THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
19th and K, Inc. t/a Ozio Martini & Cigar Lounge	Case No.: License No: Order No:	13-PRO-00151 023167 2014-366
Application to Renew a Retailer's Class CN License		
at premises 1813 M Street, N.W. Washington, D.C. 20036		

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

ALSO PRESENT: 19th and K, Inc., t/a Ozio Martini & Cigar Lounge, Applicant

Stephen J. O'Brien, of the firm Mallios & O'Brien, on behalf of the Applicant

Sarah Peck, on behalf of a Group of Five or More Residents or Property Owners, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING MOTION FOR RECONSIDERATION

INTRODUCTION

The Alcoholic Beverage Control Board affirms Board Order No. 2014-315 for the following reasons: (1) the Protestant demonstrated that 19th and K, Inc., t/a Ozio Martini & Cigar Lounge (hereinafter "Applicant" or "Ozio") is in violation of §§ 4 and 5 of its settlement agreement by failing to comply with the District's laws regarding noise and having its amplified

music disturb a resident in their home; (2) the Protestant demonstrated that Ozio's continued operation without conditions will result in the establishment likely violating § 25-725(c) on a regular basis based on Ozio's inadequate soundproofing and noise mitigation measures; and (3) Ozio's continued operations without conditions will likely result in a violation of the District's disorderly conduct law. Additionally, the Board would affirm its prior Order without these additional holdings, because the conditions imposed by the Board reasonably relate to and resolve the harms identified by the Protestant. The Board is also satisfied that its interpretation of § 25-313(b)(2) reflected in Board Order No. 2014-315 conforms with the statute and the Board's prior precedent. Therefore, the Motion for Reconsideration (Motion) filed by Ozio challenging the Board's prior Order is denied.

BOARD ORDER NO. 2014-315

In Board Order No. 2014-315, the Board determined that Ozio was having a negative impact on the neighborhood's peace, order, and quiet. *In re 19th and K, Inc., t/a Ozio Martini & Cigar Lounge*, Case No. 13-PRO-00151, Board Order No. 2014-315, 1 (D.C.A.B.C.B. Aug. 15, 2014). Specifically, the Board determined that it was unacceptable (i.e., unreasonable) for Ozio to have its amplified music be heard in a residence over 100 feet away from the establishment. *Id.* at ¶ 37. The Board further found that Ozio's efforts to control the emission of sound from its roof ineffective, because it was using an inaccurate device to ensure that it complied with its sound engineer's recommendations. *Id.* Based on these findings, the Board imposed three conditions pursuant to D.C. Official Code § 25-104(e): (1) Ozio could no longer have live bands on its roof; (2) Ozio must keep its roof closed when it provides entertainment; and (3) Ozio cannot generate amplified sounds that may be heard in a residence or dwelling. *Id.* at Order.

MOTION FOR RECONSIDERATION AND RESPONSE

Ozio filed a Motion for Reconsideration (Motion) with the Board. The Applicant has two primary objections. *Mot. for Recon.*, 1. First, the Applicant objects to the Board's conclusion that the condition mandating closure of the roof will alleviate the noise problem. *Id.* Specifically, Ozio argues that the Board could not determine that requiring the roof to be closed correlates to the noise disturbance heard by Ms. Kappel. *Id.* at 2. Second, the Applicant argues that the Board cannot find the establishment inappropriate based on the "playing of music." *Id.* Specifically, Ozio argues that, as a matter of law, the Board cannot find the playing of music inappropriate based on evidence that it is heard in a residence located in a commercial zone pursuant to D.C. Official Code § 25-725(b)(3). *Id.* at 3-4. Thus, the Board is asked to overturn its prior Order.[1]

In reply, the Protestant asks the Board to affirm its prior Order. *Protestant Group of Twenty Residents Response to Ozio's Mot. for Recon.*, 1-2 [*Response*]. Specifically, in the Protestant's view, the Board correctly determined that the music heard by Ms. Kappel was

[1] The parties have not proposed modified conditions; as a result, the Board is not in a position to consider alternative remedies that could satisfy both parties. *See e.g., In re BEG Investments, t/a Twelve Restaurant & Lounge*, Case Report 10-PRO-00138, Board Order No. 2011-368, 2 (D.C.A.B.C.B. Aug. 10, 2011) (saying ". . . the Board is not opposed to modifying conditions where such conditions severely harm an establishment's viability as a business and can be modified in such a manner that will not harm the neighborhood's peace, order, and quiet").

unlawful and followed the court's decision in *Panutat, LLC v. District of Columbia Alcoholic Beverage Control Board*, 75 A.3d 269 (D.C. 2013).

SUPPLEMENTAL 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 additional findings:

A. Anne Kappel hears Ozio's amplified music late at night inside her condominium on a regular basis. *Tr.*, March 19, 2014 at 309, 318, 322-23, 341-42. She noted that Ozio's music is "pounded" into her apartment. *Id.* at 323. Finally, the music she hears inside her home is disturbing her ability to sleep. *Id.* at 342.

B. In 2010, Gerald Henning, an acoustical engineer conducted a sound test involving playing Ozio's rooftop sound system and the Jefferson Row Condominiums. *Id.* at 85, 88, 120. Upon concluding the test, he recommended that the establishment not exceed 92 dBA when playing music on its roof in order to meet the requirements of District law. *Id.* at 91-92.

C. Nevertheless, before the hearing, Mr. Henning engaged in a sound test where the establishment played music on its roof at the level of 88 dBA. *Id.* at 102-03. He admitted that with the roof open and music playing, Ozio generated noise readings of 70 dBA in the back of the building. *Id.* Mr. Henning did not test the sound level at the front of the establishment. *Id.* During the test, Mr. Henning then instructed the establishment to lower the volume until the sound met the legal requirements. *Id.* at 108. Consequently, in 2010, Mr. Henning recommended that the establishment play amplified music on the roof at levels not exceeding 92 dBA to comply with District law, while in 2014, he recommended, at the very least, that the establishment not exceed 88 dBA on the roof to comply with District law—a difference of 4 dBA. *Id.* at 91-92, 106.

SUPPLEMENTAL CONCLUSIONS OF LAW

1. Before addressing the Motion on its merits, the Board makes the following additional conclusions of law based on the record in this case. Specifically, the Board concludes that (1) Ozio is in material breach of §§ 4 and 5 of its settlement agreement; (2) Ozio's continued operation without conditions will likely result in a violation of § 25-725(c); and (3) Ozio's continued operations risk violating the District's disorderly conduct law.

I. THE RECORD SHOWS THAT OZIO IS NOT IN COMPLIANCE WITH ITS SETTLEMENT AGREEMENT.

2. The Board finds that Ozio is not in compliance with §§ 4 and 5 of its settlement agreement. Under § 25-315, the Board must consider the licensee's record of compliance with the terms of its settlement agreement. D.C. Official Code § 25-315(b)(1). Further, as a matter of law, ". . . any breach of the voluntary agreement constitutes a breach of the license itself and must be taken into account by the Board in considering an application for renewal of the

license." *N. Lincoln Park Neighborhood Ass'n v. Alcoholic Beverage Control Bd.*, 666 A.2d 63, 67 (D.C. 1995).

3. In this case, Ozio's settlement agreement contains the following clauses:

> 4. Applicant acknowledges familiarity with the District of Columbia Noise Control Act of 1977, as amended, and the noise control provisions of District of Columbia laws and regulations, in general, including but not limited to DC Code Section 25-725, and agrees to comply with such provisions as required by law.
>
> 5. Applicant shall take appropriate action to control noise levels emanating from the third floor level summer garden so as not to disturb residents in their dwellings. Such action may include, but is not limited to, regulating the sound system and the skylight roof, as necessary.
>
> 6. Applicant shall regulate the audio system by contracted musicians, disc jockeys and other vendors, so that it is consistent with the provisions of paragraphs 4 and 5.

In re 19th and K, Inc., t/a Ozio Martini & Cigar Lounge, Board Order No. 2011-346, *Voluntary Agreement* §§ 4-6 (D.C.A.B.C.B. Jul. 27, 2011) [*Ozio 2011 Settlement Agreement*].

a. Ozio is violating § 4 of the agreement by failing to comply with the noise disturbance standard through the generation of late-night noise that may be heard in Ms. Kappel's home.

4. The Board finds that the Protestant has demonstrated that Ozio has not been in compliance with § 4 of the agreement. The Board interprets § 4 of the agreement as incorporating all of the District's relevant noise laws into the agreement. *Ozio 2011 Settlement Agreement*, § 4.

5. Chapter 27 of Title 20 regulates "excessive or unnecessary noises within the District." 20 DCMR § 2700.1 (West Supp. 2014); *Delegation of Authority Under D.C. Law 2-53*, District of Columbia Noise Control Act of 1977, Mayor's Order 97-60, § 2 (Mar. 21, 1997). Pertinent to this matter, under § 2700.14, it is a violation for an individual to create a "noise disturbance." 20 DCMR § 2700.14 (West Supp. 2014). A noise disturbance is defined as "any sound which is loud and raucous or loud and unseemly and unreasonably disturbs the peace and quiet of a reasonable person of ordinary sensibilities in the vicinity thereof . . ." § 2799 ("Noise disturbance").

> This determination is made by consider[ing] the location, the time of day when the noise is occurring or will occur, the duration of the noise, its magnitude relative to the maximum permissible noise levels permitted under the Act, the possible obstruction or interference with vehicular or pedestrian traffic, the number of people that are or would be affected, and such other factors as are reasonably related to the impact of the noise on the health, safety, welfare, peace, and quiet of the community."

Id. Chapter 27 and Chapter 28 of Title 20 also explicitly states that noise from musical instruments, loud speakers, and amplifiers are subject to both the noise level and noise disturbance standards. 20 DCMR §§ 2700.3, 2800.1-2800.2 (West Supp. 2014).

6. The Board finds that Ozio's continued unabated rooftop operations constitute an ongoing noise disturbance under § 2700.14. In this case, the totality of the circumstances weighs against Ozio. Certainly, "late-night commercial activity" at Ozio is appropriate given its zoning; nevertheless, zoning is not a determinative factor. § 2799. First, as a licensed establishment, it is expected that Ozio will be providing late night entertainment on its roof on a regular basis during its Board-approved hours. Second, the record shows that Ozio's music is emanating at least 100 feet away from its establishment and may be heard in Ms. Kappel's residence; therefore, the Board may infer that Ozio's amplified music disturbs additional residents of the Jefferson Row Condominium. *Supra*, at ¶ A; *Ozio*, Board Order No. 2014-315, ¶ 37. Based on these facts, the Board concludes that Ozio is violating the noise disturbance standard in violation of its settlement agreement. To hold otherwise, would allow Ozio to inflict harm on its residential neighbors by inflicting "unwelcome noise" that intrudes on the privacy of residents "captive" in their homes as they attempt to "sleep." *In re T.L.*, 996 A.2d 805, 812-13 (D.C. 2010) *citing City of Marietta v. Grams*, 531 N.E.2d 1331, 1336 (O.H. 1987);

b. Ozio is violating § 5 of the agreement by playing amplified music loud enough to disturb Ms. Kappel in her home.

7. Separately, the Board further finds that the Protestant has demonstrated that Ozio is not in compliance with § 5 of the agreement. In § 5, Ozio pledges to ". . . take appropriate action to control noise levels emanating from the third floor level summer garden so as not to disturb residents in their dwellings." *Ozio 2011 Settlement Agreement*, § 5.

8. Based on the plain language of the agreement, Ozio, as a condition of licensure, has agreed to prevent its rooftop music from disturbing residents inside their homes, regardless of zoning. *Id.* Despite this restriction, the record shows that Ozio is in breach of § 5 based on the credible testimony of Ms. Kappel that she hears Ozio's music in her residence. *Supra*, at ¶ A; *Ozio*, Board Order No. 2014-315, ¶ 37. Thus, under the facts in this case, the Protestant demonstrated that Ozio is in material breach of its settlement agreement by having amplified music played on its rooftop in a manner loud enough to disturb Ms. Kappel in her residence.

c. The conditions imposed by the Board ensure that Ozio complies with the letter and spirit of §§ 4 and 5 of its agreement.

9. Based on Ozio's material breach of both the letter and spirit of §§ 4 and 5 of its settlement agreement, the Board finds it appropriate to require Ozio to close its roof when it provides entertainment and refrain from generating amplified sounds that may be heard in a residence. The Board notes that these provisions will ensure that Ozio remains in compliance with both the letter and intent of its agreement.

II. THE CONTINUED OPERATION OF OZIO WITHOUT CONDITIONS WILL LIKELY RESULT IN REPEATED VIOLATIONS OF § 25-725(c) BECAUSE THE ESTABLISHMENT LACKS ADEQUATE SOUNDPROOFING AND NOISE MITIGATION PRACTICES.

10. The Board concludes that the continuation of rooftop entertainment will likely result in the establishment engaging in repeated violations of § 25-725(c).

11. Unlike in an enforcement action, the burden of proof is on Ozio to demonstrate that its continued operations will not, among other considerations, have a negative impact on the neighborhood by violating § 25-725. D.C. Official Code §§ 25-311(a), 25-313(b)(2). In making this determination, the Board looks to the substantial evidence in the record, or such ". . . evidence as a reasonable mind might accept as adequate to support a conclusion." *Hegwood v. Chinatown CVS, Inc.*, 954 A.2d 410, 412 (D.C. 2008); 23 DCMR § 1718.3 (West Supp. 2014). Under the appropriateness test, the Board is entitled to make reasonable conclusions regarding an establishment's future effect on the neighborhood based on the substantial evidence in the record. *See Panutat, LLC, v. District of Columbia Alcoholic Beverage Control Bd.*, 75 A.3d 269, 276-77 (D.C. 2013) (finding the Board did not engage in "speculation" that the addition of new establishment "would be likely to bring more noise to the neighborhood" if approved); *Le Jimmy, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 433 A.2d 1090, 1093 (D.C. 1981) (finding that the substantial evidence in the record did not support the conclusion that issuing the license would result in future problems regarding traffic and parking).

12. Under § 25-725(c), ". . . licensees . . . shall comply with the noise level requirements set forth in Chapter 27 of Title 20 of the District of Columbia Municipal Regulations." D.C. Official Code § 25-725(c). Chapter 27 provides that no person may create noise that violates the maximum daytime and nighttime noise levels set by § 2701.1. 20 DCMR § 2701.1 (West Supp. 2014). This means that at night, defined as the hours between 9:00 p.m. and 7:00 a.m., licensed establishments should not cause noise that exceeds 60 dBA in commercial zones. *Id.*; 20 DCMR § 2799 (West Supp. 2014).

13. Under the appropriateness test, an applicant's efforts to mitigate or alleviate operational concerns may be used to justify a finding of appropriateness. *Donnelly v. District of Columbia Alcoholic Beverage Control Board*, 452 A.2d 364, 369 (D.C. 1982); *Upper Georgia Ave. Planning Comm. v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 992 (D.C. 1985). Thus, the Board is entitled to consider an establishment's efforts to mitigate noise and soundproof the establishment when considering appropriateness.[2]

14. Accordingly, in *Riverfront*, the Board determined that providing live music in an open field without any physical soundproofing features was inappropriate. *In re Dos Ventures, LLC, t/a Riverfront at the Ball Park*, Case No. 13-PRO-00088, Board Order No. 2013-512, ¶ 43 (D.C.A.B.C.B. Nov. 13, 2013). Similarly, in *Romeo and Juliet*, the Board found that the risk of

[2] *See Kingman Park Civic Association v. Alcoholic Beverage Control Bd.*, Case No. 11-AA-831, 5 (D.C. 2012) (unpublished) (saying that the establishment's location in a ". . . sound-proofed basement venue without windows . . ." constituted substantial evidence of appropriateness).

noise leakage from a large unenclosed sidewalk café surrounded by a tree enclosure necessitated a limit on the establishment's outdoor seating hours. *In re 301 Romeo, LLC, t/a Romeo & Juliet*, Case No. 13-PRO-00136, Board Order No. 2014-045, ¶ 46 (D.C.A.B.C.B. Jan. 29, 2014).

15. Ozio could not demonstrate that it has sufficient soundproofing or noise mitigation practices to prevent violations of Chapter 27.

16. Here, neither party could provide the Board with reliable sound measurements; however, this fact is more problematical for Ozio than the Protestant. *Ozio*, Board Order No. 2014-315 at ¶¶ 28-29. Because Ozio has the burden of proof, Ozio must make an initial showing that it can provide amplified music on its roof in compliance with § 25-725(c). § 25-311(a). Yet, the record in this case shows that Ozio's rooftop music may be heard in a residence over 100 feet away from the establishment. *Ozio*, Board Order No. 2014-315 at ¶ 37. While Ozio has conducted sound tests, the record shows that they were not sufficient. *Supra*, at ¶¶ B, C. Specifically, Ozio's sound tests produced two different results, where, if the later test is believed, Ozio has been operating under the presumption that it could generate sounds 4 dBA higher than appropriate, which makes it unsurprising that Ozio has been causing noise to be heard in a residence located at least 100 feet away from the establishment. *Supra*, at ¶ C; *Ozio*, Board Order No. 2014-315 at ¶ 37. Finally, even if the sound tests were credible, Ozio demonstrated that it does not have a reasonable means of ensuring that it complies with the sound engineer's recommendation. *Ozio*, Board Order No. 2014-315 at ¶ 37. Consequently, based on this circumstantial evidence, the Board finds it reasonable to conclude that Ozio will likely violate § 25-725(c) in the future unless it complies with the conditions imposed by the Board.[3]

17. Ozio also currently intends to offer nighttime concerts, disc jockeys, and other forms of live entertainment, and, based on its Motion, has no intention of closing its roof, if allowed. The Board finds no reasonable difference between providing live music in an undeveloped field, as in *Riverfront*, and an unenclosed roof, as is the case here. Similar to the open field in *Riverfront*, if Ozio does not close its roof, then there are no physical soundproofing features to prevent the emanation of noise from the establishment. Consequently, because the roof provides the only form of physical soundproofing, the Board finds that requiring the closure of the roof when Ozio provides live entertainment is the only reasonable means of providing a modicum of soundproofing.

18. The record in this case further demonstrates that when the roof is closed this does not guarantee that noise will not be heard in Ms. Kappel's residence. *Ozio*, Board Order No. 2014-315 at ¶ 37; *supra*, at ¶ A. Similar to the tree enclosure in *Romeo & Juliet*, the record shows that the closure of the roof does not provide sufficient soundproofing. Further, Ozio demonstrated that it does not have reasonable noise mitigation practices in place to ensure compliance with § 25-725(c). *Ozio*, Board Order No. 2014-315 at ¶ 37.

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[3] The Board notes that if it credits Mr. Henning's sound level readings, then Ozio admitted that it would regularly violate the Chapter 27 by playing music at 88 dBA, because this would generate a 70 dBA reading outside the establishment when the legal limit in a commercial zone is 60 dBA. *Supra*, at ¶ C; 20 DCMR § 2799 (West Supp. 2014). Consequently, if Ozio's own sound engineer cannot promise that the establishment will comply with the law, it is difficult for the Board to conclude that Ozio has made a prima facie case of appropriateness.

19. In order to ensure compliance with § 25-725, the Board also conditions renewal on Ozio refraining from generating amplified music that may be heard in a residence. The Board finds this condition appropriate, because it achieves a result reasonably related to the Protestant's complaints, while providing Ozio the flexibility to determine the best means of satisfying the condition. Hence, the conditions focus on preventing Ozio from disturbing residents in their homes, rather than directing ABRA's enforcement resources towards noise in the streets, which is not directly harmful to residents.[4]

III. OZIO'S CONTINUED OPERATION WITHOUT CONDITIONS WILL LIKELY RESULT IN A VIOLATION OF THE DISORDERLY CONDUCT LAW BASED ON THE UNREASONABLY LOUD LATE-NIGHT NOISE THAT DISTURBS NEARBY RESIDENTS.

20. The Board finds that Ozio's continued operations without conditions will result in a likely violation of the District's disorderly conduct law.

21. The appropriateness test includes the word "order," which generally refers to "[t]he rule of law and custom or the observance of prescribed procedure." § 25-313(b)(2); WEBSTER'S II NEW COLLEGE DICTIONARY, at 771 ("order"). Further, § 400.1 permits the Board to consider "criminal activity" as part of its "peace, order, and quiet" analysis. 23 DCMR § 400.1(a). Thus, in any protest involving peace, order, and quiet, the Board may consider whether the licensee's operations will comply with the District's alcohol laws or generate criminal activity. As noted above, the Board is entitled to make reasonable conclusions regarding an establishment's future effect on the neighborhood based on the substantial evidence in the record. *Supra*, at ¶ 11.

22. Under § 25-823(1), a licensee may not violate Title 25 of the District of Columbia (D.C.) Official Code, Title 23 of the D.C. Municipal Regulations (Title 23), ". . . or any other laws of the District." D.C. Official Code § 25-823(1). Similarly, under § 25-823(2), a licensee may not ". . . allow[] the licensed establishment to be used for any unlawful or disorderly purpose." D.C. Official Code § 25-823(2). Consequently, the plain language of §§ 25-823(1) and 25-823(2) authorizes the Board to punish licensees for violating the law or permitting unlawful or disorderly conduct to occur.

23. The District's disorderly conduct law provides in § 22-1321(d) that "[i]t 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. Official Code § 22-1321(d). The Board has previously said that it will not find a licensee's noise-making activities unreasonable under the disorderly conduct law when the ". . . licensee has taken commercially reasonable steps to soundproof its establishment and is not otherwise in violation of the District

[4] The Board also finds this condition preferable because it (1) avoids unnecessary micromanagement of a licensee's operations; (2) creates a bright-line standard; (3) prevents the imposition of expensive soundproofing measures that may not address the source of the problem or address changing circumstances in the future (e.g., changes to the sound system); and (4) permits the establishment to avoid severe modifications to its license, such as a limitation of rooftop hours or the complete elimination of entertainment or amplified music privileges on the roof.

of Columbia's noise laws." *In re Krakatoa, Inc., t/a Chief Ike's Mambo Room*, Case No. 10-PRO-00160, Board Order No. 2011-205, ¶ 35 (D.C.A.B.C.B. May, 18, 2011).

24. The purpose of the disorderly conduct law was to curb "excessive loudness" that disturbs people in their homes. The Disorderly Conduct Arrest Project Subcommittee of the Council for Court Excellence, *Revising the District of Columbia Disorderly Conduct Statutes: A Report and Proposed Legislation*, 9-10 (Oct. 14, 2010) [*CCE Report*] *found in* Committee on Public Safety and Judiciary, *Report on Bill 18-425, the Disorderly Conduct Amendment Act of 2010*, Council of the District of Columbia (Nov. 18 2010).[5] Based on the specific nighttime hour limitation written into part (d), the drafters demonstrated an intent to protect the right of residents to "conduct . . . basic nighttime activities such as sleep." *In re T.L.*, 996 A.2d 805, 813 (D.C. 2010) *citing City of Marietta v. Grams*, 531 N.E.2d 1331, 1336 (O.H. 1987); *CCE Report*, at 9 n. 15.

25. In this case, Ms. Kappel reported hearing Ozio's amplified music late at night in her residence, which is located over 100 feet from the establishment. *Ozio*, Board Order No. 2014-315 at ¶ 37; *supra*, at ¶ A.

26. The record further shows that Ozio has insufficient soundproofing measures on its roof. The establishment provides live entertainment on its roof, which may or may not be enclosed when the establishment provides entertainment. *Ozio*, Board Order No. 2014-315 at ¶ 21. When the roof is open, there is no evidence in the record that Ozio has any physical soundproofing features to block the transmission of sound from the roof. The establishment had sound tests performed in 2010 and 2014, which resulted in two different maximum decibel recommendations. *Supra*, at ¶¶ B-C. Specifically, in 2010, the sound engineer recommended that the establishment not exceed 92 dBA on its roof, while in 2014, the recommendation was lowered to 88 dBA. *Id.* Based on the recent lowering of the maximum decibel recommendation, it is not surprising that Ozio has been regularly producing noise that can be heard in Ms. Kappel's residence. Further, even if Ozio had a reliable sound test performed, Ozio indicated that it does not have a reliable device or means of ensuring compliance with the sound level recommendation on an ongoing basis. *Ozio*, Board Order No. 2014-215, at ¶ 37. Based on the inconsistent sound tests conducted by Ozio and the failure of Ozio to properly manage noise from the roof, the Board finds that Ozio does not have commercially reasonable soundproofing measures in place; therefore, the late-night noise heard in Ms. Kappel's home constitutes an ongoing violation of the § 22-1321(d), because it constitutes an unreasonably loud, late-night noise that disturbs an individual in her home.

27. Ozio argues that the Board cannot consider a licensee's compliance with criminal laws as part of a protest; however, this argument is contrary to the court's opinions in *Club 99*, *4934*, and *Am-Chi. Mot. for Recon.*, at 4 n. 5.

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[5] The Committee states that it was relying on the recommendations provided by the Council for Court Excellence (CCE). Committee on Public Safety and Judiciary, *Report on Bill 18-425, the Disorderly Conduct Amendment Act of 2010*, Council of the District of Columbia, 9 (Nov. 18 2010) *also available at* http://dcclims1.dccouncil.us/images/00001/20110128161004.pdf.

28. In *Club 99*, the Board found the licensee guilty of hiring a sixteen year old to work as a nude "Go-Go" dancer in violation of the District's laws governing the employment of minors. *Club 99, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 457 A.2d 773, 774 (D.C. 1982). The petitioner argued that the Board of Education, not the Alcoholic Beverage Control Board, should enforce the child labor laws, as, at the time, the laws fell under Title 36 of the D.C. Official Code. *Id.* The court found that Title 25 permitted the Board to sanction a licensee for ". . . allow[ing] the premises . . . to be used for any unlawful . . . purposes." *Id.* Accordingly, ". . . the Board's authority to sanction a liquor licensee for violations of the D.C. Code is by statute provided for directly." *Id.* Consequently, the court upheld the Board's authority to sanction a licensee for violating the child labor laws, even though that area of the law was under the jurisdiction of another agency.[6]

29. Further, the court's precedent, in cases such as *4934* and *Am-Chi*, further show that the Board may directly sanction and adjudicate violations of §§ 25-823(1) and 25-823(2) based on criminal violations. *4934, Inc. v. Washington*, 375 A.2d 20, 23 (D.C. 1977 (saying "[i]n Am-Chi, such unlawful purpose consisted of a solicitation for prostitution a conceded violation of D.C. Code 1973, s 22-2701. Here, the Board assigned as the "unlawful" purpose, an asserted breach of s 22-2001(a)(1)(B). . ."); *see generally Am-Chi Rest., Inc. v. Simonson*, 396 F.2d 686 (D.C. Cir. 1968).

30. Therefore, the Board affirms Board Order No. 2014-315, because the facts demonstrate that Ozio's continued operation without conditions risk violating the District's disorderly conduct laws, which would have a negative impact on the neighborhood's right to "order."[7]

DISCUSSION: RESOLUTION OF MOTION

31. Separate from the above, the Board affirms Board Order No. 2014-315, because the substantial evidence in the record supports the Board's decision to impose the requirement that

[6] While the Board may have the authority to enforce laws that fall beyond the purview of Title 25, the Board strongly prefers to refer enforcement matters to the agency with primary jurisdiction. The Board notes that these types of cases are generally difficult to prosecute before the Board, because, among other issues, the burden of proof rests with the government in any enforcement action taken against a licensee. Nevertheless, this concern is not as pressing in a protest action, where the process, unlike a show cause action, is geared towards resolving neighborhood issues.

[7] Ozio's citation to *Kopff* and *Dupont Circle Citizens Association* as standing for the proposition that the Board must wait for a coordinate agency to rule or find a violation is unpersuasive and without merit. *Mot. for* Recon., 4 n.5. In this case, *Kopff* and *Dupont Circle Citizens Association* are not relevant, because the Board is not acting as a court of appeals by reversing the final decision of a coordinate agency. *Kopff v. D.C. Alcoholic Beverage Control Bd.*, 413 A.2d 152, 154 (D.C. 1980) ("The Board did not err in relying on the duly-issued certificate of occupancy. If the Board had gone behind the certificate of occupancy to ascertain whether or not it was properly issued, the Board would have been acting in effect as a court of appeals over other coordinate administrative departments."); *Dupont Circle Citizens Ass'n v. D.C. Alcoholic Beverage Control Bd.*, 766 A.2d 59, 62 (D.C. 2001) ("There, despite the fact that the intervenor had been issued a certificate of occupancy by another government agency, the petitioners asked the Board to hear evidence that the certificate should not have been issued because of alleged fire safety conditions.") The Board further notes that it is not obligated to apply the "reasonable doubt" standard, because the matter is being adjudicated as a protest subject to the burden of proof provided by Title 25. D.C. Official Code § 25-311(a); 23 DCMR § 1718.3 (West Supp. 2014); *Mot. for Recon.*, at 4 n. 5.

the establishment close its roof when providing entertainment. The Board further finds that § 25-725 does not act as a restriction on the Board's ability to determine that amplified music heard in a residence located in a commercial zone is inappropriate.

IV. THE RECORD SHOWS THAT KEEPING THE ROOF CLOSED WHEN OZIO PROVIDES ENTERTAINMENT IS A REASONABLE MEANS OF PROVIDING SOUNDPROOFING.

32. In its prior Order, the Board conditioned renewal on the establishment keeping the roof closed when Ozio provides entertainment. *Ozio*, Board Order No. 2014-315 at ¶ 40. The basis of this condition was the Board's conclusion that the establishment was generating unacceptable levels of noise and had insufficient means to control the emission of sound. *Id.* at ¶ 37. In addition to the testimony provided by Ms. Kappel, the establishment's sound engineer agreed that when the roof is open, the establishment should keep the sound level below 88 dBA; in contrast, when the roof is closed, the establishment should not have its sound level exceed 88 dBA.[8] *Tr.*, 3/19/2014 at 106.

33. Based on this testimony, the Board is entitled to conclude that the closed roof provides more sound mitigation than an open roof.[9] Consequently, because the record shows that the closure of the roof provides soundproofing, requiring its closure when entertainment is provided is a reasonable means of preventing the emission of sound from the establishment. Consequently, Ozio has no basis to argue that this condition does not flow rationally from the facts and issues in this case. *Mot. for Recon.*, at 2; *Economides v. District of Columbia Board of Zoning Adjustment*, 954 A.2d 427, 436 (D.C. 2008) *citing Draude v. District of Columbia Bd. of Zoning Adjustment,* 582 A.2d 949, 953 (D.C.1990).

V. SECTION 25-313(b)(2) COVERS THE EMANATION OF AMPLIFIED MUSIC INTO A RESIDENCE LOCATED IN A COMMERCIAL ZONE.

34. The Board affirms its finding of inappropriateness, because the record demonstrates that Ozio regularly plays amplified music in a manner that allows it to be heard in a residence over 100 feet away, which constitutes a negative impact on "quiet" under § 25-313(b)(2). *Ozio*, Board Order No. 2014-315 at ¶¶ 37, 40.

35. An agency's interpretation of a statute is governed by the two-part *Chevron* test. *Pannell-Pringle v. D.C. Dep't of Employment Servs.*, 806 A.2d 209, 211 (D.C. 2002) *citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The threshold question under *Chevron* is whether the statute is clear. *Id. citing Columbia Realty Venture v.*

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[8] In the alternative, the Board notes that even if there were no evidence in the record supporting such a conclusion, the fact that an enclosed structure provides more sound mitigation than an open structure can be reached based on common, everyday experience. The Board further notes that there is no evidence in the record suggesting that the roof contains any type of flaw or structural design that permits sound to travel through the roof without being impeded. As a result, in this case, the burden shifts to Ozio to show through substantial evidence that the condition is insufficient. *See* 23 DCMR § 400.3 (West Supp. 2014).

[9] Section 25-446.01(2) statutorily recognizes that "physical attributes" can mitigate noise heard outside the establishment. D.C. Official Code § 25-446.01(2).

District of Columbia Rental Housing Comm'n, 590 A.2d 1043, 1046 (D.C.1991). If so, then the plain language of the statute governs its interpretation. *Id.* If not, the agency must simply provide a "reasonable" interpretation of the ambiguous statute to have its interpretation upheld. *Id. citing Chevron*, 467 U.S. at 842-43.

a. The Board's interpretation falls within the commonly understood meaning of the term "quiet" found in § 25-313(b)(2).

36. The plain meaning of the term "quiet" in § 25-313(b)(2) goes beyond the scope of "noise" described in § 25-725. Section 25-313(b)(2) provides that the Board must "consider . . . [t]he effect of the establishment on peace, order, and quiet, including the noise . . . provision[] set forth in §§ 25-725 . . . ." D.C. Official Code §[] 25-313(b)(2).

37. In interpreting a statute, the words used by the statute should be given their ordinary and common meaning. *District of Columbia v. Cato Institute*, 829 A.2d 237, 240 (D.C. 2003). The definition of the term "quiet" is defined as "[m]aking little or no sound." WEBSTER'S II NEW COLLEGE DICTIONARY, 909 (2001) ("quiet"). By including the term "quiet," the drafters intended that the Board consider whether an establishment would generate little or no sound. Thus, under this standard, the Board is entitled to determine that Ozio is having a negative impact on the neighborhood's quiet, when the establishment is generating music that may be heard in a residence located over 100 feet away from the establishment; hence, the record demonstrates that Ozio consistently fails to avoid generating little or no sound. *Ozio*, Board Order No. 2014-315 ¶ 37.

b. The reference to § 25-725 in § 25-313(b)(2) is illustrative, not restrictive, based on the use of the word "including."

38. The Board further does not consider the reference to § 25-725 in § 25-313(b)(2) as a restriction on the term "quiet." D.C. Official Code § 25-313(b)(2). Section 25-313(b)(2) states that the Board must "consider . . . [t]he effect of the establishment on peace, order, and quiet, *including* the noise . . . provision[] set forth in §§ 25-725 . . . ." § 25-313(b)(2) (emphasis added).

39. In *Gholson*, the court stated, "it is generally improper to conclude that entities not specifically enumerated are excluded" when the term "include" is used in a statute. *Gholson v. U.S.*, 532 A.2d 118, 118 (D.C. 1987) (quotation and citations removed).[10]

40. The legislative history of the appropriateness standard further indicates no explicit intention on the part of the drafters to limit the term "quiet" to § 25-725.[11] Instead, the committee report on Title 25 indicates that the drafters agreed with the Board that it would be a good idea to "articulate" that the trash and litter statutes were "factors to be considered" when determining an establishment's effect on peace, order, and quiet. *Report on Bill 13-449, "the*

[10] It is not necessary for the legislature to use the phrase "but not limited to" with the word "include" to be considered illustrative or enlarging. *Gholson v. U.S.*, 532 A.2d 118, 118 (D.C. 1987).

[11] In the past, the current appropriateness test and noise statute were codified in different parts of Title 25.

Title 25, D.C. Code Enactment and Related Amendments Act of 2000, Committee on Consumer and Regulatory Affairs, Council of the District of Columbia, 115 (Nov. 20, 2000). In another part of the report, the Committee advised that the District's noise laws were based on a "reasonable man standard." *Id.* at 27 n. 5 (quotation marks removed). As a result, the Board's interpretation does not run contrary to any expressed statutory intent.

41. Contrary to the argument raised by Ozio, the court's decision in *Panutat* also supports the conclusion that the reference to § 25-725 is illustrative. *Mot. for Recon.*, 5. In that case, the court approved the Board's denial of the application, in part, because approval of the license would lead to additional disturbances from patron noise. *Panutat, LLC v. District of Columbia Alcoholic Beverage Control Board*, 75 A.3d 269, 277-78 (D.C. 2013). The court then added that the Board was entitled to rely on evidence that patrons disturbed the sleep of one resident by engaging in loud talking, playing music, and revving their engines. *Id.* at 267-77 n. 12. The applicant in that case argued that the Board could not consider patron noise, because § 25-725 excludes the ". . . noises produced by the human voice." *Id.* Nevertheless, the court rejected this argument, stating, ". . . 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." *Id.*

42. Under § 25-725, crowd noise is just as exempt as amplified music heard in a commercial zone. Specifically, in § 25-725(a), the drafters provide an exclusive list of sounds, which do not include patron noise, while, in § 25-725(b), the drafters exempted specific situations and locations from the statute's purview. *Id.* If the reference to § 25-725 in § 25-313(b)(2) were intended to be restrictive, then it would be more logical to exempt everything excluded by § 25-725 under the peace, order, and quiet test, rather than create an artificial and piecemeal exception that treats parts (a) and (b) of § 25-725 differently.

43. Consequently, the Board concludes that the reference to § 25-725 in § 25-313(b)(2) merely serves as an example of considerations, and does not act as a restriction on the Board's authority to interpret the phrase "peace, order, and quiet." Therefore, the Board affirms its decision in Board Order No. 2014-315. [12]

[12] Even if Ozio were correct that § 25-725 acts as a restriction, the Board would affirm the result in this case. It has been said that ". . . [s]tatutory provisions are to be construed not in isolation, but together with other related provisions." *Thomas v. D.C. Dep't of Employment Servs.*, 547 A.2d 1034, 1037 (D.C. 1988). Here, the appropriateness test includes the word "order," which generally refers to "[t]he rule of law and custom or the observance of prescribed procedure." WEBSTER'S II NEW COLLEGE DICTIONARY, at 771 ("order"). Thus, in any protest involving peace, order, and quiet, the Board must look at whether the establishment will comply with the District's alcohol laws. In regards to noise, besides § 25-725, § 25-823(1) makes it an offense for licensees to violate Title 25, Title 23 or ". . . any other laws of the District . . . ." § 25-823(1). Further, § 25-823(2) forbids licensees from allowing the establishment ". . . to be used for any unlawful or disorderly purpose." § 25-823(2). In light of § 25-823, the Board can also affirm its prior Order, because Ozio's continued operation risks violating the District's disorderly conduct laws, noise disturbance regulations, and § 25-725(c) as discussed in Sections I through III above, which would result in a negative impact on the neighborhood's right to peace, order, and quiet. §§ 25-313(b)(2), *supra*, at ¶¶ 2-30. Therefore, even if Ozio is correct, there is sufficient evidence in the record to sustain the Board's prior Order, albeit for different reasons.

VI. THE BOARD'S DECISION IN BOARD ORDER NO. 2014-315 IS SUPPORTED BY THE BOARD'S PRIOR PRECEDENT ON NOISE AND AMPLIFIED MUSIC.

44. Ozio's Motion further argues that the Board contradicted itself in its recent order related to the 2014 *Chi-Cha Lounge* case; however, the Board notes that this case is not final and a motion for reconsideration is still pending in that case. *See ABRA Protest File No. 13-PRO-00132.* Therefore, the Board will not address the 2014 *Chi-Cha Lounge* decision in this Order. Nevertheless, the Board affirms Board Order No. 2014-315, because it is consistent with the Board's prior precedent on noise.

45. The Council of the District of Columbia created the Alcoholic Beverage Control Board with the purpose of ". . . giv[ing] the Board a paramount role in [alcoholic beverage control] matters . . . ." *Report on Bill 13-449, the "Title 25, D.C. Code Enactment and Related Amendments Act of 2000*, Council of the District of Columbia, 2 (Nov. 20, 2000) [*Report on Bill 13-449*]. The legislature recognized ". . . that the selling of alcohol is something much more than the selling of hot dogs or shampoo," which could ". . . lead to addiction, violence, drunk driving and the creation of public nuisances." *Id.* at 3.[13] Consequently, the Council established the Board to "balance . . . the very legitimate concerns of residents . . . and . . . the legitimate needs of businesses." *Id.* at 4.

46. In enacting Title 25, the Council recognized that the interests of residents and license holders may conflict. In order to address these concerns, the Council granted standing to various individuals and entities to protest the issuance, renewal, or substantial change of a liquor license. D.C. Official Code § 25-601. The Council then invested the Board with the power to resolve these conflicts by determining whether the establishment is "appropriate" for the neighborhood. D.C. Official Code § 25-313.

47. The issue of noise enters the protest process through the "appropriateness" test. In creating the appropriateness standard, the Council required all applicants for licensure or renewal to "bear the burden of proving to the satisfaction of the Board that the establishment . . . is appropriate for the" neighborhood. D.C. Official Code §§ 25-311(a), 25-313. Specific to this case, under the appropriateness test, the Board must "consider . . . [t]he effect of the establishment on peace, order, and quiet, including the noise . . . provision[] set forth in §§ 25-725 . . . ." § 25-313(b)(2).

48. The regulations further explain that an applicant "shall present to the Board such evidence and argument as would lead a reasonable person to conclude" that "[t]he establishment

[13] While the Board could find no relevant District of Columbia case determining whether the playing of amplified music by a business constitutes a common law nuisance, other states have held that such activity may constitute a nuisance. *See e.g., Corbi v. Hendrickson*, 302 A.2d 194, 195, 197, 200 (M.D. 1973) (The Court of Appeals of Maryland affirmed the lower court's order prohibiting a nightclub from playing music that could be heard on the complainant's property, because such action constituted a nuisance); *McQuade v. Tucson Tiller Apartments, Ltd.*, 25 Ariz. App. 312, 314 (Ariz. Ct. App. Div. 2 Dec. 15, 1975) (an Arizona court upheld an injunction prohibiting a business owner from hosting large concerts that disturbed nearby apartment buildings, because such action constituted a "continuing nuisance").

will not interfere with the peace, order, and quiet of the relevant area, considering such elements as noise . . . and criminal activity." 23 DCMR § 400.1(a) (West Supp. 2014). Consequently, the Board interprets Title 25 and Title 23 as providing at least two separate areas of review when adjudicating noise cases: (1) peace, order, and quiet; and (2) § 25-725.

49. The Board's interpretation on how to address noise issues raised under § 25-313(b)(2) has undergone changes from 2010 to the present. *See Andrews v. D.C. Police & Firefighters Ret. & Relief Bd.*, 991 A.2d 763, 771 (D.C. 2010) (saying, an agency may engage in interpretive rulemaking through adjudication, ". . . because the agency is not really effecting a change in the law").

50. In 2010, the Board previously interpreted § 25-725 as precluding a finding that a licensee's establishment was inappropriate when it generated noise that could be heard in a premises hearing a commercial zone. *See e.g., Eatonville, Inc., t/a Eatonville*, Case No. 10-PRO-00082, Board Order No. 2010-538, ¶ 6 (D.C.A.B.C.B. Oct. 27, 2010).

51. Nevertheless, a year later, the Board explicitly rejected this interpretation after the Council of the District of Columbia revised the city's disorderly conduct law. *In re 3313 11th Hospitality, LLC, t/a To Be Determined*, Case No. 10-PRO-00139, Board Order No. 2011-170, ¶ 59 (D.C.A.B.C.B. Apr. 20, 2011). The Board announced this new interpretation in *3313*, stating,

> In the past, the Board has not been persuaded by arguments that an establishment will disturb residents in commercial zones by creating noise, because D.C. Code § 25-725 . . . provides ABC-licensed establishments in commercial zones broad exemptions to the noise prohibitions contained in the ABC laws . . . . However, this strict approach [is] no longer . . . warranted given recent changes to the . . . disorderly conduct laws."

Id. at ¶ 58. The Board further explained that ". . . it now has a duty to consider the impact of noise on a neighborhood, even if such noise is exempted by § 25-725, because creating unreasonably loud noises after 10:00 p.m. is now deemed disorderly conduct" and enforceable by the Board under D.C. Official Code § 25-823(2). *Id.* In *3313*, the Board then went on to determine that a wall shared with a resident was not properly soundproofed. *Id.* at ¶ 60. Based on this conclusion, the Board ordered the licensee to hire the services of a sound engineer and engage in "commercially reasonable soundproofing." *In re 3313 11th Hospitality, LLC, t/a To Be Determined*, Case No. 10-PRO-00139, Board Order No. 2011-170, ¶¶ 60, 61 (D.C.A.B.C.B. Apr. 20, 2011).

52. In the 2011 *Chi-Cha Lounge* case, the protestant heard noise from licensee's establishment in his condominium located in a C-2-A zone and above the licensee's premises. *In re 1624 U Street, Inc., t/a Chi-Cha Lounge*, Case No. 10-PRO-00156, Board Order No. 2011-214, ¶¶ 4, 28 (D.C.A.B.C.B. May 25, 2011).[14] The facts further demonstrated that the licensee engaged in extensive soundproofing, which included (1) the installation of gypsum board on the walls; (2) the installation of a sound limiter; (3) the filling of physical cavities located in the building with denim and rubber; (4) the removal and redirection of speakers; (5) the

[14] The Board emphasizes that this citation is to a prior case involving Chi-Cha Lounge, which is not the case referenced by Ozio in its Motion.

soundproofing of all of the establishment's air conditioning vents; and (6) the establishment's management committed to testing the sound level generated by the establishment on an hourly basis. *Id.* at ¶¶ 10, 13, 14, 15. Additionally, one of the protestant's relatives prevented the establishment from completing all of tasks recommended by the sound engineer. *Id.* at ¶ 11. There was also no evidence in the record that the establishment was playing amplified music outside the establishment. *See generally In re 1624 U Street, Inc., t/a Chi-Cha Lounge,* Board Order No. 2011-214.

53. In resolving the protest, the Board found that this did not violate § 25-725. The Board then analyzed the facts under the District's disorderly conduct law. *Id.* at 30. The Board reasoned that "noise generated by an establishment cannot be 'unreasonable' if a licensee has taken commercially reasonable steps to soundproof its establishment and is not otherwise in violation of the District of Columbia's noise laws." *Id.* at ¶ 31. There, the applicant was not deemed at risk of violating the disorderly conduct law, because the applicant attempted to comply with its sound engineer's recommendations, but could not execute all of the recommendations based on the actions of the protestant's relative. *Id.* at ¶ 32. Therefore, the Board renewed the license without conditions, because the applicant took "commercially reasonable steps to soundproof its premises." *Id.*

54. Using the test expounded in the 2011 *Chi-Cha Lounge* case, the Board determined in *Muse* that the licensee's amplified music was having a negative impact on peace, order, and quiet. *In re Zhou Hospitality, t/a Muse Nightclub and Lounge*, Case No. 10-PRO-00155, ¶ 22 (D.C.A.B.C.B. Aug. 3, 2011). There, the Board found that bass sounds from the establishment were vibrating abutting condominiums. *Id.* at ¶ 25. The Board further found that the establishment's soundproofing efforts were inadequate and failed to cover the floor, walls, and ceiling of the premises. *Id.* at ¶ 26. Based on these findings the Board imposed a number of conditions on the licensee, including the hiring a sound engineer to perform an analysis, and preventing the playing of music on the third floor. *Id.* at ¶ 27, pg. 8.

55. On September 13, 2013, the District of Columbia Court of Appeals issued its order in the *Panutat* case. *Panutat, LLC, t/a District of Columbia Alcoholic Beverage Control Bd.*, 75 A.3d 269, 269 (D.C. 2013) (citing the caption). In that case, the court approved the Board's denial of the application, in part, because approval of the license would lead additional disturbances from patron noise. *Panutat, LLC, t/a District of Columbia Alcoholic Beverage Control Bd.*, 75 A.3d 269, 277 (D.C. 2013). The court then added that the Board was entitled to rely on evidence that patrons disturbed the sleep of one resident, engaged in loud talking, playing music, and revving their engines. *Id.* at 267-77 n. 12. The applicant in that case attempted to argue that the Board could not consider patron noise, because § 25-725 excludes the ". . . noises produced by the human voice." *Id.* Nevertheless, the court rejected this argument, stating, ". . . 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." *Id.*

56. Before *Panutat*, the Board relied on the disorderly conduct statute as justification for departing from an interpretation of § 25-313(b)(2) that required the Board to solely view noise in the context of § 25-725. After *Panutat*, the Board has relied on the court's reasoning to justify

treating the "peace, order, and quiet" factor criteria as broader than both § 25-725 and the disorderly conduct law.[15]

57. For example, in a series of protest cases regarding noise and sidewalk cafes, the Board stopped referring to the disorderly conduct statute, and referred exclusively to *Panutat* to justify the Board's authority when resolving noise issues. *See e.g., In re 301 Romeo, LLC, t/a Romeo & Juliet*, Case No. 13-PRO-00136, Board Order No. 2014-045, ¶ 44 (D.C.A.B.C.B. Jan. 29, 2014); *In re 1001 H Street, LLC, t/a Ben's Chile Bowl/Ben's Upstairs*, Case No. 13-PRO-00133, Board Order No. 2014-071, ¶ 41 (D.C.A.B.C.B. Mar. 12, 2014).

58. Post-*Panutat* the Board has also found that an establishment's amplified music may have a negative effect on a neighborhood's peace, order, and quiet. For example, two months after the court decided *Panutat*, in *Riverfront*, the Board examined whether the applicant would take appropriate measures to control noise at the establishment. *Riverfront*, Board Order No. 2013-512 at ¶ 42. Solely citing *Panutat*, the Board found that the establishment's efforts to curb noise by facing its speakers towards the river were inadequate to prevent the transmission of amplified music into the neighborhood *Id.* These efforts were deemed inadequate, because the amplified music from other establishments could be heard reverberating throughout the neighborhood and the premises, as an undeveloped lot, had no soundproofing features whatsoever. *Id.* at ¶¶ 30, 33, 43. Consequently, the Board denied the application, because the applicant could not demonstrate that it could control the transmission of amplified music. *Id.* at ¶¶ 38, 43, 50; *see also Clover Capitol Hill, LLC, t/a Tortilla Coast*, Case No. 13-PRO-00165, Board Order No. 2014-256, ¶ 17 (D.C.A.B.C.B. Jun. 18, 2014) (conditioning approval of the application on the establishment keeping its windows and doors closed when the establishment provides live entertainment in order to avoid the generation of unreasonable noise).

59. Consequently, this precedent supports the Board's interpretation of § 25-313(b)(2); whereby, the mere fact that the residence where an establishment's music is heard is located in a commercial zone does bar a finding of inappropriateness. This is especially true in this case where (1) the establishment is playing music on a roof that lacks soundproofing; (2) the establishment's management has failed to take reasonable steps to control the emission of noise from the roof; and (3) the noise may be heard late at night in a residence located approximately 100 feet from the establishment. *Ozio*, Board Order No. 2014-315, at ¶ 37; *supra*, at ¶ 17. Based on this reasoning, the Board concludes that it has the authority to find Ozio's conduct unreasonable on its face, and therefore, inappropriate under § 25-313.

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[15] The Board specifically cited its disorderly conduct-related reasoning in its order denying the motion for reconsideration in the *Panutat* case before it went up for appeal. *In re Panutat, LLC, t/a Sanctuary 21*, Case No. 10-PRO-0003, Board Order No. 2012-099, 5 (D.C.A.B.C.B Mar. 28, 2012) (see point 5). Nevertheless, the court did not cite the disorderly conduct law when it interpreted the Board's authority to resolve noise issues during a protest; as a result, the Board finds no compelling reason to continue limiting the term "quiet" found in § 25-313(b)(2) to the scope of the disorderly conduct law. *Panutat, LLC v. District of Columbia Alcoholic Beverage Control Bd.*, 75 A.3d 269, 276-77 n. 12 (D.C. 2013). Finally, as a matter of policy, the Board finds that this interpretation provides a more appropriate balance between the reasonable expectations of residents and businesses and more closely aligns the appropriateness test with current District law regarding noise. *See Draude v. D.C. Bd. of Zoning Adjustment*, 527 A.2d 1242, 1253 (D.C. 1987) (saying "[i]n order to ensure that all whose claims the agency adjudicates receive fair and equal treatment, however, the agency must explain and justify its change of mind or its use of a different standard from one situation to the next."); *supra*, at ¶ 45; 20 DCMR § 2700.14 (West Supp. 2014).

VII. EVEN IF LEGAL, OZIO'S LAWFUL CONDUCT MAY BE DEEMED INAPPROPRIATE BECAUSE IT HAS A NEGATIVE IMPACT ON "QUIET" UNDER § 25-313(b)(2).

60. Ozio further argues that lawful conduct cannot be used to justify a determination that an establishment's operations are inappropriate; therefore, Ozio argues that the mere fact that it complies with § 25-725 should be determinative. *Mot. for Recon.*, 3. This is incorrect. The case law of the District of Columbia Court of Appeals shows that under the appropriateness test, legal behavior may be deemed inappropriate when the evidence supports a finding that the behavior causes or reasonably will cause illegal activity or other inappropriate effects on the neighborhood. Therefore, regardless of whether Ozio complies with § 25-725, the Board is entitled to find Ozio inappropriate when the record shows that its rooftop entertainment activities negatively impact the neighborhood's "quiet."

a. Case law shows that the Board may deem legal conduct inappropriate when the record supports a finding that the licensee's lawful practice creates an inappropriate effect on the neighborhood or otherwise encourages illegal activity.

61. Under § 25-313, the appropriateness test focuses on the "[t]he effect of" the establishment on the neighborhood. D.C. Official Code §§ 25-313(b)(1)-(3).

62. In *LCP*, the Board concluded that a licensee's plumbing and bathroom facilities could not accommodate the establishment's patrons. *LCP, Inc., v. District of Columbia Alcoholic Beverage Control Bd.*, 499 A.2d 897, 904 n. 8 (D.C. 1985). The Board also concluded that the establishment's patrons engaged in public urination on several occasions. *Id.* at 899-900. The licensee argued that the Board could not find the establishment's plumbing facilities inadequate, because the licensee unquestionably complied with the "applicable zoning regulations." *Id.* Nevertheless, the court stated that the mere fact that the licensee complied with the zoning regulations could not ". . . undercut the Board's finding that [the] plumbing facilities were inadequate . . . ." *Id.*; *see also Am-Chi Rest., Inc. v. Simonson*, 396 F.2d 686, 688 (D.C. Cir. 1968) (saying licensee may be held responsible for a "method of operation" that may lead to "mischievous consequences sooner or later").

63. In contrast, in *Upper Georgia*, the court upheld the Board's finding "the dancing was not illegal under applicable zoning regulations, and therefore it could not be used as a basis for finding the location inappropriate." *Upper Georgia Ave. Planning Comm. v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 992 (D.C. 1985) (footnote removed).

64. If the Board interprets *Upper Georgia* as standing for the principle that legal activity cannot form the basis for a finding of inappropriateness, then this would create a conflict between the court's reasoning in *Upper Georgia* and *LCP*—where in one case compliance with the zoning regulations satisfied the appropriateness test, while in the other it was not. A better interpretation of these two cases, which avoids a conflict, is as follows: the failure to have sufficient bathrooms encourages the inappropriate harm of public urination, as was the case in

LCP, while lawful nude dancing is not inappropriate, because it does not result in harm to the neighborhood, as was the case in *Upper Georgia*. Thus, reading *LCP* and *Upper Georgia* together, the Board has the authority to deem legal conduct inappropriate when the record supports a finding that the licensee's lawful practice creates the risk of an inappropriate effect on the neighborhood or otherwise encourages illegal activity.[16]

65. This point is further emphasized by the fact that Title 25's appropriateness criteria, references considerations that do not depend on the legality of a licensee's conduct. For example, a licensee does not need to engage in illegal behavior to have a negative effect on "real property values"; "residential parking needs"; or unduly attracting school-age children. D.C. Official Code §§ 25-313, 25-315. Similarly, the Board does not interpret the phrase "peace, order, and quiet" as limited to illegal conduct. § 25-313(b)(2).

66. In light of this reasoning, Ozio's compliance with § 25-725 does not render the establishment appropriate as a matter of law. Here, the record demonstrated that Ozio does not have sufficient soundproofing features or noise mitigation practices to manage the playing of amplified music on its roof. *Supra*, at ¶¶ 16-17. The record further demonstrated that Ozio's amplified music may be heard in a commercially zoned residence located over 100 feet away from the establishment. *Ozio*, Board Order No. 2014-315, ¶¶ 34, 37. While this practice may be legal under § 25-725, as discussed above in Sections V and VI, this violates the "quiet" criteria contained in § 25-313(b)(2). §§ 25-313(b)(2), 25-725(b)(3).

67. Separately, the mere fact that Ozio's behavior is legal under § 25-725, does not prevent the establishment from engaging in a practice that violates or creates the reasonable risk that Ozio will violate its settlement agreement, § 25-725(c), the disorderly conduct law, or the noise disturbance standard, as the Board found in Section I, II, and III above. D.C. Official Code § 22-1321(d) (disorderly conduct), 20 DCMR §§ 2700.3, 2799.14, 2799, 2800.1-2800.2 (noise disturbance); *Supra*, at ¶¶ 2-8, 10-19.

68. Therefore, the mere fact that Ozio's operations may not constitute a violation of § 25-725, does not prevent the Board from finding such behavior inappropriate when Ozio's legal practice creates the risk of an inappropriate effect on the neighborhood or otherwise encourages illegal activity, as is shown by the record in this case.

VIII. THE CONDITIONS IMPOSED BY THE BOARD CURE THE INAPPROPRIATE IMPACT OF THE ESTABLISHMENT.

69. The Board affirms the conditions imposed in Board Order No. 2014-315, because they ensure that the establishment operates in an appropriate manner, which is in the best interest of the neighborhood.

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[16] *Gerber* is an example of this principle. *Gerber v. D.C. Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1195-96 (D.C. 1985) (the court found finding of inappropriateness reasonable where, in part, the ". . . applicant "ha[d] not indicated that [he] would take any special precautions to prevent the sale of alcoholic beverages to underage school children").

70. Under § 25-104(e), ""[t]he 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 [neighborhood] . . . where the licensed establishment is to be located. D.C. Official Code § 25-104(e). Among other purposes, the Board uses conditions to address ". . . valid concerns regarding appropriateness that may be fixed through the imposition of specific operations limits or requirements on the license." *Riverfront*, Board Order No. 2013-512 at ¶ 49. Consequently, in light of this authority and the harms identified above, Ozio's argument that the Board's imposition of conditions exceeds the scope of its statutory powers is without merit in light of § 25-104(e) and the Board's finding of inappropriateness.[17] *Mot. for Recon.*, 3.

ORDER

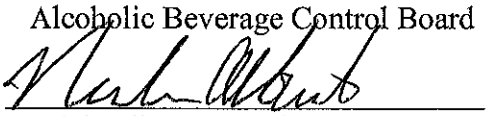
Therefore, the Board, on this 1st day of October 2014, hereby **DENIES** the Motion for Reconsideration filed by 19th and K, Inc., t/a Ozio Martini & Cigar Lounge.

IT IS FURTHER ORDERED that the attached order shall constitute the final version of Board Order 2014-315. The new Order solely contains clerical corrections and is not intended to change the substance of the original Order.[18]

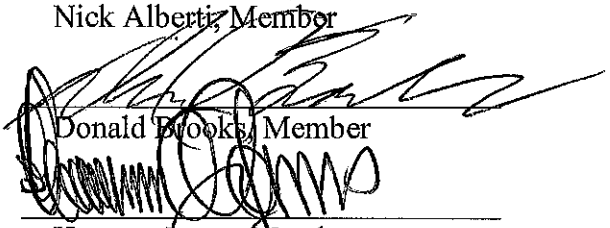
[17] In its Motion, Ozio also appears to imply that *Palace Restaurant* stands for the principle that the Board ". . . cannot create new standards" and then summarized the case saying that the Board was reversed, because it ". . . employed [the] previously unknown 'uniqueness' test." *Mot. for Recon.*, 4. Yet, in that case, the court ordered a remand, because the parties were not on notice that the Board would consider "uniqueness;" therefore, the court remanded the case so that the parties could be heard on the issue of ". . . whether uniqueness is a proper criterion under the applicable statute, and if so, to submit evidence on that issue." *Palace Rest., Inc. v. Alcoholic Beverage Control Bd.*, 271 A.2d 561, 561-62 (D.C. 1970) (footnote removed). In footnote 4 of the court's decision, the court then stated, "[w]e do not now decide whether uniqueness of the establishment is a permissible criterion." *Id.* at 562 n. 4; *Jameson's Liquors, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 384 A.2d 412, 417 n. 4 (D.C. 1978) ("In Palace Restaurant, the court did not reach the question whether the "unique or unusual" criterion was valid . . ."). Based on the record in this case, the Board does not believe Ozio can claim surprise that the emanation of its amplified music into the neighborhood would be the focus of the hearing; as a result, Ozio's citation to *Palace Restaurant* is misplaced.

[18] The following edits have been made to the Order: (1) the words "the" and "below" is added to the first sentence of the Order; (2) the page numbers have been added to the Order; (3) the word "violation" is now spelled properly in the last sentence of paragraph 35; (4) the footnotes are renumbered; (5) a comma is deleted from the quote in paragraph 30; and (6) the "--" in the second sentence of footnote 4 (previously numbered 3) is replaced with a "—."

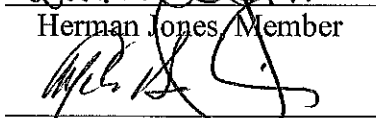
District of Columbia
Alcoholic Beverage Control Board



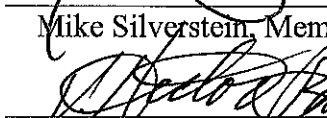
Nick Alberti, Member



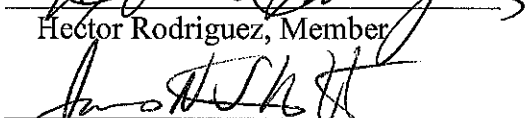
Donald Brooks, Member



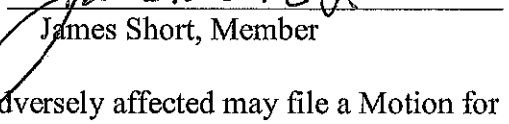
Herman Jones, Member



Mike Silverstein, Member



Hector Rodriguez, Member



James Short, Member

Pursuant to 23 DCMR § 1719.1, any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, Reeves Center, 2000 14th Street, NW, 400S, Washington, D.C. 20009.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, 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).

BOARD ORDER NO. 2014-315 (CORRECTED)

THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
19th and K, Inc. t/a Ozio Martini & Cigar Lounge	Case No.: License No: Order No:	13-PRO-00151 089394 2014-315
Application to Renew a Retailer's Class CN License		
at premises 1813 M Street, N.W. Washington, D.C. 20036		

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

ALSO PRESENT: 19th and K, Inc., t/a Ozio Martini & Cigar Lounge, Applicant

Michael Fonseca, on behalf of the Applicant

Sarah Peck, on behalf of a Group of Five or More Residents or Property Owners, Protestants

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

INTRODUCTION[1]

The Alcoholic Beverage Control Board hereby approves the Application to Renew a CN License filed by 19th and K, Inc., t/a Ozio Martini & Cigar Lounge, (hereinafter "Applicant" or

[1] This version of Board Order No. 2014-315 contains the clerical changes described in Board Order No. 2014-366.

"Ozio Martini & Cigar Lounge") subject to the conditions described below, which the Board imposes based on the establishment's failure to control noise emanating from its roof.

Procedural Background

The Notice of Public Hearing advertising Ozio's Application was posted on September 27, 2013, and informed the public that objections to the Application could be filed on or before November 11, 2012. *ABRA Protest File No. 13-PRO-00151*, Notice of Public Hearing [*Notice of Public Hearing*]. The Alcoholic Beverage Regulation Administration (ABRA) received a protest petition a Group of Five or More Residents or Property Owners, represented by Sarah Peck and Abigail Nichols (Protestant). *ABRA Protest File No. 13-PRO-00151*, Roll Call Hearing Results.

The parties came before the Board's Agent for a Roll Call Hearing on November 25, 2013, where the Protestant was granted standing to protest the Application. On January 22, 2014, the parties came before the Board for a Protest Status Hearing. Finally, the Protest Hearing in this matter occurred on March 19, 2014. Both parties filed Proposed Findings of Fact and Conclusions of Law.

The Board recognizes that an Advisory Neighborhood Commission's (ANC) 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 (D.C. 1982); D.C. Code §§ 1-309.10(d); 25-609 (West Supp. 2012). 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 has not received a written recommendation from any ANC regarding the Application.

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 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. 2014).

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. Testimony of ABRA Investigator Felicia Dantzler

1. Ozio Martini & Cigar Loungehas submitted an Application to Renew a Retailer's Class CN License at 1813 M Street, N.W., Washington, D.C. *Notice of Public Hearing.*

2. Alcoholic Beverage Regulation Administration (ABRA) Investigator Felicia Dantzler investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 13-PRO-00151*, Protest Report (Mar. 2014) [*Protest Report*].

3. The proposed establishment is located in the Golden Triangle neighborhood and sits in a DC/C-3-C commercial zone. *Protest Report*, at 3. At least, fifty-eight licenses have been issued within 1,200 feet of the establishment. Id. at 3-6. There are least thirty-four restaurants, four nightclubs, nine taverns, one club, and one establishment holding a Retailer's Class DR license. Id. at 3. There are no schools, recreation centers, public libraries, or day care centers located within 400 feet of the establishment. Id. at Exhibit 2.

4. According to the public notice, Ozio Martini & Cigar Lounge's hours of operation are as follows: 10:00 a.m. to 2:00 a.m., Sunday through Thursday, and 10:00 a.m. to 3:00 a.m. on Friday and Saturday. *Notice of Public Hearing.* The establishment has hours of alcoholic beverage sales, service, and consumption which 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 also operates a sidewalk café and summer garden. Id. The sidewalk café operates until 11:00 p.m. during the week, except for Sundays. Id. The summer garden operates until 2:00 a.m. during the week and 3:00 a.m. during the weekend. Id.

5. Investigator Dantzler monitored the establishment on February 28, 2014 around 11:00 p.m.; on March 1, 2014, around 11:45 p.m.; on March 14, 2014, around midnight; and on March 15, 2014, around midnight. *Protest Report*, 9. During these visits, the investigator heard music from Ozio's rooftop summer garden as she stood behind the building, even though there was a large industrial fan present. Id. She could hear music from another establishment as well. Id.

6. The establishment's investigative history shows that it has been convicted of one primary tier violation, one secondary tier violation and one unlisted violation in the period between 2010 and 2013. Id. at 10-11.

II. Commissioner Kevin O'Conner

7. Advisory Neighborhood Commissioner (ANC) Kevin O'Conner serves as the representative of ANC 2B02 and Chairperson of the ANC's ABRA policy committee. *Tr.*, March 19, 2014 at 61. Mr. O'Conner is aware that Ozio hired a professional sound engineer to conduct sound measurements. Id. at 63. The ANC does not believe the establishment has been in violation of its settlement agreement. Id. at 69.

III. Gerald Henning

8. Gerald Henning serves as an acoustical engineer. Id. at 85. He drafted the sound report for Ozio and conducted tests at the establishment in 2010. *Applicant's Exhibit No. 1*; *Tr.*, 5/19/14 at 87-88. The tests involved multiple measurements under various conditions. Id.

9. The test involved sound level measurements in Units 13 and 20 at the Jefferson Row Condominiums, as well as the building's terrace. Id. at 88, 120. Unit 20 is located on the north side of the building, while Unit 13 is located adjacent to the alley that runs behind Ozio. Id. at 120. The terrace had a view of Ozio. Id. at 121. The report documents the decibels (dBA) under three conditions at the establishment: with the roof open, with the roof half open, and with the roof closed while playing music. Id. at 91; *Applicant's Exhibit No. 1, 4.* He noted that when

the establishment played music at around 92 dBA, the noise generated by Ozio could not be heard at the test locations and met the requirements of D.C. law. Id. at 91-92, 95.

10. He noted that he used a Type 1 meter during his test. Id. at 97. A Type 1 meter is more precise than a Type 2 meter, which is used by the District of Columbia to measure sound. Id. at 97.

11. Mr. Henning admitted that in 2010 he could hear music in Units 13 or 20 while he conducted the test. Id. at 166. Yet, he noted that he could not tell where the music was coming from while inside the building. Id. He noted that when he stood on the terrace he could tell that the sound was coming from Ozio. Id.

12. Mr. Henning conducted additional sound readings before the current protest, which involved the establishment playing music from its rooftop area. Id. at 100, 103. He stood at both the back and front of the building, approximately three to four feet from the building, in order to take sound measurements. Id. at 100. He also took measurements from inside the establishment and determined a baseline reading from measurements taken in the afternoon. Id. at 101.

13. Mr. Henning found that the baseline reading in front of the establishment was 68 dBA and the baseline reading in the back of the establishment was 60 dBA. Id. When Mr. Henning had Ozio play music from the roof, he measured a sound reading of 68 dBA in front of the establishment and a sound reading of 64 dBA in the rear of the establishment with the roof closed. Id. at 104. He noted that when he took these measurements he could not hear music from the establishment, but rather, only heard noise from traffic. Id. As a result, the 68 dBA measurement he took represented the ambient sound level of the area. Id. Nevertheless, he admitted that he could hear Ozio's music play in the rear of the establishment when he took the measurement in the rear of the establishment. Id. at 105. Mr. Henning also took measurements with the roof open. Id. Under these conditions, he found that the establishment generated a sound reading of 70 dBA. Id. He did not take a measurement in the front of the establishment. Id. Mr. Henning concluded that when Ozio plays music on the roof, it should keep the source of the music at 88 dBA with the roof closed, and less than that with the roof open. Id. at 106.

IV. Sall Abdoulaye

14. Sall Abdoulaye serves as the general manager of Ozio. Id. at 176. Ozio's rooftop has a separate disc jockey area with a distinct sound system. Id. at 195-96.

15. Mr. Abdoulaye was present at the establishment when Mr. Henning conducted the sound test in 2010. Id. at 176-77. He noted that the tests were conducted partly in response to complaints by nearby residents. Id. at 179. In 2011, the establishment received a number of complaints from one person. Id. at 187. In 2012, the establishment received one noise complaint. Id. In 2013, the establishment received no complaints from residents. Id. at 187.

16. He noted that a resident complained about hearing music generated by the establishment on February 20, 2014. Id. In response, the establishment turned down the music. Id. at 181. He

admitted that on that day disturbing noise came from Ozio. Id. at 181-82. He attributed the disturbance to a band using its own sound equipment. Id. at 182; see also id. at 237.

17. Mr. Abdoulaye has heard music from other establishments in the neighborhood on Ozio's roof during his operating hours. Id. at 182. He attributed the noise in the neighborhood to the Eighteenth Street Lounge. Id. at 183.

18. Mr. Abdoulaye uses an "app" to determine the sound level generated by the establishment's roof. Id. at 188, 206. He admitted that the app is not accurate, but it is used to determine whether the establishment is complying with the sound engineer's recommendations. Id. at 190, 198-99. Ozio attempts to play music on the roof at 88 dBA, regardless of whether the roof is open or closed. Id. at 221.

V. Steven Christacos

19. Steven Christacos serves as the Vice President of Ozio. Id. at 227. The establishment's sound system has a computerized sound limiter. Id. at 231, 280. The limiter may only be accessed by a "sound person." Id. at 231, 265, 283. He believes that the sound system of the roof is set to generate sounds below 88 dBA. Id. at 232, 269-70.

VI. Anne Kappel

20. Anne Kappel lives at the Jefferson Row Condominium in Unit 20. Id. at 298. Ms. Kappel's unit contains the rooftop terrace where Mr. Henning conducted his tests. Id. at 308. She currently serves as her building's vice president. Id. at 299. She negotiated a settlement agreement with Ozio in 2011. Id. at 307-08.[2]

21. Between May 2011 and September 2011, a number of residents complained about noise coming from Ozio. Id. at 307. Ms. Kappel has heard noise coming from Ozio's roof when the roof is open or closed. Id. at 318, 322, 344-46. She further confirmed that she hears music from other establishments in her apartment. Id. at 323. Finally, she estimates that her residence is located between 100 and 150 feet away from Ozio. Id. at 315.

VII. Carl Nelson

22. Carl Nelson lives at the Palladium Condominium, which is located on the 1300 block of 18th Street, N.W. Id. at 355. Mr. Nelson's has observed noise in his bedroom. Id. at 432. In response, he invested $4,500 in a set of laminated glass storm doors that provide extra noise protection. Id. at 432-33. He admitted that his property values have risen. Id. at 432.

23. Mr. Nelson used a noise meter to take sound measurements in the neighborhood. Id. at 356-57. Mr. Nelson conducted sound readings near Ozio. Id. at 358. He specifically took readings in the driveway behind Ozio near the establishment's eastern wall on six occasions. Id.

[2] The Board advises the parties that the process by which Ozio and other parties negotiated a settlement agreement is not relevant to these proceedings. Id. at 305-06.

at 367. He generally found that readings conducted at this location were in the 70 to 77 dB(A) range after 10:00 p.m. *Protestant's Exhibit H (Corrected).*

24. Mr. Nelson took a sound reading on the Jefferson Row Terrace on March 9, 2014 at 12:45 a.m. *Tr.*, 3/19/14 at 384. While on the terrace, he heard music from Ozio. Id. at 379. The noise meter Mr. Nelson had in his possession indicated a reading of 68 dB(A) to 73 dB(A). Id. He did not observe noise coming from the front of Ozio while he was conducting readings. Id.

25. Mr. Nelson admitted he could "make no claim about the source of any of the noise" during his sound readings. Id. at 388, 426.[3]

VIII. Abigail Nichols

26. Abigail Nichols lives at the Palladium Condominium. Id. at 437. She has observed a lot of noise in her apartment that makes her windows shake. Id. at 437-38. On one occasion, when Ms. Nichols was disturbed by noise, she went outside and observed that the sound came from another establishment. Id. at 438.

CONCLUSIONS OF LAW

27. The Board may approve an Application to Renew a Retailer's Class CN License when the proposed establishment will not have an adverse impact on area located within 1,200 feet of the establishment. D.C. Official Code §§ 25-104, 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2014). Specifically, the question in this matter is whether the Application will have a negative impact on the peace, order, and quiet 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. 2014).

I. THE BOARD GIVES MINIMAL WEIGHT TO THE SOUND METER READINGS SUBMITTED BY BOTH PARTIES.

28. Before delving into the merits of the protest issues, the Board resolves the issue of the credibility and weight given to the noise meter readings submitted by both parties. Section 2700.7 of Chapter 27 of Title 20 of the D.C. Municipal Regulations requires sound levels to be tested in accordance with the "test procedures to be used for measuring sound levels to determine compliance with Chapters 27 and 28 . . . ." 20 DCMR §§ 2700.7. Section 2700.20 further provides that

> Noise levels under the Act may be measured by any official designated by the Mayor or by any person who is a qualified acoustical engineer who holds a certificate of registration as a professional engineer issued by the District. The measurements shall be admissible as evidence in any civil, criminal, or administrative proceeding relating to the enforcement of any provision of the Act.

[3] The Board accepted the protestant's video of the establishment into the record. The Board notes that it merely considers the video supportive of the testimony of other witnesses regarding noise from the establishment. *Protestant's Exhibit B.*

20 DCMR § 2700.20 (West Supp. 2014). The Board interprets § 2700.7 as requiring all sound measurements to comport with the testing procedures created in accordance with Chapter 27 in order to find a violation of Chapter 27. Furthermore, the Board interprets § 2700.20 as only allowing the Board to deem measurements taken by a government official or "qualified acoustical engineer" sufficient to determine whether a licensee is in violation of Chapter 27.[4] The testing procedures are discussed in Chapter 29 of Title 20 of the DCMR. 20 DCMR § 2900 *et seq.* (West Supp. 2014).

29. In this case, neither party established that either Mr. Henning or Mr. Nelson were "qualified acoustical engineer[s] [that] hold[] a certificate of registration as a professional engineer issued by the District."[5] § 2700.20. As a result, the Board cannot accept any of the measurements as proof that Ozio is in violation of Chapter 27. The Board is also not convinced that the parties established that the sound tests conducted by each side comply with the extensive testing procedures outlined in Chapter 29. See e.g., 20 DCMR §§ 1900.1.2 (requiring annual qualification of the noise meter), 2902.1 (requiring battery checks before and after tests), 2903.1(a), 2903.2(a) (requiring a wind screen), 2906.2 (creating specific reporting requirements). Consequently, the Board solely relies on the measurements insofar as they bolster the credibility of witnesses testifying that they heard noise at a specific location and shows that Ozio attempted to take steps to mitigate the noise generated by the establishment.

II. THE BOARD FINDS THE APPLICATION FILED BY OZIO INAPPROPRIATE DUE TO THE DISTURBING NOISE GENERATED BY THE ESTABLISHMENT.

30. 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. 2014).

31. During the hearing, the parties focused extensively on whether Ozio was generating too much noise. "In determining the appropriateness of an establishment, the Board shall consider all relevant evidence of record, including: . . . The effect of the establishment on peace, order, and quiet, including the noise . . . provisions set forth in [§ 25-725]." D.C. Official Code § 25-313(b)(2); see also D.C. Official Code §§ 25-101(35A), 25-314(a)(4).

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[4] The Nichols Group argues that § 2700.20 is permissive; however, the Board is not persuaded by this interpretation *Protestant's Proposed Findings of Fact and Conclusions of Law*, 8 n. 6. The second sentence of § 2700.20 shows that the drafters of the regulation strongly preferred--if not required—that sound measurements used in administrative proceedings comply with the testing procedures described in the regulations. *Protestant's Proposed Findings of Fact and Conclusions of Law*, 8 n. 6. If the Board were to rely on measurements that did not follow the testing procedures described in the statute, the Board risks relying on measurements that may not be technically or scientifically sound.

[5] In this case, it is likely that Mr. Henning has such a certificate but Ozio did not submit it to the Board. Therefore, based on the record before the Board, the Board cannot use Mr. Henning's measurements to determine if Ozio is in violation of Chapter 27.

a. The record does not show that Ozio's operations do not violate § 25-725(a).

33. Under § 25-725(a) an on-premise license holder (e.g., restaurant, tavern, or nightclub) cannot "produce any sound, noise, or music . . . that . . . *may be heard in any premises* other than the licensed establishment by the use of any . . ." instrument, mechanical device, or other device used to amplify sound. § 25-725(a), (a)(1)-(a)(3) (emphasis added). The language used by § 25-725(a) excludes the unamplified human voice from this prohibition; therefore, noise generated by patron voices (e.g., loud talking, laughing, or yelling) does not constitute a violation of § 25-725(a). Furthermore, § 25-725(b) provides specific exceptions for noise generated by the licensee that is heard (1) in the same building as the licensee; (2) a building owned by the licensee that abuts the establishment; or (3) a premise located in a C-1, C-2, C-3, C-4 C-M, or M zone. § 25-725(b), (b)(1)-(b)(3). Section 25-725(b) also exempts noises caused by the occasional opening of doors for the purpose of entering or exiting the establishment, as well as noise generated by heating, ventilation, and air conditioners. § 25-725(b), (b)(4)-(b)(5).

34. The Board credits Ms. Kappel's testimony that she hears the establishment's music in her residence. Supra at ¶ 21. Nevertheless, the Jefferson Row Condominium is located in a commercial zone. *Protestant's Proposed Findings of Fact and Conclusions of Law*, ¶ 2. Therefore, the noise Ms. Kappel hears does not constitute a violation under § 25-725(a). § 25-725(a)-(b).

35. The Board also finds that neither Mr. Nelson or Ms. Nichols could identify Ozio as the source of the noise heard in the apartment. Supra, at ¶¶ 22, 26; *Applicant's Proposed Findings of Fact and Conclusions of Law*, ¶ 9. Therefore, the Board cannot find that Ozio is causing any violations of § 25-725(a) at the Palladium.

a. The Board agrees with the Nichols Group that the establishment is generating too much disturbing noise under § 25-313(b)(2).

36. In Panutat, the court advised that § 25-313(b)(2) permits the Board to consider noise beyond the scope of § 25-725. Panutat, LLC, t/a District of Columbia Alcoholic Beverage Control Bd., 75 A.3d 269, 267-77 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").

37. In this case, the Board credits Ms. Kappel that she hears noise from the establishment on repeated occasions. Supra, at ¶ 21. The Board finds this situation unacceptable, because her residence is located over 100 feet away from Ozio. Id. Furthermore, while Ozio appears to have good intentions, its efforts to curb noise are not sufficiently effective given that the establishment is using an admittedly inaccurate device to ensure that it complies with Mr. Henning's recommendations. Supra, at ¶ 18. As a result, it is not surprising that the establishment is generating noise that can be heard in a property over 100 feet away from the establishment.

b. The Board finds that Ozio is not having a detrimental impact on real property values.

38. The mere fact that Ozio may be generating too much noise is not sufficient proof that the establishment is having a negative impact on real property values. The Board further credits Mr. Nelson that his property values have risen. Id. Therefore, the Board finds that there is insufficient evidence in to demonstrate that Ozio is having a negative impact on real property values.

III. THE BOARD IMPOSES CONDITIONS ON OZIO TO ENSURE THAT THE ESTABLISHMENT'S OPERATIONS REMAIN APPROPRIATE.

39. Under § 25-104(e), "[t]he 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).

40. The Board finds that a live band on the roof is not appropriate given the proximity of residents to the establishment. Ozio shall also ensure that the roof is closed when it provides entertainment. Finally, the Board prohibits Ozio from generating amplified sounds that may be heard in a residence or dwelling. The Board finds that these measures will ensure that the establishment has a minimal impact on residents and complies with current law.[6]

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[6] The Board does not address the additional noise violations alleged by the Nichols Group related to Chapter 28 of Title 20 and the noise disturbance standard, because the Board finds that the conditions imposed in this order adequately address any impact on residents related to those alleged violations. *Protestant's Proposed Findings of Fact and Conclusions of Law*, 8-9

The Board also notes that the Nichols Group appears to have incorrect interpretation of § 25-725(c). This section requires that licensees "comply with the *noise level requirements* set forth in Chapter 27 of Title 20 of the District of Columbia Municipal Regulations." § 25-725(c) (emphasis added). As noted by the District of Columbia Court of Appeals, an administrative agency's ". . . authority and discretion are limited to that which is granted under [its] founding statutes." Rupsha 2007, LLC v. Kellum, 32 A.3d 402, 409-10 (D.C. 2011). While an administrative agency is generally given discretion to interpret its own statute, ". . . courts have been reluctant to read into a statute powers for a regulatory agency which are not fairly implied from the statutory language since the agency is statutorily created." Chesapeake & Potomac Tel. Co. v. Pub. Serv. Comm'n, 378 A.2d 1085, 1089 (D.C. 1977).

In this case, § 25-725(c) does not mention Chapter 28 as falling within the Board's purview. Because of this limitation, any alleged violations of Chapter 28 should be referred to an appropriate agency with jurisdiction.

Similarly, Title 20 clearly creates two distinct categories of noise violations, one being noise level violations and the other noise disturbance violations. 20 DCMR §§ 2700.3, 2701.1 (West Supp. 2014); compare 20 DCMR § 2799 ("noise disturbance") with 20 DCMR § 2799 ("noise level") (providing separate definitions to the terms "noise disturbance" and "noise level"). As a result, it is clear that the legislature intentionally excluded noise disturbances from § 25-725(c). Therefore, any alleged violations of the noise disturbance standard should be referred to an appropriate agency with jurisdiction.

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

41. 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 15th day of August 2014, hereby **APPROVES** the Application to Renew a Retailer's Class CN License at premises 1813 M Street, N.W. filed by 19th and K, Inc., t/a Ozio Martini & Cigar Lounge, subject to the following conditions:

1. Ozio is prohibited from having live bands perform on its roof.

2. Ozio must keep its roof closed when it provides entertainment as defined by D.C. Official Code § 25-101(21A).

3. Ozio shall not generate amplified sounds that can be heard in a residence or dwelling.[7]

The ABRA shall deliver a copy of this order to the Applicant and the Nichols Group.

[7] In light of the complicated regulations and technical background requirements involving the proper use of noise meters, conditions that solely require an investigator to have working ears are likely the best way to address noise problems.