

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

In the Matter of:)	
)	
Po Boy Jim 2, LLC)	Case No.: 19-PRO-00064
t/a Po Boy Jim 2)	License No: ABRA-105468
)	Order No: 2019-869
)	
Application to Renew a)	
Retailer's Class CR License)	
)	
at premises)	
1934 9th Street, N.W.)	
Washington, D.C. 20001)	

BEFORE: Donovan Anderson, Chairperson
James Short, Member
Bobby Cato, Member
Rema Wahabzadah, Member
Rafi Aliya Crockett, Member

ALSO PRESENT: Po Boy Jim 2, LLC, t/a Po Boy Jim 2, Applicant

Evan Schlom, 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) approves the Application to Renew a Retailer's Class CR License filed by Po Boy Jim 2, LLC, t/a Po Boy Jim 2, (hereinafter "Applicant" or "PBJ"). In renewing this license, the Board considered credible complaints that the establishment has previously failed to follow provisions in its settlement agreement related to noise, trash, and security, as well as provisions limiting entertainment and cover charges. Because the establishment only recently opened in August 2018, the Board finds that the minor nature of the violations in the establishment's investigative history, and PBJ's efforts to mitigate these problems, do not warrant the cancellation or the imposition of conditions at this time.

Instead, the Board is persuaded that the enforcement process remains the appropriate means of addressing violations of the settlement agreement at this time. Finally, in accordance with § 6(a) of its settlement agreement, PBJ is required to file a legally compliant security plan within 30 days from the receipt of this Order.

Procedural Background

The Notice of Public Hearing advertising PBJ's Application was posted on April 19, 2019, and informed the public that objections to the Application could be filed on or before June 3, 2019. *ABRA Protest File No. 19-PRO-00064*, Notice of Public Hearing [*Notice of Public Hearing*]. The records of the Alcoholic Beverage Regulation Administration (ABRA) indicate that Abutting Property Owner Evan Schlom (Protestant) has filed a protest against the Application. *ABRA Protest File No. 19-PRO-00064*, Roll Call Hearing Results.

The parties came before the Board's Agent for a Roll Call Hearing on June 17, 2019, where the above-mentioned objector was granted standing to protest the Application. On August 14, 2019, the parties came before the Board for a Protest Status Hearing. Finally, the Protest Hearing in this matter occurred on September 25, 2019. After the hearing, the Board received proposed findings and conclusions of law from the Protestant.

Based on the issues raised by the Protestants, 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. 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. PBJ has submitted an Application to Renew a Retailer's Class CR License at 1934 9th Street, N.W., Washington, D.C. *Notice of Public Hearing*.
2. ABRA Investigator Vanessa Pleitez investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 19-PRO-00064, Protest Report* (Sept. 2019) [*Protest Report*].
3. The proposed establishment is located in an ARTS-2 zone. *Protest Report*, at 3. Sixty-nine licensed establishments are located within 1,200 feet of the proposed location. *Id.* at 3-4. There are no schools, recreation centers, public libraries, or day care centers located within 400 feet of the establishment. *Id.* at 7.

4. According to the public notice, PBJ's hours of operation 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.* The establishment's hours of alcoholic beverage sales, service, and consumption are the same as its hours of operation. *Id.* PBJ's hours of entertainment begin at 11:00 a.m., and end at 10:00 p.m. on Wednesday, and 2:00 a.m. on Thursday through Saturday. *Id.* at 8.

5. ABRA investigators visiting the location did not observe issues related to peace, order, and quiet over the course of seven visits between August 16, 2019, and September 17, 2019. *Id.* ABRA's records show that as of September 18, 2019, the establishment had generated 11 noise complaints, one of which led to a settlement agreement violation. *Id.* at 9. PBJ's investigative history shows several other minor secondary tier violations in 2019. *Id.* at *Exhibit 29*. The establishment was previously issued warnings for failing to have its settlement agreement accessible at the establishment and for failing to post its license. *Transcript (Tr.)*, September 25, 2019 at 74, 77-78. In 2019, PBJ received a \$500 fine for failing to file a quarterly report, and a \$500 fine for failing to have a licensed manager on duty and violating its settlement agreement. *Id.* at 78-79, 118.

6. Street parking for the public is available in the vicinity of the establishment. *Protest Report*, at 9.

7. During her visits to the establishment, Investigator Pleitez was aware that the establishment had a trash company remove trash four times per week. *Id.* at 98. She also took pictures showing that the establishment's trash bins were closed. *Id.* at 99.

II. Settlement Agreement

8. PBJ has a settlement agreement attached to its license, which has been in effect since July 19, 2017. *In re Po Boy Jim, LLC, t/a Po Boy Jim 2*, ABRA Case No. 17-PRO-00021, Board Order No. 2017-391, 1-2 (D.C.A.B.C.B. Jul. 19, 2017).

9. In regards to noise, the settlement agreement currently mandates in § 3(a) that "Sound, noise, or music emanating from the Establishment shall not be heard beyond the property boundary of the Establishment." *Id.* at *Settlement Agreement*, § 3(a). The agreement further requires in § 3(b) that PBJ "take all necessary actions to ensure that music, noise, and vibration from the Establishment are not audible in any residential premises, including, but not limited to, making architectural modifications to the Establishment." *Id.* at § 3(b).

10. In regards to trash, the settlement agreement mandates in § 4(a) that "All trash, recyclable materials, and grease stored outdoors at the Establishment shall be in containers that are impervious to vermin, leaks, and odors." *Id.* at § 4(a). PBJ is required in § 4(b) to replace all damaged and leaking containers within 3 days, ensure containers remain closed, and that all waste is stored in containers. *Id.* at § 4(b). PBJ is required in § 4(c) to have trash collection occur at least 3 times per week. *Id.* at § 4(c). In § 4(f), PBJ is required to keep the exterior of the establishment free of litter and power wash the trash storage area twice per month. *Id.* at § 4(f).

11. In regards to entertainment, the settlement agreement prohibits the establishment from charging a cover charge. *Id.* at § 1(d). The agreement also prohibits entertainment Sunday through Tuesday. *Id.* at § 2.

12. In regards to security, the establishment's settlement agreement required the filing of a security plan with the Board. *Id.* at § 6(a). PBJ also agreed to install security cameras. *Id.* at § 6(b). A review of ABRA's records indicate that no security plan is on file with the agency.

III. Ian Reid

13. Ian Reid serves as one of the owners of PBJ, which first opened in July 2018. *Tr.*, 9/25/19 at 5, 144. PBJ accepted government funding to install soundproofing at the establishment. *Id.* at 130. As part of PBJ's soundproofing efforts, the establishment hired a contractor to install an additional wall with soundproofing insulation in July 2019. *Id.* at 131-33, 151. After the work, PBJ was able to resolve the complaints of a resident abutting the establishment's wall. *Id.* at 133. He further noted that the current Protestant would not agree to perform a sound test in conjunction with PBJ. *Id.* at 134.

14. In regards to trash, PBJ undertook several steps to keep the area outside the establishment clean. *Id.* at 135. First, PBJ asked the trash company to exchange the establishment's plastic bins with metal ones. *Id.* Second, instead of relying on PBJ's employees, the establishment hired an outside company to perform the power washing. *Id.* The bill for the power washing is shared with other nearby establishments. *Id.* He did not personally observe when staff were power washing the alley when the task was assigned to his staff. *Id.* at 146.

IV. Evan Schlom

15. Evan Schlom lives in the condominium building abutting PBJ's premises. *Id.* at 159. Mr. Schlom has lived in the building since the end of June 2017. *Id.* His unit is located on the third floor and abuts PBJ's premises. *Id.* at 160. Nevertheless, his unit does not share a common wall because PBJ is located in a two-story building. *Id.*

16. Mr. Schlom described various times he observed the establishment in violation of its settlement agreement. *Id.* at 160. For example, he has seen the establishment advertise entertainment for Sundays and advertise a cover charge on one occasion. *Id.* at 160-61. Specifically, he showed advertisements showing disc jockey events on Sunday, December 16, 2018; and Sunday, January 27, 2019. *Id.* at 163, 165. He indicated that live entertainment may have been held on other Sundays. *Id.* at 167-68. He also observed that PBJ failed to install exterior security cameras until sometime between December 2018 and February 2019, even though the settlement agreement was entered into in July 2017. *Id.* at 169, 205. Nevertheless, Mr. Schlom admitted that security cameras are presently installed at the establishment. *Id.* at 169. He has also observed the trash bins overflowing "for hours at a time" and lids open on multiple occasions between July 2018 and September 2019. *Id.* at 173-74. He also has observed that the rear of the establishment is "constantly filthy." *Id.* at 180. Furthermore, he does not believe that the establishment has power washed the alley before August 2019. *Id.* at 180-81, 184-85. Finally, he has heard noise and vibrations from the establishment in his unit and other

common areas of his building. *Id.* at 187. He is also aware that other neighbors of his have complained about the noise. *Id.* at 188. He further believes that the establishment is intentionally ignoring the complaints of various residents. *Id.* at 200.

17. Mr. Schlom indicated that ABRA investigators are not able to effectively enforce the settlement agreement based on the intermittent nature of the offenses and the amount of time it takes for investigators to respond. *Id.* at 194. He also indicated that he often does not file complaints with the agency when he witnesses violations. *Id.* at 197.

18. Finally, he has observed staff at PBJ park illegally in the alley on various occasions. *Id.* at 199. Nevertheless, he has recently noticed a decrease in illegal parking in the alley. *Id.*

19. The Protestant requests that the Board prohibit PBJ from mounting speakers on the wall abutting his building; requiring speakers to be placed on the floor or mounted by use of string suspension; require proof of trash pickup, grease control, and pest control contracts; require photographic proof of power washing; and require the establishment to maintain a log of complaints and require responses within a reasonable time. *Id.* at 240. The Protestant further requests that PBJ be prohibited from using the second floor after 11:00 p.m., and be prohibited from offering live entertainment after 10:00 p.m. *Id.* at 244.

CONCLUSIONS OF LAW

20. The Board may approve an Application to Renew a 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).

I. The Establishment is Appropriate for the Neighborhood.

21. 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).

22. 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. It has not been established that PBJ is having a regular and significant negative impact on the peace, order, and quiet of the neighborhood.

23. “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).

24. While PBJ’s record is not perfect, the record does not support cancelling or imposing additional conditions on the license. In this case, there is no significant evidence of rowdiness, loitering, or criminal activity at or around the establishment. *Supra*, at ¶ 5. The Protestant’s primary issues with the establishment concern noise, trash, and adherence to various parts of the settlement agreement. *Supra*, at ¶ 16. Even if true, the establishment has made efforts to comply with the settlement agreement and mitigate the establishment’s impact on its neighbors. *Id.* Moreover, the Board does not credit claims that ABRA’s enforcement is ineffective. *Supra*, at ¶ 17. As the record shows, PBJ received appropriate warnings and convictions for several secondary tier violations in 2019. *Supra*, at ¶ 5. In light of the minor nature of these offenses, canceling or restricting the license would be inappropriate; especially, when the enforcement process appears to be working and additional offenses committed by PBJ will receive higher and higher penalties for noncompliance. Moreover, the conditions contained in the settlement agreement appear sufficiently adequate to address noise and trash concerns, as they are similar to those that are usually imposed by the Board. As a result, the Board is not persuaded that the conditions requested by the Protestant are warranted or that a negative finding is appropriate at this time.

b. PBJ is not having a negative impact on residential parking needs and vehicular and pedestrian safety.

25. “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).

26. In this case, the Board has only heard testimony that PBJ’s staff may on occasion illegally park in the alley behind the establishment. *Supra*, at ¶ 18. Nevertheless, even if true, this does not appear to be having a pervasive impact on the ability of residents to park in the neighborhood or threaten the safety of pedestrians and vehicles. Moreover, it has not been established that routine parking enforcement and complaints to the appropriate parking enforcement officials could not adequately deter illegal parking in the alley. Therefore, the Board finds in favor of PBJ on this ground.

c. PBJ is not having a negative impact on real property values.

27. 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). There is no indication in the record suggesting that the property is blighted or otherwise having a negative impact on property values. Therefore, the Board finds in favor of PBJ on this ground.

II. The Establishment’s Record of Violations Does Not Merit Cancellation or Conditions.

28. 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 Board is cognizant that in 2019, PBJ had multiple secondary tier violations, a pending show cause action for another violation, and over the course of its operating history, received various warnings for violations. *Supra*, at ¶ 5. Nevertheless, in light of the establishment’s only recent opening in August 2018, the minor nature of the violations in the establishment’s violation history, and PBJ’s efforts to mitigate these problems, the Board does not find that cancellation or the imposition of conditions warranted at this time. Moreover, for the same reasons, to the extent PBJ continues to operate in violation of its settlement agreement, these issues should be addressed through the enforcement process at the present time.

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

29. 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 20th day of November 2019, hereby **APPROVES** the Application to Renew a Retailer's Class CR License.

IT IS FURTHER ORDERED, in accordance with D.C. Official Code § 25-104(e) and § 6(a) of PBJ’s settlement agreement, that the establishment shall file a security plan within thirty (30) days from the date of this Order.

The Applicant is **ADVISED** that it is obligated to comply with its settlement agreement, including provisions regarding noise, trash, and security, as well as limitations on charging a cover charge and providing entertainment. The Applicant is further warned that in light of being on notice of these restrictions, the Board may deem future violations as intentional and subject to heightened penalties. Therefore, it may be wise to undertake additional voluntary actions to avoid disturbing the peace, order, and quiet of the establishment’s neighbors (e.g., dismounting and moving the speakers).

The Protestant is **ADVISED** to continue filing complaints over the phone and by email with ABRA’s enforcement division in order to ensure compliance with the existing settlement agreement.

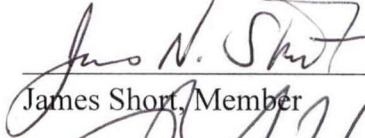
IT IS FURTHER ORDERED that the Board’s findings of fact and conclusions of law contained in this Order shall be deemed severable. If any part of this determination is deemed invalid, the Board intends that its ruling remain in effect so long as sufficient facts and authority support the decision.

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

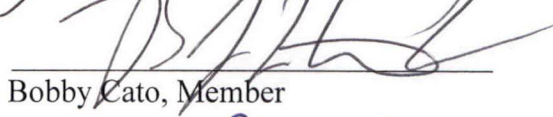
District of Columbia
Alcoholic Beverage Control Board



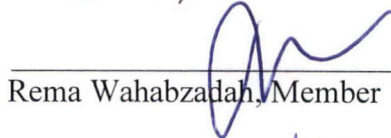
Donovan Anderson, Chairperson



James Short, Member



Bobby Cato, Member



Rema Wahabzadah, Member



Rafi Aliya Crockett, 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).