

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

In the Matter of:)	
)	
Bardo, LLC)	License No: 103291
t/a Bardo River Brewery)	Case No.: N/A
)	Order No: 2016-543
Applicant for a)	
Manufacturer's Class B License)	
)	
25 Potomac Avenue, S.E.)	
Washington, D.C. 20003)	

TO: Mathew August LeFande, Counsel for Bardo, LLC (Applicant)
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Arlington, VA 22207
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NOTICE OF HEARING AND ORDER

PROPOSED ACTION

The Alcoholic Beverage Control Board is considering taking the following actions regarding the Application for a Manufacturer's Class B License with a summer garden and on-site sales and consumption permit:

1. Denying the request for an on-site sales and consumption permit; or
2. Imposing conditions on the license in accordance with D.C. Official Code § 25-104(e), which may include, but are not limited to:
 - a. Requiring the hours of operation, the hours of sale, service, and consumption, the hours of on-site sales and consumption, and all outdoor seating to not exceed 10:00 p.m.

INSTRUCTIONS

The Alcoholic Beverage Control Board, on this 5th day of October 2016, **ORDERS** Bardo, LLC, t/a Bardo River Brewery (hereinafter "Applicant" or "Bardo") to appear at a

Qualifications Hearing, located at the Reeves Center, 2000 14th Street, N.W., Suite 400, Washington, D.C., on October 20, 2016 at 3:00 p.m. Please note that the date and time of this hearing may be changed to accommodate the parties or any potential witnesses.

The purpose of the **Qualifications Hearing** is to determine whether the owner(s) listed in the Application are qualified for licensure and whether the applicant has complied with the law related to the application process. Because this hearing may result in an administrative action or order that impacts your rights, the hearing shall be conducted as a contested case or contested fact finding hearing using the procedures provided by the D.C. Administrative Procedure Act (D.C. APA) (D.C. Official Code § 2-501 *et seq.*) and the protest procedures described in Title 23 of the D.C. Official Code (Title 23). *See* 23 DCMR §§ 1600.5, 1606.1-1606.8 (West Supp. 2016). Please note that Title 25 of the D.C. Official Code (Title 25) places the burden of proof on the applicant to demonstrate through substantial evidence that he or she meets the qualifications for licensure. *Citizens Ass'n of Georgetown, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 288 A.2d 666, 666-69, 671 (D.C. 1972); 23 DCMR § 1718.3 (West Supp. 2016). The Board is also entitled by law to raise qualification issues and introduce evidence on its own initiative. *Citizens Ass'n of Georgetown, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 288 A.2d 666, 669 (D.C. 1972) (“The Board has a public interest function to perform unlike that of a court in private civil litigation between two contesting parties where relevant and material allegations made by the plaintiff are taken as admitted if not contested.”); *see also id.* at 672. Finally, the Board also has the right to obtain additional information regarding the application under 23 DCMR § 1611.1.

Please note that at this time, the Board is not objecting to the issuance of a Manufacturer’s Class B License. Instead, the Board intends to examine whether the issuance of an on-site sales and consumption permit as an endorsement to the license is appropriate, and intends to limit any further proceedings to the issues raised by the permit request.

If you consent to limiting the maximum hours of operation, hours of sale, service, and consumption, and outdoor seating hours to 10:00 p.m. and waive the right to a hearing and judicial review of this matter, then the Board is willing to forgo its concerns regarding the permit request. If you agree to this condition, the Board intends to issue a consent order approving the permit with the proposed condition, so long as the application otherwise complies with all other requirements imposed by Title 25 of the D.C. Official Code and Title 23 of the D.C. Municipal Regulations. Please note that this offer may be revoked at any time up and until the issuance of a consent order by the Board affirming the agreement.

All pleadings, or any other written communication, addressed to the Board, should be delivered to Martha Jenkins, General Counsel, 2000 14th Street, N.W., Suite 400, Washington, D.C. You or your legal counsel, if represented, should contact General Counsel Martha Jenkins at (202) 442-4456 or abra.legal@dc.gov upon receipt of this notice to discuss any potential settlement, consent order, or stipulation that you want the Board to consider in lieu of holding a Qualifications Hearing in accordance with § 2-509(a).

All documents referenced in this notice are incorporated by reference as part of the record, and also form the basis of the counts described below. The records in Case No. 13-PRO-00088 and Case No. 15-PRO-00114 are also considered part of the record in this matter and may be considered by the Board in adjudicating your application. Furthermore, any individual or entity identified below, or in the records incorporated into this notice, may be called or heard as witnesses. Please contact Records Management Specialist Kathleen Kelly at (202) 442-6953 or Kathleen.kelly@dc.gov if you wish to obtain copies of any document.

Please note that if this matter proceeds to a hearing, the Board retains the discretion to deny the on-site sales and consumption permit request if supported by the record. In addition, in lieu of denying the permit, the Board may impose conditions on the license under D.C. Official Code § 25-104(e). Finally, any information obtained during these proceedings may be used by ABRA or forwarded to other government agencies to support additional administrative or criminal actions against the applicant or the individual owners.

Under D.C. Official Code § 2-509(b), you may personally appear at the hearing, and you, as well as the applicant or any other party, may be represented by legal counsel. At your scheduled hearing, you have the right to produce witnesses and evidence on your behalf and to cross-examine witnesses. You may also examine evidence produced and have subpoenas issued on your behalf to require the production of witnesses and evidence.

The Board reserves the right to amend this notice in accordance with D.C. Official Code § 2-509 based on new information that is discovered during the hearing process. The Board also reserves the right to schedule additional hearings to address preliminary motions or additional information received by the Board during the hearing process.

All hearings are conducted before the Board in the English language. If a party or witness is deaf, or because of a hearing impediment cannot readily understand or communicate the spoken English language, the party or witness may apply to the Board for the appointment of a qualified interpreter.

Please note that under § 2-509, your failure to appear at the time and place set for the hearing, either in person or through counsel, or both, will not preclude the Board from proceeding in this matter, deeming the application abandoned, or entering a default judgment based on the information contained below.

The basis of the contemplated action is certain information received by the Board, which raise questions of material fact and law as to whether the Board may approve and issue a license to the Applicant. Specifically, the proposed facts and proposed conclusions of law upon which this action is based are set forth below:

Count I: Bardo must demonstrate its qualifications for a license with an on-site sales and consumption permit under D.C. Official Code § 25-301(a)(7) or must demonstrate that it does not merit the inclusion of conditions on its license, in

light of evidence that the Application’s inclusion of an on-site sales and consumption permit is inappropriate and will have an adverse impact on the neighborhood under D.C. Official Code §§ 25-104(e), 25-313 and 25-311(a) and 23 DCMR § 400.

PROPOSED FINDINGS OF FACT

The Board bases its denial of the request for an on-site sales and consumption permit or otherwise conditions licensure based on the following facts:

I. The 2013 Application by Riverfront at the Ballpark.

1. In 2013, “Riverfront submitted an Application for a New Retailer’s Class CT License” at 25 Potomac Avenue, S.E. *In re Dos Ventures, LLC, t/a Riverfront at the Ball Park*, Case No. 13-PRO-00088, Board Order No. 2013-512 (D.C.A.B.C.B. Nov. 13, 2013) *citing ABRA Protest File No. 13-PRO-00088*, Notice of Public Hearing. Riverfront’s plan consisted of acting “as a venue during Nationals games,” an event site for organizations and sports leagues, an area to host food trucks, and a live entertainment area. *Id.* at ¶¶ 18, 21, 24. Although the site would not have a building, the applicant proposed having five stationary bars and portable bathroom facilities. *Id.* at ¶¶ 22-23. When the Board considered this proposal, the applicant had proposed an occupancy of 12,200 people. *Id.* at ¶ 22. The applicant proposed that Riverfront operate completely outdoors. *Id.* at ¶ 13.
2. The property is located across the street from the Nationals Major League Baseball Stadium. *Id.* at ¶ 1. Events at the baseball stadium may attract up to 40,000 people. *Id.* at ¶ 16.
3. During events, the Metropolitan Police Department First District only has under a dozen officers assigned to the baseball stadium. *Id.*
4. “During Nationals games, Potomac Avenue, S.E., is one of the main ways drivers reach the stadium.” *Id.* at ¶ 7. “On game days, the traffic on Potomac Avenue, S.E., is congested while on other days Potomac Avenue, S.E., features light traffic.” *Id.* “South Capitol Street, S.E., consistently features ‘a steady amount of traffic,’ because the road links to two freeways and a bridge that crosses the Anacostia River.” *Id.* “Near the proposed establishment, one crosswalk is located at the corner of First Street, S.E., and Potomac Avenue, S.E., while the other crosswalk is located at the corner of South Capitol Street, S.E., and Potomac Avenue, S.E.” *Id.*
5. The area around the baseball stadium is subject to a traffic plan developed by the Metropolitan Police Department, the Department of Transportation, the Department of Public Works, and various community stakeholders. *Id.* at ¶ 11. “According to the traffic plan, no traffic may cross the medium on Potomac Avenue, S.E.” *Id.* “[V]ehicles traveling westbound on Potomac Avenue, S.E., [cannot] turn left and park at the proposed location” due to the placement of traffic bollards on Potomac Avenue, S.E., while the plan is in effect. *Id.* “Finally, Potomac Avenue, S.E., intentionally only has two crosswalks at the corners near the stadium,

which are assigned police officers during stadium events, in order to ensure pedestrian safety.” *Id.*

6. In 2013, the MPD Commander for the First District, Daniel Hickson, described South Capitol Street, S.E., as “a bad intersection for pedestrians to cross, regardless of whether an event occurs at the stadium.” *Id.* at ¶¶ 10, 12. Indeed, in May 2012, “a car hit an officer directing traffic and wearing a visibility vest” on that road. *Id.* at ¶ 12.

7. An establishment that lacks a building and located in an open field cannot reasonably mitigate noise from amplified music or sounds generated by the human voice. *See id.* at ¶ 13. Already a similar nearby establishment, known as the Fairgrounds, has generated noise that regularly bothers residents on the 1200 block of South Capitol Street, S.E. *Supra*, at ¶¶ 30-33.

8. The Board denied Riverfront’s 2013 application based on these facts. *Id.* at 2.

II. The 2016 Application by Bardo Big River.

9. In 2016, the Board considered an application submitted by Bardo LLC, t/a Bardo Big River (BBR), which was owned by William Stewart, the current Applicant. *In re Bardo, LLC, t/a Bardo Big River*, Case No. 15-PRO-00114, Board Order No. 2016-120, 1 (D.C.A.B.C.B. Mar. 16, 2016). BBR requested a Retailer’s Class D Tavern License with a brewpub endorsement. *Id.* at 1, ¶ 4.

10. The applicant proposed an “entirely outdoor[]” operation with “a capacity of 750 people.” *Id.* at ¶ 4.

11. The applicant further proposed using “four . . . large shipping containers” to be used as restrooms and storage. *Id.* The applicant did not propose hosting “entertainment.” *Id.* at ¶ 10. Bardo proposed “operat[ing] a dog park, bicycle parking lot, and food truck area that [would] be separated from the premises by a six foot fence.” *Id.* “The premises [would] occupy a 40,000 square foot area.” *Id.* Furthermore, the applicant proposed having “tables and chairs and a dishwashing area.” *Id.*

12. “[B]efore and during games, police, transportation officials, and traffic control aids are used to provide security and traffic control for the area outside the stadium.” *Id.* at ¶ 20. “Nevertheless, once the game ends, the officers and transportation officials leave and traffic aids are removed.” *Id.* “Furthermore, once the game ends, Potomac Avenue, S.E., is reopened to traffic.” *Id.*

13. “During events, the city relies on a Transportation Operations and Parking Plan (TOPP) negotiated between the local ANC, the District Department of Transportation, the Metropolitan Police Department, and the Capitol Riverfront Business Improvement District.” *Id.* ¶ 23. “The TOPP is adjusted on a yearly basis and does not take into account the BBR’s proposed operations outside the stadium.” *Id.*

14. “[T]he TOPP describes the ideal amount of people and resources needed for game days; however, it does not guarantee that the necessary amount of staff and resources will be present.” *Id.* at ¶ 24. For example, “on one occasion a vehicle broke down on South Capitol Street, S.E., which forced police officers to be diverted from their station at a nearby intersection.” *Id.*

15. “Further, on game days, as part of the TOPP, Potomac Avenue, S.E., ‘is [only] closed to outside traffic,’ and 1st Street, S.E., M Street, S.E., and the nearby bridge entrance are closed to outside traffic as well. *Id.* at ¶ 25. “On game days, 600 cars using the stadium’s ‘Garage C’ and the 150 cars using the ‘Lot A’ parking lot, all enter and exit these areas by means of Potomac Avenue, S.E. *Id.* “Therefore, at least 750 vehicles will use Potomac Avenue, S.E., after the 7th inning on game days.” *Id.*

16. “[T]he last train on the Red Line ends service at 11:20 p.m. between Sunday and Thursday; therefore, all baseball game attendees that rely on Metro must be on the train [by] that time.” *Id.* at ¶ 26.

17. “Public transportation is available near the proposed location. *Id.*, at ¶ 6. “The A42, A46, A48, P6, and the V1 bus lines operate in the neighborhood. *Id.* Furthermore, the Navy Yard/Ballpark Metro Station is located nearby.” *Id.*

18. “The area near Potomac Avenue, S.E., 1st Street, S.E., and Half Street, S.E. has “limited parking” and a limited number of parking meters.” *Id.* at ¶ 7. “The other side of South Capitol Street, S.W., has a public parking area.” *Id.* “A parking garage owned by Colonial operates near Half Street, S.E., and M Street, S.E.” *Id.* “The Yards, located on 1st Street, S.E., also has three public parking lots.” *Id.* “[P]arking is almost impossible to find when the Washington Nationals play home games at Nationals Park.” *Id.*

19. “25 Potomac Avenue, S.E., borders both the baseball stadium and [BBR’s] proposed location. *Id.* at ¶ 8. “While the street running between the stadium and [BBR’s] location has a crosswalk, there is no traffic light.” *Id.*

20. “The proposed location will share the lot with a 306 unit apartment building.” *Id.* at ¶ 9. “The apartment building is currently undergoing construction on the northeast portion of the property.” *Id.* “The building is scheduled to be completed during the summer of 2016.” *Id.* “The apartment building and the proposed establishment will solely be separated by an above ground parking lot.” *Id.* “The proposed location will eventually contain two new residential buildings.” *Id.* at ¶ 32. “The first building will be Dock 79.” *Id.* “In addition, a second building will be constructed almost 100 feet away from [BBR], which may or may not eventually replace [BBR].” *Id.*

21. “[M]any parking lots available during game days over the last eight years are undergoing construction and will be converted into residences.” *Id.* at ¶ 27. “As a result, the neighborhood will soon lose approximately 2,000 to 3,000 parking spaces.” *Id.*

22. “[I]n the past, the area has had issues with people crossing South Capitol Street, S.E., which led to one traffic fatality.” *Id.* at ¶ 28. “In response, barriers were placed on . . . South Capitol Street, S.E., to prevent dangerous street crossings.” *Id.* “In 2015, another fatality almost occurred near the corner of South Capitol Street, S.E., and Potomac Avenue, S.E., because vehicles coming from the bridge cannot see the traffic light, the cross walk, and crossing guard due to the curve of the road.” *Id.* Finally, “after the 7th inning, large buses transporting game attendees park in the westbound lane of Potomac Avenue, S.E., which would reduce the visibility of [the applicant’s] patrons as they attempt to cross the street and encourage them to cross between buses.” *Id.*

23. The Board denied BBR’s 2016 application based on these facts. *Id.* at 2.

III. The Present Application filed by Bardo River Brewery.

24. The current Applicant, now trading as Bardo River Brewery, has proposed an operation similar to the prior applicants. According to the Application, Bardo seeks a Manufacturer’s Class B License with a summer garden endorsement and an on-site sales and consumption permit at 25 Potomac Avenue, S.E. *Application*, at 1 (see questions Nos. 1-2, 5-6, 9-11). Bardo has not applied for an entertainment endorsement. Bardo proposes to have an occupancy of 750. *Id.* (see question no. 7a). Over the course of a single business day, as people enter and leave, more than 750 people may patronize the premises.

25. Bardo has proposed hours of operation, hours of sale, service, and consumption, and summer garden hours of 11:00 a.m. to midnight. *Id.* at 2 (see question no. 10). Based on the Application, the on-site sales and consumption permit would authorize the sale and consumption of alcoholic beverages on the premise from 11:00 a.m. to midnight, every day of the week. D.C. Official Code § 25-126(b).

26. The diagram provided by Bardo shows that 13,000 square feet will be open to the public. *Application*, at Diagram (“public assembly areas”). The premises will be surrounded by a six foot fence of unnamed material that separates patrons from the nonpublic area on the premises and the river. *Id.* The establishment will not have a building or otherwise have walls or a roof.

27. In addition to making beer, Bardo indicated in the Application that it would operate as an outdoor summer beer garden. *Id.* at 3 (see question no. 15). The site would have a children’s play area, offer games for patrons like cornhole, have a bicycle service area, and offer space for food trucks. *Id.* The food trucks would be located outside the establishment’s fence, if allowable by law. *Id.* at 143. This proposal is substantially similar to the plans presented by Riverfront and BBR. *Supra*, at ¶¶ 1, 11.

28. The Application indicates that there are 266 parking spots in a parking lot located 1620 S. Capitol Street, S.E. *Id.* at 3 (see question no. 18(b)). The Application does not state whether Bardo will have exclusive access to these spaces, whether the spaces will be made available to fans attending events at the baseball stadium, or whether the lot will be used by any nearby residents.

29. The Application indicates that Potomac Avenue, S.E., is “lightly traveled.” *Id.* at 4 (see question no. 18(c)). Bardo has not provided factual support for this assertion. Moreover, the Application does not address the issue of vehicular and pedestrian safety on South Capitol Street, S.E., or how pedestrian and vehicular safety will be affected when patrons attempt to exit the baseball stadium en masse after events and visit Bardo. There is also no evidence in the record regarding the degree of lighting provided outside the premises; especially, when the baseball stadium is no longer in use.

30. William Stewart, the owner, indicated that Bardo will have the same security plan presented during the prior BBR application. *Transcript (Tr.)*, August 10, 2016 at 54-55. He further indicated that Bardo will have “zero parking.” *Id.* at 58. Bardo will have permanent toilets on the premises, not portable restrooms. *Id.* at 62-63.

31. Mr. Stewart indicated that security cameras from the neighboring building will monitor the premises and the building may provide private security. *Id.* at 63. Nevertheless, there appears to be no guarantee that the owner of the nearby building has an obligation to provide security or camera support for the premises, and the building owner appears to have the ability to decline to provide those services at any time. *Id.*

32. Mr. Stewart indicated that Bardo may hire the off-duty police officers to provide security. *Id.* at 74-75.

33. Although Bardo filed an application, the Alcohol and Tobacco Tax and Trade Bureau (TTB) has not issued a license or permit for Bardo at this time. *Id.* at 128.

34. The Board notes that although Mr. Stewart’s prior application for a Retailer’s Class DT License with a brew pub endorsement was denied, the current Application is not barred by the prohibition on successive applications described in D.C. Official Code § 25-338, because the current Application is for a different class of license. D.C. Official Code § 25-338(a) (“A second and each subsequent application for the same class of license for the same person or persons shall not be considered within 5 years of a denial”).

PROPOSED CONCLUSIONS OF LAW

35. The Board rejects the request for an on-site sales and consumption permit because the addition of this permit would render the Application inappropriate. Section 25-301(a)(7) provides that

“Before issuing, transferring to a new owner, or renewing a license, the Board shall determine that the applicant meets all of the following criteria: . . . (7) The applicant has complied with all the requirements of this title and regulations issued under this title.

D.C. Official Code § 25-301(a), (a)(7). Under § 25-313,

(a) To qualify for issuance . . . an applicant shall demonstrate to the satisfaction of the Board that the establishment is appropriate for the locality, section, or portion of the District where it is to be located.

(b) In determining the appropriateness of an establishment, the Board shall consider all relevant evidence of record, including: . . .

(2) The effect of the establishment on peace, order, and quiet, including the noise and litter provisions set forth in §§ 25-725 and 25-726;

(3) The effect of the establishment upon residential parking needs and vehicular and pedestrian safety

D.C. Official Code § 25-313(a), (b), (b)(2)-(b)(3).

I. Based on the Board’s recent denials of applications at the proposed location, the presumption of appropriateness has been rebutted.

36. Under § 25-311(a), the general rule is that “the applicant shall bear the burden of proving to the satisfaction of the Board that establishment . . . is appropriate,” but when an application does not face objections, it is “presumed to be appropriate.” D.C. Official Code § 25-311(a). Yet, it has been said that “(p)resumptions . . . may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts.” *Legille v. Dann*, 544 F.2d 1, 5-6 (D.C. Cir. 1976). Or, to say it more succinctly, the presumption provided by § 25-311(a) “is one of fact and is of course rebuttable.” *Columbia Fin. Co. v. Worthy*, 141 A.2d 185, 187 (D.C. 1958); *In re HRH Services, LLC, t/a The Alibi*, Case No. 15-PRO-00096, Board Order No. 2016-280, n. ¶ 118 n. 6 (D.C.A.B.C.B. May 18, 2016) (“It should also be noted that the [applicant’s concession] eliminates the need for the Board to consider whether [the applicant] should not be entitled to a presumption of appropriateness under D.C. Official Code § 25-311(a)"); *In re Colin Unlimited, LLC, t/a Saki*, Case No. 10-PRO-00180, Board Order No. 2011-447, ¶ 21 (D.C.A.B.C.B. Oct. 19, 2011) (“we note that even if no objection was filed, it does not prohibit the Board from determining the appropriateness of the establishment”). Furthermore, once rebutted, “the presumption disappears as a rule of law, and the case is in the (factfinder’s) hands free from any rule.” *Legille*, 544 F.2d at 5-6.

37. On its face, Bardo’s application is substantially similar to the applications presented by Riverfront and BBR, which were recently denied by the Board. *Supra*, at ¶¶ 8, 23. Based on the addition of an on-site sales and consumption permit, the Application submitted by Bardo has the following substantial similarities to the prior applicants: (1) the same location near the baseball stadium; (2) the same issues regarding the simultaneous operation of the proposed business and the baseball stadium; (3) the same neighborhood, which has not undergone any significant changes since last reviewed; (4) the same or substantially similar outdoor beer garden business model, which is substantially similar to the denied applications; (5) the same or similar intent to operate without a building; (6) the same or substantially similar public transportation resources in the neighborhood, which have not undergone any significant changes since the last review; (7) the same roads and parking and traffic conditions, which have not undergone any significant

changes since the last review; (8) the same history of traffic accidents; and (9) the same soundproofing features and the same potential to generate an unreasonable amount of noise. *Supra*, at ¶¶ 1, 2, 6, 10, 22, 24, 26-27. In light of these similarities, there is substantial evidence that the permit requested by the applicant is inappropriate, which rebuts the presumption of appropriateness provided by § 25-311(a), and requires the Applicant to submit proof on this issue.

II. In light of the court’s decision in *Gerber*, approving the Application would be arbitrary and capricious in light of the Board’s recent denials of similar applications with similar business models at the same location.

38. Issuing an on-site sales and consumption permit to Bardo would be arbitrary, capricious, and an abuse of discretion based on the Board’s past denial of similar applications at the same location.

39. In *Gerber*, it was argued that Board approval of a Retailer’s Class B License was “arbitrary and capricious and an abuse of discretion,” when the Board previously denied an applicant who had “similar qualifications” and had applied “in the same location.” *Gerber v. D.C. Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1195 (D.C. 1985). The court in that case did not “reach the question of whether the Board, when it finds two successive applicants substantially the same and equally fit, has some independent duty to justify a difference in outcome in its license decisions.” *Id.* at 1196. The court further justified not reaching this issue because the “character of the applicants and the nature of the premises differed substantially.” *Id.*;

40. Moreover, in *Panutat*, the applicant argued that “[i]f the Board found that Shadow Room was appropriate for this commercial district, it also must have found that the nearly identical operation proposed by [p]etitioner ... was also appropriate.” *Panutat, LLC v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 269, 279 (D.C. 2013). The applicant argued that some of the language in the order approving one license may have contradicted some of the language in the order denying the other license. *Id.* While the court indicated that the language may be “difficult to square,” the court stated that it did not “perceive [any] . . . reason to disturb what a reading of the full text of the orders shows to be the Board’s consistent rationale” *Id.* at 280.

41. Unlike in *Gerber*, as noted above, the location and “nature of the premises” with an on-site sales and consumption permit renders this Application similar to the applications denied in *Riverfront* and *Bardo Big River*. *In re Dos Ventures, LLC*, Board Order No. 2013-512 at 2; *In re Bardo, LLC*, Board Order No. 2016-120 at 2; *supra*, at ¶ 37. There is further no evidence in the record that “the neighborhood has changed in some significant way” or that the applicant “has an effective way to address, minimize, or avoid problems such as those in evidence in this case.” *Panutat, LLC v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 269, 279 (D.C. 2013). Based on the similarities between Bardo and the prior applicants, as well as the lack of a change in circumstances, there is no “consistent rationale” for denying the prior applications but approving this Application. Under these circumstances approval of the present Application would be

arbitrary, capricious, and an abuse of discretion; therefore, the request for a permit should be denied.

III. The Application fails to satisfy §§ 25-313(b)(2) and 25-313(b)(3).

42. In determining appropriateness, the Board must consider whether the applicant’s future operations will satisfy the reasonable expectations of residents to be free from disturbances and other nuisances—not just whether the Application complies with the minimum requirements of the law. D.C. Council, Bill 6-504, the “District of Columbia Alcoholic Beverage Control Act Reform Amendment Act of 1986,” Committee on Consumer and Regulatory Affairs, 38 (Nov. 12, 1986); see *Panutat, LLC v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 269, 277 n. 12 (D.C. 2013) (“However, in mandating consideration of the effect on peace, order, and quiet, § 25-313(b)(2) does not limit the Board’s consideration to the types of noises described in § 25-725.”). As part of its analysis, the Board should evaluate each “unique” location “according to the particular circumstances involved” and attempt to determine the “prospective” effect of the establishment on the neighborhood. *Le Jimmy, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 433 A.2d 1090, 1093 (D.C. 1981). Furthermore, the analysis may also include the Applicant’s efforts to mitigate or alleviate operational concerns, the “character of the neighborhood,” the character of the establishment, and the license holder’s future plans. *Donnelly v. District of Columbia Alcoholic Beverage Control Board*, 452 A.2d 364, 369 (D.C. 1982) (saying that the Board could rely on testimony related to the licensee’s “past and future efforts” to control negative impacts of the operation); *Upper Georgia Ave. Planning Comm. v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 992 (D.C. 1985) (saying the Board may consider an applicant’s efforts to “alleviate” operational concerns); *Citizens Ass’n of Georgetown, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 410 A.2d 197, 200 (D.C. 1979); *Gerber v. D.C. Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1196 (D.C. 1985); *Sophia’s Inc. v. Alcoholic Beverage Control Bd.*, 268 A.2d 799, 800-801 (D.C. 1970).

a. Bardo’s open-air operations will have an adverse impact on the neighborhood by creating an unreasonable amount of noise.

43. “In determining . . . appropriateness . . . , the Board shall consider all relevant evidence of record, including: . . . [t]he effect of the establishment on peace, order, and quiet, including the noise . . . provision[] set forth in §[] 25-725” D.C. Code § 25-313(b)(2).

44. Under § 25-725(c), “The licensees under this subchapter shall comply with the noise level requirements set forth in Chapter 27 of Title 20 of the District of Columbia Municipal Regulations.” D.C. Code § 25-725(c).

45. Section 25-313(b)(2) also permits the Board to consider noise that falls outside the bounds of § 25-725. *Panutat, LLC, t/a District of Columbia Alcoholic Beverage Control Bd.*, 2013 WL 5271321, *4 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”). Thus, the Board may further “. . . consider whether an establishment is generating little or no sound.” *In re Solomon Enterprises, LLC, t/a Climax Restaurant & Lounge*, Case No. 13-PRO-00152, Board Order No. 2014-474, ¶ 32 (D.C.A.B.C.B.

Nov. 15, 2014) citing *In re 19th and K, Inc., t/a Ozio Martini & Cigar Lounge*, Case No. 13-PRO-00151, Board Order No. 2014-366, ¶ 37 (D.C.A.B.C.B. Oct. 1, 2014); see also *Panutat, LLC*, 75 A.3d 269, at 276-77 n. 12.

46. More specifically, the Board has explained that the appropriateness test seeks to “. . . determine the appropriate amount of sound in light of the reasonable expectations of residents.” *Id.*; see also D.C. Council, Bill 6-504, the “District of Columbia Alcoholic Beverage Control Act Reform Amendment Act of 1986,” Committee on Consumer and Regulatory Affairs, 38 (Nov. 12, 1986). In the past, the Board has relied upon the court’s decision in *T.L.* as a means of determining the reasonable expectations of residents. *Climax Restaurant & Lounge*, Board Order No. 2014-366 at ¶ 33; see also *Ozio Martini & Cigar Lounge*, Board Order No. 2014-366 at ¶ 6. There, it was determined that the government has a substantial interest in preventing noise from disturbing people in their homes. *In re T.L.*, 996 A.2d 805, 812 (D.C. 2010). Therefore, the government has the authority to prevent noise so unreasonably loud that it “. . . unreasonably intrude[s] on the privacy of a captive audience or so loud and continued as to offend[] a reasonable person of common sensibilities and disrupt[] the reasonable conduct of basic nighttime activities such as sleep.” *Id.* at 813 (quotation marks removed). *In re Inner Circle 1223, LLC t/a Dirty Martini Inn Bar/Dirty Bar*, Case No. 13-PRO-00172, Board Order No. 2014-507, ¶¶ 29-30 (D.C.A.B.C.B. Dec. 10, 2014) (footnote removed)

47. “In applying this standard, the Board has previously held that an establishment acts inappropriately when it generates amplified music that may be heard in residences located in another building.” *In re Naomi’s Ladder, LLC, t/a Touche*, Case No. 15-PRO-00023, Board Order No. 2016-351, ¶30 (D.C.A.B.C.B. Jun. 1 2016). “For example, in *Ozio*, the Board determined that it was unreasonable for the licensee to have its amplified music emanate into a residence approximately 100 feet away from the establishment.” *Id.* at ¶ 30 citing *Ozio Martini & Cigar Lounge*, Board Order No. 2014-366 at ¶ 59. “Likewise, in *Climax*, the Board found that it was inappropriate for the licensee to have its amplified music emanate into an apartment located 700 feet away from the establishment.” *Id.* at *Climax Restaurant & Lounge*, Board Order No. 2014-366 at ¶ 35.

48. In considering noise, the Board “may [also] consider an applicant’s efforts to address or alleviate operational concerns” including the establishment’s soundproofing features and noise mitigation practices related to both amplified music and the human voice.” *In re Inner Circle 1223, LLC t/a Dirty Martini Inn Bar/Dirty Bar*, Board Order No. 2014-507, at ¶ 34.

49. Just recently, at this site, in the *Bardo Big River* case, the Board said that it

recognizes that [BBR] has not applied for an entertainment endorsement; nevertheless, it will still have the right to play recorded music, it will have an occupancy of 750 people, and it will have the right to operate until 2:00 a.m. during the week and 3:00 a.m. during the weekend . . . Dock 57, a large apartment building, will open in the summer and will be located within 200 feet of [BBR] . . . Under these circumstances, [BBR] has no means to mitigate noise and cannot satisfactorily demonstrate that it can prevent its amplified music or crowd noise from bothering nearby residents or emanating throughout the neighborhood and beyond.

In re Bardo, LLC, t/a Bardo Big River, Case No. 15-PRO-00114, Board Order No. 2016-120, ¶ 42 (D.C.A.B.C.B. Mar. 16, 2016).

50. In this case, there is no evidence that the facts relied upon by the Board in *Bardo Big River* have significantly changed. The reduction of hours to midnight does not negate the fact that residents will live a few hundred feet from the establishment and there is no building to contain noise from amplified music or patron voices generated on the premises. *Supra*, at ¶ 20. Therefore, the Application, as presented, is inappropriate, due to the potential to generate unreasonable amounts of noise.

b. Bardo’s location by the stadium and major roads will have an adverse impact on pedestrian and vehicular safety and residential parking.

51. The Board is further convinced that Bardo’s presence will have an adverse impact on pedestrian and vehicular safety and residential parking.

52. “In determining the appropriateness of an establishment, the Board shall consider all relevant evidence of record, including: . . . [t]he effect of the establishment upon residential parking needs and vehicular and pedestrian safety” D.C. Official Code § 25-313(b)(3). Among other considerations, the Board is instructed to consider the availability of both private and public parking, any parking arrangements made by the establishment, whether “[t]he flow of traffic . . . will be of such pattern and volume as to . . . increase the [reasonable] likelihood of vehicular [or pedestrian] accidents” 23 DCMR § 400.1(b), (c) (West Supp. 2016). In prior cases, the Board has also considered the availability of public transportation, which may alleviate the demand for parking. *In re Cham Restaurant Group, t/a New Town Kitchen and Lounge*, Case No. 14-PRO-00055, Board Order No. 2014-526, ¶ 40 (D.C.A.B.C.B. Jan. 7, 2015).

53. The Board’s findings and determination in *Bardo Big River* regarding vehicular and pedestrian safety still applies to the current case. As said previously,

. . . [I]n *Riverfront*, the Board deemed the location unsafe for pedestrians because a large occupancy venue across the street from the baseball stadium encouraged jaywalking near major roads. *In re Dos Ventures, LLC, t/a Riverfront at the Ball Park*, Board Order No. 2013-512 at ¶ 47. In addition, the Board also deemed the establishment unsafe in light of an accident involving a police officer near the site and the need for the area around the stadium to operate under a traffic safety plan. *Id.* The current Application does not address these concerns.

First, the TOPP or traffic safety plan used to manage traffic during baseball games does not include or consider the presence of [BBR] As Mr. McCarthy indicated, even with the TOPP in place, various resources may not always be available to fulfill the plan. . . . It should also be noted that the TOPP is the creation of a number of district agencies and does not include ABRA as a party Consequently, the Board finds it inappropriate to license [BBR] when the existing TOPP does not account for [BBR]’s

existence and the Board cannot legally compel other agencies to modify the plan. *See* D.C. Official Code § 25-201.

Second, after the Nationals game is finished, it is critical for the city and the neighborhood, that the large crowd attracted to the game disperses in an orderly and efficient fashion; otherwise, MPD and other government agencies would likely be forced to maintain extra resources in the area beyond the expected time Further, vehicles using the stadium's garages exit onto Potomac Avenue, S.E. and buses load passengers and drive away on Potomac Avenue, S.E. If [BBR] is permitted to operate, baseball attendees would regularly cross Potomac Avenue, S.E., which would delay or interfere with the orderly exit of vehicles and buses from the stadium. The Board finds this scenario likely because Potomac Avenue, S.E., lacks appropriate traffic control aids to manage the use of the road by a high volume of pedestrians while vehicles attempt to leave the area.

Third, the Board has concerns that adding [BBR] across from the stadium will negatively impact traffic safety. The record shows that the corner of South Capitol Street, S.E., and Potomac Avenue, S.E., is located on a major road that has limited visibility Already, there has been one fatality and an officer engaged in traffic control was injured. . . . Moreover, having patrons walk between buses and crossing Potomac Avenue, S.E., while attendees attempt to [b]oard buses [that leave on the same street] appears unsafe and contradictory to the goal of an orderly exit of crowds after events at Nationals Park. . . . Under these circumstances, the Board is afraid that licensing [BBR] will likely increase fatalities and injuries on South Capitol Street, S.E., and Potomac Avenue, S.E.

The Board recognizes that [BBR] proposed providing a staff member outside the establishment to promote traffic safety. . . . In *Club Illusions*, the Board previously found that the mere posting of crossing guards on a dangerous road was not sufficient to ensure pedestrian and vehicular safety. *In re 2101 Venture, LLC, t/a Club Illusions*, Case No. 12-PRO-00054, Board Order No. 2013-004, ¶ 46 (D.C.A.B.C.B. Jan. 16, 2013). Likewise, in this case, based on evidence that a police officer was hurt while engaging in traffic control near the establishment, [BBR] has not shown that it has the ability to provide a sufficient level of safety for pedestrians crossing near the establishment

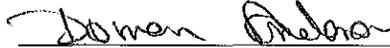
In re Bardo, LLC, Board Order No. 2016-120, at ¶¶ 46-51. There is no evidence that the dangerous and concerning traffic conditions identified in *Bardo Big River* have been ameliorated in any way. Moreover, the neighborhood appears to be losing a significant amount of parking and Bardo has not indicated the amount of parking that it will actually have available on game days. *Supra*, at ¶¶ 18, 21, 28. Because Bardo's operations are substantially similar to the ones proposed in the prior case, the Board is compelled to reach the same conclusion, and deem the Application inappropriate.

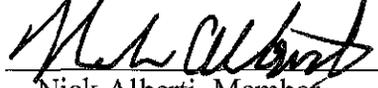
54. Finally, in the alternative, the above findings and conclusions of law justify the imposition of conditions in accordance with D.C. Official Code § 25-104(e).

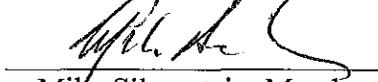
SERVICE INSTRUCTIONS

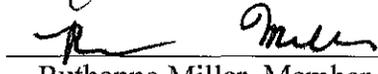
In accordance with 23 DCMR § 1703.5(g), ABRA shall deliver a copy of this Order to the Applicant's counsel by email.

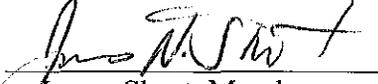
District of Columbia
Alcoholic Beverage Control Board


Donovan Anderson, Chairperson


Nick Alberti, Member


Mike Silverstein, Member


Ruthanne Miller, Member


James Short, Member

Under 23 DCMR § 1719.1 (West Supp. 2016), 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).