguishes the fact pattern in *Panutat, LLC v. D.C. Alcoholic Beverage Control Bd.*, where the court indicated that the Board could consider noise that fall outside of D.C. Official Code § 25-725. Indeed, this case is distinguishable from *Panutat* where the amplified music in this case is directly addressed by § 25-725 and specifically exempted under

D.C. Official Code § 25-725(b)(1) and (3). Moreover, where the noise in this case is limited to the property and is not emanating into the street or otherwise crossing any lot lines, the Board cannot reasonably infer a prospective harm on the community. *Supra*, at ¶ 9. In particular, based on the limit of the noise disturbances to amplified noise, patron voices, and other kitchen use sounds limited to the same building, this renders the present controversy wholly a private nuisance, rather than a public nuisance that merits a negative appropriateness finding. Indeed, where § 25-313 requires a consideration of the licensee’s impact on the area as a whole, which would be the case if noise was leaving the lot where the establishment is located, the Board cannot infer a negative impact on the community in this case. D.C. Code § 25-313(a) (“that the establishment is appropriate *for the locality, section, or portion* of the District where it is to be located”) (emphasis added).

32. The Board further emphasizes that this reasoning is limited to noise based on the laws at issue in this case. In particular, the Board distinguishes other types of appropriateness concerns from this reasoning regarding noise; especially, crime and violence, where matters such as crime and violence do not have legal limitations based on the building or zone where they occurred, crime and violence can cause dangerous crowd conditions, endanger the community (e.g., gunfire), and such occurrences may require the District to expend law enforcement resources in and around the licensed establishment.

i. There is no indication that DCity Smokehouse’s operations have or will violate D.C. Official Code § 25-725(a).

33. Turning to the specific facts of this case, the Board first considers D.C Official Code § 25-725. D.C. Official Code § 25-725(a) prohibits on-premise retailers from producing “any sound, noise, or music of such intensity that it may be heard in any premises other than the licensed establishment by the use of any: . . . [m]echanical device, . . . instrument for amplification of the human voice or any sound or noise; . . . noise-making article, instrument, . . . [or] [m]usical instrument.” D.C. Code § 25-725(a). Pertinent to this case, § 25-725(b) indicates that this prohibition does not apply to “Areas in the building which are not part of the licensed establishment” or “Any premises other than the licensed establishment that are located within a commercial, manufacturing, or mixed-use zone” D.C. Code § 25-725(b)(1), (3).

34. In this case, § 25-725(a) does not apply to unamplified patron voices and the use of the kitchen related to food preparation and service. As such, these activities do not rise to the level of an appropriateness violation. Furthermore, § 25-725 exempts amplified sounds when they emanate from the same building or from a mixed-use zone, such as the MU-4 zone where the abutting property owners experiencing noise are located. *Supra*, at ¶¶ 3, 17, 21, 23.¹ As a result, none of the sounds at issue in this case constitutes a violation of § 25-725.

¹ The Board distinguishes this case from one where noise is penetrating a residence on a separate lot but the residence is located in a mixed use zone, which is exempted from a violation of § 25-725(b)(3). In that case, such a situation may not be deemed wholly private where noise is traversing property lines and it may be reasonable to infer a lack of adequate or commercially reasonable soundproofing under the appropriateness test, a decibel violation, or a violation of the disorderly conduct law, even if § 25-725 does not apply, under the circumstances.

ii. The record does not support a finding that DCity Smokehouse’s operations have or will violate Chapter 27.

35. Turning to the decibel requirements, D.C. Official Code § 25-725(c) requires that “licensees . . . comply with the noise level requirements set forth in Chapter 27 of Title 20 of the District of Columbia Municipal Regulations. D.C. Code § 25-725(c) (emphasis added). In pertinent part, Chapter 27 of Title 20 of the D.C. Municipal Regulations provides the following:

2701.1 . . . no person shall cause, suffer, or permit any sound that emanates from an operation, activity, or noise source under his or her control to exceed the maximum permissible sound level . . . For the purposes of this subsection, the source level shall be measured at the property line of the property on which the noise source is located or as close as is practicable if there is an obstruction. Sound levels shall be measured according to the test procedures prescribed by the administering agency”

20 DCMR § 2701.1 (West Supp. 2023). The decibel limits for commercial zones are 65 dB(A) during daytime (7:00 a.m. to 9:00 p.m.) and 60 dB(A) at night. 20 DCMR §§ 2701.1, 2799 (West Supp. 2023). It should be noted that the decibel limits do not apply to the “unamplified human voice.” 20 DCMR § 2704.8 (West Supp. 2023). Finally, the regulations emphasize that decibel limits may only be measured in accordance with the specific testing procedures outlined in the noise regulations. § 2701.3.

36. The Board notes that compliance with Chapter 27 is not at issue in this case where the sole uncontroverted testimony is that an official decibel test recorded no violation. *Supra*, at ¶ 15. Further, at a minimum, the Protestants did not rebut the Applicant’s case-in-chief with decibel measurements taken in accordance with the testing requirements or otherwise show a violation. As a result, there is no basis for finding or inferring that the Applicant’s operations violate Chapter 27.

iii. There is no indication that DCity Smokehouse’s operations have or will violate the disorderly conduct law.

37. Finally, the District’s disorderly conduct law, which is a criminal law, also has a provision related to noise. Specifically, § 22-1321(d) provides that “It is unlawful for a person to make an *unreasonably loud noise* between 10:00 p.m. and 7:00 a.m. that is likely to annoy or disturb one or more other persons in their residences.” D.C. Code § 22-1321(d) (emphasis added). In regard to the disorderly conduct law, the Board is not aware of any existing case law or official interpretation that a licensed establishment engaging in regular business activities, such as cooking, cleaning, or talking in a kitchen, providing music, permitting patrons to converse, or allowing a phone to ring, which is heard in the same building, is in violation of the disorderly conduct law; especially, if the business is solely providing music as part of their business, there is no evidence noise is leaving the lot, and where it has not been shown that the operators are intentionally attempting to harass or annoy anyone. It should also be further noted that in light of the DCity Smokehouse’s limited entertainment hours, no live entertainment provided by the business could constitute a violation of the disorderly conduct law based on the

10:00 p.m. start time written into the law, as long as the establishment complied with its hours. *Supra*, at ¶ 4.

38. Consequently, where the record shows no violation of § 25-725, the decibel limits, or the disorderly conduct law, the sound complained of by the abutting property owners does not rise to the level of an appropriateness violation or otherwise justify the imposition of conditions. Therefore, the Board finds in favor of the DCity Smokehouse on this issue.

III. The Establishment’s Record of Compliance Merits Renewal.

39. Under § 25-315, “[t]he Board shall consider the licensee's record of compliance with this title and the regulations promulgated under this title and any conditions placed on the license during the period of licensure, including the terms of a settlement agreement.” D.C. Code § 25-315(b)(1). In this case, the violations found in the licensee’s record are not sufficiently egregious, repetitive, or serious to merit non-renewal of the license. Therefore, the Board finds that the license merits renewal in this case.

IV. The Application Satisfies All Remaining Requirements Imposed by Title 25.

40. 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. 2023). 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 28th day of June 2023, hereby **APPROVES** the Application to Renew a Retailer's Class CT License at premises 203 Florida Avenue, N.W., filed by Southeast Restaurant Group, LLC, t/a DCity Smokehouse.

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 omission of any testimony or evidence in the Board’s Order indicates that such testimony or evidence was contravened by the evidence or testimony credited by the Board, had no or minimal weight on the Board’s findings and conclusions, was irrelevant, was not credible, was not truthful, was repetitive, was too speculative, or was otherwise inappropriate for consideration.

The ABCA shall deliver a copy of this order to the Parties.

District of Columbia
Alcoholic Beverage and Cannabis Board

eSigned via SeamlessDocs.com
Donovan Anderson
Key: ac43cb98c6d5f6e4b73069d1dccc8

Donovan Anderson, Chairperson

eSigned via SeamlessDocs.com
James Short
Key: 547ae3732920e6ac8d1b3325d2048ec

James Short, Member

eSigned via SeamlessDocs.com
Bobby Cato
Key: 256d3fca1f6e146d7f4b75bd7917d20d

Bobby Cato, Member

eSigned via SeamlessDocs.com
Jeni Hansen, Member
Key: 82172981c5509447491b56f6c2a41899

Jeni Hansen, Member

eSigned via SeamlessDocs.com
Edward Grandis, Member
Key: 5027bda7f9f0040ec14adeb52541ce5

Edward S. Grandis, 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 and Cannabis 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).