

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

1001 H Street, LLC)	Case Number:	13-PRO-00133
t/a Ben's Chili Bowl/Ben's Upstairs)	License Number:	093103
)	Order Number:	2014-071
Application for a New)		
Retailer's Class CR License and)		
Sidewalk Café Endorsement)		
)		
at premises)		
1001 H Street, N.E.)		
Washington, D.C. 20002)		

BEFORE: Ruthanne Miller, Chairperson
Donald Brooks, Member
Herman Jones, Member
Mike Silverstein, Member

ALSO PRESENT: 1001 H Street, LLC, t/a Ben's Chili Bowl/Ben's Upstairs, Applicant

Andrew Kline, of The Veritas Law Firm, on behalf of the Applicant

Jay Williams, Commissioner, Advisory Neighborhood Commission (ANC) 6A, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

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

INTRODUCTION

The Alcoholic Beverage Control Board (Board) grants the Application for a New Retailer's Class CR License and Sidewalk Café Endorsement (Application) filed by 1001 H Street, LLC, t/a Ben's Chili Bowl/Ben's Upstairs (hereinafter, the "Applicant" or "Ben's Upstairs"). Nevertheless, in light of the proximity of nearby residents and the absence of convincing evidence that the noise mitigation measures proposed by the Applicant will be effective, the Board is persuaded that full hours for Ben's Chili Bowl's outdoor seating area is inappropriate for the neighborhood. Based on the evidence presented by Advisory Neighborhood Commission (ANC) 6A and previous Board holdings on outdoor seating

hours, the Board limits Applicant's sidewalk café and rooftop area to 6:00 a.m. to 11:00 p.m., Sunday through Thursday, and 6:00 a.m. to 12:00 p.m. on Friday and Saturday.

Procedural Background

The Notice of Public Hearing advertising Ben's Chili Bowl's Application was posted on September 13, 2013, and informed the public that objections to the Application could be filed on or before October 28, 2013. *ABRA Protest File No. 13-PRO-00133*, Notice of Public Hearing [*Notice*]. On or before the protest deadline, the Alcoholic Beverage Regulation Administration (ABRA) received a protest letter from Advisory Neighborhood Commission (ANC) 6A in accordance with District of Columbia Official Code §§ 25-601 and 25-602. Letter from David Holmes, Chair, ANC 6A, to Ruthanne Miller, Chair, Alcoholic Beverage Control Board (Oct. 11, 2013) [*Protest Letter of ANC 6A*].

The parties came before the Board's Agent for a Roll Call Hearing on November 12, 2013, where ANC 6A was granted standing to protest the Application. *ABRA Protest File No. 13-PRO-00133*, Letter from Tesha Anderson to ANC 6A, 1 (Nov. 15, 2013). On December 11, 2013, the parties came before the Board for a Protest Status Hearing. *Id.* Finally, the Protest Hearing in this matter occurred on January 8, 2014. *Notice*, 1.

The Board recognizes that an ANC's properly adopted written recommendations are entitled to great weight from the Board. See Foggy Bottom Ass'n v. District of Columbia Alcoholic Beverage Control Bd., 445 A.2d 643 (D.C. 1982); D.C. Code §§ 1-309.10(d); 25-609 (West Supp. 2014). 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 ANC 6A submitted its written recommendation on October 16, 2013. *Protest Letter of ANC 6A*, 1. The Board addresses ANC 6A's concerns in its Conclusions of Law.

I. Limitation of Issues

The sole issue in this matter is whether the Ben's Chili Bowl's rooftop and sidewalk café are appropriate for the neighborhood. As has been stated by the District of Columbia (D.C.) Court of Appeals, "The Board's regulations require findings only on contested issues of fact." Craig v. District of Columbia Alcoholic Beverage Control Bd., 721 A.2d 584, 590 (D.C. 1998); 23 DCMR § 1718.2 (West Supp. 2014).

In its protest letter, ANC 6A specified that its concerns regarding peace, order, and quiet stemmed from the "rooftop serving area" and "sidewalk café." *Protest Letter of ANC 6A*, 1. In addition, ANC 6A stated on the record that it did not object to the issuance of a license to Ben's Chili Bowl; instead, ANC 6A limited its objections to the Applicant's plans for outdoor seating, because of concerns regarding noise. *Transcript (Tr.)*, January 8, 2014 at 14, 89-90, 377, 380.

Based on ANC 6A's concession, there is no dispute regarding the Applicant's interior operations. Thus, the Board finds in favor of the Applicant on this issue, and deems the interior operations appropriate. As such, this order addresses the only remaining issue: whether granting the outdoor seating request will have an adverse impact on the

peace, order, and quiet 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); *Protest Letter of ANC 6A*, 1.

FINDINGS OF FACT

The Board, having considered the evidence, the testimony of the witnesses, the arguments of the parties, and all documents comprising the Board's official file, makes the following findings:

I. Background

1. Ben's Chili Bowl has submitted an Application for a New Retailer's Class CR License and Sidewalk Café Endorsement at 1001 H Street, N.E. *Notice*, 1.

II. ABRA Investigator Ileana Corrales

2. ABRA Investigator Ileana Corrales investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 13-PRO-00133*, Protest Report (Jan. 2014) [*Protest Report*].

3. The proposed establishment will be located in a commercial C-2-A zone. *Protest Report*, at 3. Thirteen licensed establishments are located within 1,200 feet of the establishment's proposed location. *Id.* Five of these establishments operate summer gardens or sidewalk cafés. *Tr.*, 1/8/14 at 25. There are no schools, recreation centers, public libraries, or day care centers located within 400 feet of the proposed location. *Protest Report*, at 7.

4. The establishment's proposed hours of operation are as follows: 6:00 a.m. to 2:00 a.m., Sunday through Thursday, and 6:00 a.m. to 4:00 a.m. on Friday and Saturday. *Id.* at 6. The establishment's proposed hours of alcoholic beverage sales, service, and consumption are as follows: 8:00 a.m. to 2:00 a.m., Sunday through Thursday, and 8:00 a.m. to 3:00 a.m. on Friday and Saturday. *Id.* Ben's Chili Bowl's proposed hours of operations for its outdoor seating areas are as follows: 6:00 a.m. to 2:00 a.m., Sunday through Thursday, and 6:00 a.m. to 4:00 a.m. on Friday and Saturday. *Id.* The Applicant's hours of alcoholic beverage sales, service, and consumption for its outdoor seating areas are 8:00 a.m. to 2:00 a.m., Sunday through Thursday, and 8:00 a.m. to 3:00 a.m., on Friday and Saturday. *Id.*

5. The Board notes that the Applicant has not applied for an entertainment endorsement, which means that the proposed establishment may not charge a cover charge, provide facilities for dancing, or offer live entertainment. *Id.*; D.C. Official Code §§ 25-101(21A); 25-113a(b).¹

¹ Under the definition provided by Title 25 of the D.C. Official Code, entertainment is defined as "live music or any other live performance by an actual person, including live bands, karaoke, comedy shows, poetry readings, and disc jockeys. The term 'entertainment' shall not include the operation of a jukebox, a television, a radio, or other prerecorded music." D.C. Official Code § 25-101(21A).

6. ABRA Investigators monitored the proposed location on seven separate occasions between December 19, 2013, and December 30, 2013. Id. at 7. According to the investigator's observations, the proposed location was undergoing construction.

7. Investigator Corrales noted during the hearing that the establishment will be located in the H Street Corridor. *Tr.*, 1/8/14 at 21. The proposed location is located near residences and commercial establishments. Id. No residences are immediately adjacent to the proposed location. Id. at 31. Ben's Chili Bowl purchased the closest residence on 10th Street, N.E., while the building bordering the purchased building is a residence. Id. at 43, 45. Therefore, the nearest residence will be separated from the establishment by a single row house. *Protest Report*, at Exhibit 14.

8. Ben's Chili Bowl will operate similarly to the original Ben's Chili Bowl and Next Door tavern located on U Street, N.W. *Tr.*, 1/8/14 at 22. When construction is finished, the establishment will be housed in a row-style building. Id. at 21-22. The first level of the building will operate as a separate food-service establishment, similar to Ben's Chili Bowl on U Street, N.W. Id. at 23. The second and third levels will be occupied by the Applicant. Id. Thus, even though the first level operation and the Applicant will have similar owners, they will be operated as separate entities. Id.

9. The third level will operate as a rooftop summer garden. Id. The rooftop will have a capacity of forty-four seats and a bar. Id. Ben's Chili Bowl intends to enclose the bar with a canopy that will allow the business to use the space all year. Id.

10. The establishment will also operate a sidewalk café on the 10th Street, N.E., side of the building. Id. at 24. The sidewalk café will have a seating capacity of thirty-eight patrons. Id.

III. Frank White

11. Frank White is responsible for Ben's Chili Bowl's business development operations. Id. at 85.

12. The diagram of the establishment submitted by the Applicant shows an L-shaped buffer on the roof. *Applicant's Exhibit No. 2*. The short end of the "L" creates a buffer between 729 H Street, N.E.—the residence purchased by the Applicant. *Applicant's Exhibit Nos. 2, 5* (See Lot 64 in Exhibit 5); *Tr.*, 1/8/14 at 96, 105; *Protest Report*, at Exhibit 14. Mr. White noted that the wall will be made of wood, and the wall facing 729 H Street, N.E., is 9 feet tall and will contain restrooms. *Tr.*, 1/8/14 at 99-101; *Applicant's Exhibit No. 7*. The part facing 729 H Street, N.E., will also have a wooden rain screen four feet from the buffer. *Tr.*, 1/8/14 at 101. This will mean that the seating area on the roof will be at least thirteen feet from the edge of the building, and approximately thirty-two feet away from the building's property line facing 729 H Street, N.E. Id. at 101-02; *Applicant's Exhibit No. 4*. Mr. White admitted that the roof deck does not have a similar buffer facing 10th Street, N.E. *Tr.*, 1/8/14 at 118. Instead, the buffer facing 10th Street, N.E., will only be 34 inches high and feature a steel guard rail. Id. at 120.

13. The diagram of the first floor shows the layout of the sidewalk café on 10th Street, N.E. *Applicant's Exhibit No. 10*. According to Mr. White, Ben's Chili Bowl will line the

side of the sidewalk café facing 729 H Street, N.E., with shrubs in movable planters to mitigate noise. *Tr.*, 1/8/14 at 109-110. Mr. White admitted that Ben's Chili Bowl has not gotten approval for the sidewalk café from the District Department of Transportation as of the date of the hearing. *Id.* at 110.

14. Mr. White noted that some establishments in the neighborhood have outdoor seating hours that end at 1:00 a.m. during the week and 2:00 a.m. during the weekend. *Id.* at 112-13.

15. Mr. White observed that the southwest corner of the intersection of 10th Street, N.E., and H Street, N.E., contains a Bank of America that faces the proposed location. *Id.* at 95, 118. Mr. White admitted that a mixed-use project containing residences is planned for the Bank of America property. *Id.* at 118.

16. Mr. White admitted that the Applicant did not conduct any type of sound analysis at the proposed location. *Id.* at 123. Mr. White also admitted that the Applicant has no qualitative analysis demonstrating the effectiveness of the proposed soundproofing measures on the roof. *Id.* at 125. The Applicant did not put up a large barrier on the portion of the roof facing 10th Street, N.E., because it would interfere with the view from the roof. *Id.* at 126-27, 129.

IV. Kamal Ali

17. Kamal Ali serves as the primary operator of Ben's Chili Bowl and its related businesses. *Id.* at 149. Mr. Ali plans to operate Ben's Chili Bowl as a restaurant and bar. *Id.* at 154; *Applicant's Exhibit Nos. 11, 12*. Ben's Chili Bowl does not intend to serve alcohol in the establishment's proposed sidewalk café. *Tr.*, 1/8/14 at 153. In addition, the rooftop deck will dedicate space to both tables and space for bar patrons to stand in. *Id.* at 199-200, 206; *Applicant's Exhibit No. 8*.

18. Mr. Ali agreed that the community's concerns regarding noise are "100 percent justified." *Tr.*, 1/8/14 at 160. Nevertheless, he argued that everyone should wait until the Ben's Chili Bowl is open to determine whether noise is created. *Id.* Mr. Ali further pledged to deal "professionally" with any noise complaints generated by activity on the rooftop deck. *Id.* at 161. He also pledged to conduct a sound test after the building is completed. *Id.* at 190-91. He acknowledged that Ben's Chili Bowl is not conducting any sound analysis in advance of construction. *Id.* at 189.

19. Mr. Ali admitted that his U Street, N.W., establishments do not have outdoor seating or a rooftop deck. *Id.* at 171.

V. ANC Commissioner Sondra Phillips-Gilbert

20. ANC 6A Commissioner Sondra Phillips-Gilbert testified on behalf of the Applicant, and serves as the representative of ANC 6A07. *Id.* at 54. She lives seven blocks away from the establishment's proposed location. *Id.* Commissioner Phillips-Gilbert supports the Application. *Id.* at 55. Commissioner Phillips-Gilbert admitted that she does not represent the single-member district where the establishment will be located. *Id.* at 68.

VI. Howard Gill

21. Howard Gill testified on behalf of the Applicant, and lives on 11th Street, N.W., approximately two blocks from the Ben's Chili Bowl and Next Door on U Street, N.W. Id. at 72. Based on Mr. Gill's observations of the Applicant's other establishments, he believes that they have very "professional" operations, and believes the owners have a reputation of being responsive to the community. Id. at 73, 77, 82.

VII. Daniel Goldburt

22. Daniel Goldburt testified on behalf of ANC 6A. Id. at 212. Mr. Goldburt, who lives in a home on the same block as the proposed establishment, lives three row houses away from the proposed location. Id. at 214. He estimates that his property is located approximately 65 feet away from the establishment and its proposed sidewalk café. Id. at 213-14.

23. Mr. Goldburt has concerns about the potential noise that the outdoor seating area will generate. Id. at 213-14. First, the sidewalk café concerns Mr. Goldburt, because his bedroom faces the street. Id. at 214. Currently, he regularly observes a spike in noise and patron activity after 11:00 p.m. during the week and 12:00 a.m. during the weekend when people leave licensed establishments in his neighborhood, which disturbs his sleep. Id. at 214, 226-27. Mr. Goldburt fears that if the Board grants Ben's Chili Bowl full sidewalk café hours, another surge in noise will occur at 2:00 a.m. during the week and 3:00 a.m. during the weekend when patrons leave at that time. Id.

24. Second, the rooftop deck hours concerns Mr. Goldburt, because his 6-month old baby's nursery is located "in the back of the row house upstairs." Id. at 214-15. He is fears that if the establishment is allowed to play music on the rooftop deck and play music until 2:00 a.m. and 3:00 a.m. this will disturb his child's sleep. Id.

25. Mr. Goldburt noted that no other establishment has a sidewalk café or rooftop deck immediately adjacent to his home. Id. at 235.

VIII. Leslie Meek

26. Leslie Meek testified on behalf of ANC 6A. Id. at 238. She has lived on 10th Street, N.E., for the past ten years. Id. Her family's residence abuts the house bought by Ben's Chili Bowl. Id. at 239, 241; *Applicant's Exhibit No. 2*. She estimates that the establishment's sidewalk café is located only "seven paces" from her bedroom window. Id. at 244.

27. Ms. Meek noted that her bedroom is located in the front of her home. Id. at 240. According to Ms. Meek, even with her windows closed, she can hear people engaging in a normal conversations on the street in front of her home in her bedroom on a regular basis. Id. at 241, 251. She is concerned that patrons sitting in the establishment's outdoor seating areas will not only generate noise from conversations, but from the clanking of silverware, plates, and glasses as well. Id. at 242.

28. Ms. Meek is also concerned that Ben's Chili Bowl will attract patrons from other establishments who are looking for something to eat. Id. at 245. As a result, she anticipates that the presence of Ben's Chili Bowl will attract intoxicated patrons to her portion of the neighborhood. Id. at 244-45, 281. She noted that bar patrons going to and from their vehicles generate a lot of disturbing noise. Id. at 248.

29. Ms. Meek stated that she supports limiting the establishment's outdoor seating hours to 11:00 p.m. during the week and midnight during the weekend. Id. at 253, 264.

IX. ANC Chairperson David Holmes

30. Commissioner David Holmes serves as the Chair of ANC 6A, and testified on behalf of ANC 6A. Id. at 288. Chairperson Holmes has been the Chair of ANC 6A for three years and served has served on ANC 6A since 2006. Id.

31. Chairperson Holmes described the H Street Corridor. Id. at 289. Most sidewalk cafés in the neighborhood must be located on side streets, because H Street, N.E., is very narrow. Id. at 289. This means that many sidewalk cafés in the neighborhood are very close to nearby residents. Id. He noted that loud noises emanating from outdoor seating at bars and restaurants is "a common problem" in the neighborhood. Id. at 307.

32. Based on his years of experience serving on ANC 6A, there is very little that can be done to mitigate the noise from sidewalk cafés. Id. at 289, 291. He noted that the ANC has looked at alternative solutions, such as setting back sidewalk cafés, plantings, fences, and tents in response to noise concerns, yet none of these measures have been effective in curbing noise. Id. at 289-91. Consequently, based on experience, Chairperson Holmes believes that limiting an establishment's hours is the best way to balance the expectations of residents and businesses. Id. at 291.

33. Chairperson Holmes also noted that the Rappaport Companies intends to build a large residential building on the west side of 10th Street, N.E. Id. at 293. The building will have three residential floors and a retail establishment located on the ground level. Id. at 293. The building will likely be completed by 2016. Id. at 294.

X. ANC Commissioner Omar Mahmud

34. ANC 6A Commissioner Omar Mahmud testified on behalf of ANC 6A. Id. at 313, 316. He lives across the street from the proposed establishment on 10th Street, N.W. Id. at 315. Commissioner Mahmud is concerned that the wall on the roof proposed by Ben's Chili Bowl does not block the north and west sides of the rooftop deck. Id. at 318, 334. As a result, Commissioner Mahmud is concerned that residents across the street will face noise issues once the rooftop deck begins operating. Id.

35. Commissioner Mahmud supports limiting the hours of operation for the outdoor seating areas to 11:00 a.m. during the week and midnight during the weekend. Id. at 331.

XI. ANC Commissioner Jay Williams

36. ANC 6A Commissioner Jay Williams testified on behalf of ANC 6A. *Id.* at 341. Commissioner Williams serves as the Chair of the ANC's Alcoholic Beverage Licensing (ABL) Committee. *Id.*

37. The ABL Committee held a community meeting on the Application on December 17, 2013. *Id.* at 342. Over sixty people attended the meeting. *Id.* At the meeting, the ABL Committee voted in support of limiting the Applicant's outdoor seating hours to 11:00 p.m. during the week and midnight during the weekend. *Id.* at 350.

CONCLUSIONS OF LAW

38. The Board may approve a request for a New Retailer's Class CR 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 only question in this matter is whether the Applicant's proposed outdoor seating operations will have a negative impact on the peace, order, and quiet of the area located within 1,200 feet of the establishment.

I. THE PROXIMITY OF RESIDENTS AND LACK OF CONVINCING NOISE MITIGATION MEASURES WARRANTS RESTRICTIONS ON THE APPLICANT'S OUTDOOR SEATING HOURS.

39. The Board finds that the Application is appropriate subject to the condition that the Applicant's sidewalk café and rooftop area shall operate only between 6:00 a.m. and 11:00 p.m., Sunday through Thursday, and between 6:00 a.m. and midnight on Friday and Saturday.

40. Under § 25-104(e),

The Board, in issuing licenses, may require that certain conditions be met if it determines that the inclusion of the conditions will be in the best interest of the locality, section, or portion of the District where the licensed establishment is to be located. The Board, in setting the conditions, shall state, in writing, the rationale for the determination.

D.C. Official Code § 25-104(e).

41. Under § 25-313, the Board must consider all evidence of record, including, but not limited to, "The effect of the establishment on peace, order, and quiet, including the noise and litter provisions set forth in §§ 25-725 and 25-726." D.C. Official Code § 25-313(b)(2) (West Supp. 2014). Section 25-725 states, "The licensee under an on-premises retailer's license shall not produce any sound, noise, or music of such intensity that it may be heard in any premises [located in a residential zone] other than the licensed establishment by the use of any: . . . Mechanical device . . ." D.C. Code § 25-725(a), (a)(1), (b), (b)(3) (West Supp. 2013). Further, § 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.”)

42. The Board has had several recent cases where the Board determined whether a licensee's request for outdoor seating hours was appropriate under § 25-313. In Duffy's Irish Restaurant, the Board limited the hours of the sidewalk café to 11:00 p.m. during the week and midnight during the weekend based on the presence of residences near the establishment's outdoor seating area. In re Amduffy, LLC t/a Duffy's Irish Restaurant, Case Number 13-PRO-00004, Board Order No. 2013-343, ¶¶ 21-23 (D.C.A.B.C.B. Jul. 10, 2013).

43. The Board specifically relied on Duffy's Irish Restaurant in Romeo & Juliet when it limited Romeo & Juliet's outdoor seating to 11:00 a.m. during the week and midnight during the weekend. In re 301 Romeo, LLC t/a Romeo & Juliet, Case Number 13-PRO099136, Board Order No. 2014-045, ¶¶ 45-46 (D.C.A.B.C.B. Jan. 29, 2014). Specifically, in part, the Board based its decision on the fact that it was “not convinced that the tree enclosure proposed by Romeo & Juliet [would] eliminate noise leakage from the unenclosed sidewalk café area.” In re 301 Romeo, LLC t/a Romeo & Juliet, Case Number 13-PRO099136, Board Order No. 2014-045, ¶ 46 (D.C.A.B.C.B. Jan. 29, 2014).

44. In support of its argument in favor of outdoor seating hours of 2:00 a.m. during the week and 3:00 a.m. during the weekend, the Applicant points to the L-shaped buffer on the roof and the purchase of 729 H Street, N.E., and the use of movable planters in the sidewalk café as sufficient noise mitigation measures. Supra, at ¶¶ 12, 13. Ben's Chili Bowl also noted that it was willing to work with the community and conduct a sound analysis after the Board issued the license to determine if additional steps to mitigate noise are needed. Supra, at ¶ 18.

45. Nevertheless, ANC 6A's presentation convinces the Board that ending outdoor operations at the establishment at 11:00 p.m. during the week and midnight during the weekend is warranted, and in accordance with the Board's precedent.

46. First, ANC 6A has shown that residents live close enough to the establishment to be impacted by outdoor seating. Notably, even though the establishment purchased the adjacent residence, Ms. Meek's residence is only seven paces from the proposed location, while Mr. Goldburt's residence is only 65 feet from the establishment's proposed sidewalk café. Supra, at ¶¶ 22, 27. In addition, the residential building being built by the Rappaport Companies will face the proposed establishment on the west side of 10th Street, N.E. Supra, at ¶¶ 15, 33. Therefore, as in Duffy's Irish Restaurant, the Board finds that residents live or will live close enough to the establishment to be impacted by the establishment's outdoor seating operations.

47. Second, ANC 6A has further demonstrated that the sound mitigation measures proposed by the Applicant are not sufficient. Based on the testimony of ANC Chairperson Holmes, the Board is not convinced that the movable planters proposed by Ben's Chili Bowl will prevent sound from the sidewalk café from being observed by Ms. Meeks or Mr. Goldburt in their homes. Supra, at ¶¶ 13, 22, 27, 32. In addition, because no sound analysis has been performed, the Board is not convinced that the L-shaped buffer will prevent noise from disturbing the closest residents—Ms. Meeks and Mr. Goldburt. Supra,

at ¶¶ 12, 16. Finally, because the L-shaped buffer does not face towards the west side of 10th Street, N.E., there is no sound protection for residents moving into the residential building being built by the Rappaport Companies. Supra, at ¶¶ 15, 33-34. Consequently, as in Romeo & Juliet, the Board is concerned that the sound mitigation measures proposed by the Applicant do not sufficiently protect nearby residents from the noise that will be generated by the establishment's outdoor seating areas.

48. Third, the Board agrees with ANC 6A that the Applicant's pledges to work with the community and conduct tests after the restaurant is built are not sufficiently definitive to merit consideration; especially, when it is the Applicant's burden to show at the protest hearing that its plans are appropriate. D.C. Official Code § 25-311(a).

49. Based on these conclusions, the Board finds that a proper balance between Ben's Chili Bowl and the reasonable expectations of neighbors requires the establishment's outdoor operations to be limited to 6:00 am to 11:00 p.m., Sunday through Thursday, and between 6:00 a.m. to midnight on Friday and Saturday.

50. The Board also notes that ANC 6A requested that the Board prohibit live entertainment and recorded music in the establishment's outdoor seating areas. *Tr.*, 1/8/14 at 380. The Board will not grant the request to prohibit live entertainment, because the Applicant has not applied for an entertainment endorsement, which means the issue of live entertainment is not the subject of the present protest. The Board will also not grant ANC 6A's request to prohibit recorded music in the outdoor seating area for two reasons: (1) the hours limitations imposed by the Board are sufficient to address nearby resident's concerns regarding noise; and (2) nearby residents are adequately protected by Title 25's noise provision. Therefore, the Board denies ANC 6A's request to prohibit live entertainment and recorded music in the outdoor seating areas.

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

51. 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 12th day of March 2014, hereby **GRANTS** Application for a New Retailer's Class CR License and Sidewalk Café Endorsement filed by 1001 H Street, LLC, t/a Ben's Chili Bowl/Ben's Upstairs, subject to the following condition:

- (1) The operations of the Applicant's sidewalk café and rooftop area shall be limited to 6:00 a.m. to 11:00 p.m., Sunday through Thursday, and 6:00 a.m. to midnight, on Friday and Saturday.

The ABRA shall distribute copies of this Order to the Applicant and ANC 6A.

District of Columbia
Alcoholic Beverage Control Board



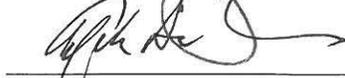
Ruthanne Miller, Chairperson



Donald Brooks, Member



Herman Jones, Member



Mike Silverstein, Member

I have recused myself from this matter.



Nick Alberti, Member

Under 23 DCMR § 1719.1 (2008), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, Reeves Center, 2000 14th Street, NW, 400S, Washington, D.C. 20009.

Also, under 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 under 23 DCMR § 1719.1 (2008) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b) (2004).