

(hereinafter “Applicant” or “Darnell’s”) on the condition that the establishment cease operating its Summer Garden at 10:00 p.m., Sunday through Thursday, and 11:00 p.m. on Friday and Saturday) and that it submit a new Certificate of Occupancy reflecting the Summer Garden pursuant to Title 23 of the District of Columbia Municipal Regulations (DCMR) § 1005.1.

Procedural Background

The Notice of Public Hearing advertising Darnell’s Application was posted on November 21, 2014, and informed the public that objections to the Application could be filed on or before January 5, 2015. *ABRA Protest File No. 15-PRO-00002, Notice of Public Hearing [Notice of Public Hearing]*. The Alcoholic Beverage Regulation Administration (ABRA) received protest letters from Advisory Neighborhood Commission (ANC) 1B, a Group of Five or More Individuals, Josephine Poole and David Riley, Abutting Property Owners. *ABRA Protest File No. 15-PRO-00002, Roll Call Hearing Results*.

The parties came before the Board’s Agent for a Roll Call Hearing on January 20, 2015, where the ANC and David Riley were granted standing to protest the Application. The Board dismissed the protest of Josephine Poole for failure to attend the Roll Call Hearing. *See Board Order No. 2015-084*.

On February 18, 2015, the parties came before the Board for a Protest Status Hearing. Finally, the Protest Hearing in this matter occurred on April 8, 2015.

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, 646 (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.

In this instance, the Board notes that the ANC entered into a Settlement Agreement with the Applicant, and thus the issues raised by the ANC in its protest have been addressed. That Settlement Agreement was approved by the Board on March 11, 2015. *See Board Order No. 2015-085*. As a result of the Board’s approval of the Settlement Agreement, the ANC withdrew its protest. The Group of Five or More Individuals was dismissed by the Board, leaving only the Abutting Property Owner as the sole Protestant to the renewal of the license.

Based on the narrow issue raised by the Abutting Property Owner in its Protest, 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. 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. Background

1. This license was transferred from Assefa Kidane t/a Manchester Bar and Restaurant. The Applicant submitted a Transfer Application without a Substantial Change. ABRA Licensing File No. ABRA-095113. As such, all conditions placed on the license at the time of transfer remain attached to the transferred license pursuant to D.C. Official Code §§ 25-316 and 25-405. The transfer was approved by the Board on November 4, 2014. ABRA Licensing File No. ABRA-095113.

A. Hours of Operations, and Sales, Service and Consumption

2. The establishment's current hours of operation are as follows: 8:00 a.m. to 11:00 p.m., Sunday through Thursday, and 8:00 a.m. to 1:00 a.m. on Friday and Saturday. *ABRA Licensing File No. ABRA-095113.*

3. The establishment's hours of alcoholic beverage sales, service, and consumption are as follows: 10:00 a.m. to 11:00 p.m., Sunday through Thursday, and 10:00 a.m. to 1:00 a.m. on Friday and Saturday. *ABRA Protest File No. 15-PRO-00002, Notice of Public Hearing.*

B. Entertainment

4. The establishment's Entertainment Endorsement is limited to the interior, and the hours of entertainment are as follows: 6:00 p.m. to 11:00 p.m., Sunday through Thursday, and 6:00 p.m. to 1:00 a.m. on Friday and Saturday. *ABRA Licensing File No. ABRA-095113.*

C. Summer Garden

5. The establishment's Summer Garden hours of operation are as follows: 8:00 a.m. to 11:00 p.m. Sunday through Thursday, and 8:00 a.m. to 12:00 a.m. on Friday and Saturday. *ABRA Licensing File No. ABRA-095113.*

6. Finally, the establishment's hours of alcoholic beverage sales, service and consumption in the Summer Garden are as follows: 10:00 a.m. to 11:00 p.m., Sunday through Thursday, and 10:00 a.m. to 12:00 a.m. on Friday and Saturday. *ABRA Licensing File No. ABRA-095113.*

7. The Summer Garden contains seating for 24 patrons transferred from the Manchester Bar and Restaurant license on November 4, 2014, though ABRA records do not contain a current Certificate of Occupancy that reflects the seating or occupancy of the Summer Garden. *ABRA Licensing File No. ABRA-095113.*

II. Testimony of ABRA Investigator Zachary Vick

8. Former ABRA Investigator Zachary Vick investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 15-PRO-00002, Protest Report (Apr. 2015) [Protest Report]*.
9. The establishment is located in a residential district with residences located on either side of the property, and a commercial district is located to the south. *Tr. 4/8/15 at 25, 36.* There are 39 licensed establishments within 1,200 feet of the establishment. *Tr. 4/8/15 at 25.* Fifteen of the licensed establishments are Retailer Class CR restaurants, two are retailer Class B licensees, two are retailer class CX multi-purpose licensees, 18 are taverns and two are nightclubs. *Tr. 4/8/15 at 25.* In addition to the nightclubs, 25 of the establishments have an Entertainment Endorsement and 12 have a Summer Garden Endorsement. *Tr. 4/8/15 at 25.*
10. There are no schools, recreation centers, public libraries, or day care centers located within 400 feet of the establishment. *ABRA Protest File No. 15-PRO-00002.*
11. ABRA investigative personnel monitored Darnell's on 11 separate occasions from March 12, 2015 to April 1, 2015. *Tr. 4/8/15 at 30, 42-43.* The establishment was open only three times during the monitoring period. *Tr. 4/8/15 at 30, 41-42.* ABRA investigators did not observe any criminal activity, excessive trash, or hear excessive noise during these monitoring visits. *Tr. 4/8/15 at 30, 40.* A regulatory inspection was conducted on March 27, 2015, and no ABRA violations were found as a result of the inspection. *Tr. 4/8/15 at 30, 40, 44.*
12. Former Investigator Vick contact the Office of Unified Communications for the number of calls for service to 944 Florida Avenue N.W., the establishment's address. *Tr. 4/8/15 at 31.* There were 23 calls for service between March 1, 2014 and March 1, 2015, most of which were calls for disorderly conduct. *Tr. 4/8/15 at 31.*
13. Former Investigator Vick also checked ABRA records for noise violations. *Tr. 4/8/15 at 31.* There was one violation dated January 17, 2015, for Case Number 15-CMP-00166 which remained pending at the time of the Protest hearing. *Tr. 4/8/15 at 31-32.*
14. Former Investigator Vick interviewed the Applicant and the Protestants as a part of his investigation. *Tr. 4/8/15 at 26.* The Applicant informed former Investigator Vick that further limiting the hours would harm the licensee's ability to be profitable. *Tr. 4/8/15 at 26.* The Protestants would like the hours reduced such that closing occurs at 10:00 p.m. *Tr. 4/8/15 at 26.*
15. The Applicant noted that he has entered into a Settlement Agreement with the ANC, and that he voluntarily lowers the music in the rear room at night when requested. *Tr. 4/8/15 at 25.* The Protestants informed former Investigator Vick that Darnell's has a negative effect on the peace, order and quiet due to the noise generated by the establishment and the strain placed on the limited parking spaces in the neighborhood. *Tr. 4/8/15 at 27.*

III. Testimony of Michael Istok

16. Michael Istok testified on behalf of the Applicant. *Tr.* 4/8/15 at 49. He lives across the street from the establishment on the 4th floor of a condominium building located at 2120 Vermont Avenue, N.W. *Tr.* 4/8/15 at 49, 55. He has lived there for three and one half years. *Tr.* 4/8/15 at 49. He has frequented the establishment several times. *Tr.* 4/8/15 at 49-50.

17. Mr. Istok described the patrons as typically in their 40's, and many of them are professionals. *Tr.* 4/8/15 at 50. He has also utilized the Summer Garden where other patrons engage in drinking, smoking and conversation. *Tr.* 4/8/15 at 51. There is no entertainment on the Summer Garden. *Tr.* 4/8/15 at 51.

18. Mr. Istok has never been disturbed by the noise emanating from the establishment. *Tr.* 4/8/15 at 51. He walks his dog during the evenings and at night, and has never heard any excessive noise. *Tr.* 4/8/15 at 51, 55. Likewise, he has never heard any excessive noise as he comes and goes in the neighborhood. *Tr.* 4/8/15 at 51.

19. Mr. Istok does not believe that Darnell's has a negative impact on the community. *Tr.* 4/8/15 at 52. He has never seen anyone littering nor has he seen litter associated with Darnell's. *Tr.* 4/8/15 at 52. He has not witnessed any rowdy patrons. *Tr.* 4/8/15 at 53. He testified that parking can be challenging, but there are a lot of cars in the neighborhood that belong to people who are patronizing the U Street establishments. *Tr.* 4/8/15 at 53-54.

IV. Testimony of David Riley

20. David Riley testified on behalf of the Protestants. *Tr.* 4/8/15 at 62. He resides at 912 W Street N.W. across from the Applicant's Summer Garden. *Tr.* 4/8/15 at 63-64, 112. He also owns a two unit flat located at 909 W Street N.W. *Tr.* 4/8/15 at 63. When Mr. Riley moved into the neighborhood in 1945, the establishment was utilized as a laundry mat. *Tr.* 4/8/15 at 104.

21. Mr. Riley is not opposed to ABC licensed establishments in the neighborhood. *Tr.* 4/8/15 at 63. In fact, he served as a supporting witness for the previous licensee, Assefa Kidane, who operated a quiet, little restaurant at that location. *Tr.* 4/8/15 at 63.

22. The previous licensee leased the business to Darnell Perkins for several previous years, and during this time, the relationship between Mr. Riley and Mr. Perkins deteriorated. *Tr.* 4/8/15 at 64. Mr. Riley testified that Mr. Perkins holds loud parties on the premises and that the Applicant operates after its authorized hours. *Tr.* 4/8/15 at 64.

23. When the neighborhood calls MPD, Mr. Perkins will utilize outside spotters to run into the bar and turn down the music. *Tr.* 4/8/15 at 64-65. When MPD leaves the area, the establishment turns the music back up. *Tr.* 4/8/15 at 64. Mr. Riley used to call ABRA and DCRA to file complaints, but he no longer does so because the agencies are not responsive. *Tr.* 4/8/15 at 109.

24. Mr. Riley is aware that the establishment has incurred fines for various violations related to noise and entertainment. *Tr.* 4/8/15 at 65. The violations are dated December 2010, December

2012, and January 2013. *Tr.* 4/8/15 at 71. Mr. Perkins was the ABC Manager during those years the establishment was cited, but he was not the owner. *Tr.* 4/8/15 at 72-73.

25. Mr. Riley stated that for the three to four weeks leading up to the Protest hearing, the establishment has not been open for business on Fridays, and only once on a Saturday night. *Tr.* 4/8/15 at 76, 82. This makes it difficult for an ABRA investigator to conduct a thorough investigation for the Protest hearing. *Tr.* 4/8/15 at 77, 82.

26. With regard to quality of life issues, Mr. Riley testified that patrons will exit the establishment from the Summer Garden and urinate on the trees in his yard. *Tr.* 4/8/15 at 77-79. In the past, he has had to push other patrons out of his yard who were there to urinate. *Tr.* 4/8/15 at 80-81. Patrons can enter and exit the Summer Garden without going through the interior of the establishment. *Tr.* 4/8/15 at 77-78.

27. Mr. Riley testified that the music emanating from the establishment is loud. *Tr.* 4/8/15 at 77, 107-108. As a result, the tenants in his two unit house cannot open their windows and enjoy fresh air during the summer months. *Tr.* 4/8/15 at 84. Some of the tenants have vacated the property due to the noise, and this affects Mr. Riley's income. *Tr.* 4/8/15 at 112-113. The noise from the Summer Garden includes loud screams and inebriated patrons trying to sing along with the music from the inside of the bar. *Tr.* 4/8/15 at 114-116. Mr. Perkins makes no effort to control the noise created by the patrons on the Summer Garden. *Tr.* 4/8/15 at 116-117.

28. Other quality of life issues that concern Mr. Riley are the trash bins that sit outside of the Summer Garden. *Tr.* 4/8/15 at 84. They are unclean and attract rats. *Tr.* 4/8/15 at 84.

29. Mr. Riley is requesting that the Board amend the hours in the Summer Garden to reflect a closing time of 10:00 p.m. *Tr.* 4/8/15 at 85-87, 106-107. Additionally, he would like to have the Applicant soundproof the interior of the establishment. *Tr.* 4/8/15 at 86, 113.

V. Testimony of Josephine Poole

30. Josephine Poole testified on behalf of the Protestants. *Tr.* 4/8/15 at 119. She has resided at 907 W Street NW, on the floor above the Applicant's bar, for 15 years. *Tr.* 4/8/15 at 119, 127, 141, 144.

31. Prior to the existing establishment, the establishment housed a store and a restaurant. *Tr.* 4/8/15 at 120. The current owner operates the establishment as a bar and grill. *Tr.* 4/8/15 at 120. She has called the police to complain about the noise that enters her residence through the vent in the floor. *Tr.* 4/8/15 at 120-121, 141. She can also smell the alcohol through the vent. *Tr.* 4/8/15 at 141-142. Additionally, she hears the noise that emanates from the Summer Garden which sits below her back bedroom window. *Tr.* 4/8/15 at 120. The noise bounces off the walls and shakes her pictures. *Tr.* 4/8/15 at 120, 144.

32. MPD responds to the complaints but rather than talking to Ms. Poole, they address the matter with Mr. Perkins. *Tr.* 4/8/15 at 120. She testified that he the lowers the volume of the music in the presence of the police, but then he turns it back up when they leave. *Tr.* 4/8/15 at 120.

33. On one occasion, the noise was so bad, Ms. Poole had to leave her home until the establishment closed for the night because she couldn't sleep. *Tr.* 4/8/15 at 122. She has tried to resolve the noise concern with the landlord for over five years. *Tr.* 4/8/15 at 122, 143.

34. Ms. Poole described the noise emanating from the interior and exterior of the operations of the establishment. *Tr.* 4/8/15 at 129. With regard to the inside operations of the establishment, Ms. Poole can hear the establishment's entertainment in her living room. *Tr.* 4/8/15 at 129, 136. The music is louder on the W Street side of her apartment because the bar is located under her bedroom. *Tr.* 4/8/15 at 129. She can also hear the patrons' voices when they talk. *Tr.* 4/8/15 at 129, 136-137. The restaurant portion of the establishment is located in the front of the premises and it is not as noisy. *Tr.* 4/8/15 at 138-141. She would like the Applicant to install soundproofing and reduce the volume of the music. *Tr.* 4/8/15 at 130-131.

35. With regard to the exterior operations, Ms. Poole picks up the discarded beer and wine bottles, as well as cigarette butts and other litter. *Tr.* 4/8/15 at 129-130.

CONCLUSIONS OF LAW

36. The Board may approve an Application to Renew a Retailer's Class CT License when the proposed establishment will not have an adverse impact on the neighborhood. D.C. 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; residential parking and vehicular and pedestrian safety; 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).

37. Furthermore, “. . . the Board shall consider whether the proximity of [a tavern or nightclub] establishment to a residence district, as identified in the zoning regulations of the District and shown in the official atlases of the Zoning Commission for the District, would generate a substantial adverse impact on the residents of the District.” D.C. Official Code § 25-314(c).

I. THE BOARD FINDS THAT THE APPLICATION FILED BY DARNELL'S IS APPROPRIATE FOR THE NEIGHBORHOOD SUBJECT TO CERTAIN CONDITIONS.

38. 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).

39. The Board finds that the application for renewal of Darnell's license is appropriate for the neighborhood subject to the following conditions: (1) neither Darnell's, nor its patrons, shall generate any noise during Darnell's operation that may be heard in a residence; and 2) the hours

of operation of the Summer Garden be limited to 10:00 p.m. Sunday through Thursday, and 11:00 p.m. on Friday and Saturday.

40. The Board finds that Darnell's generation of excessive noise render the Application inappropriate unless subject to conditions. "In determining the appropriateness of an establishment, the Board shall consider . . . [t]he effect of the establishment on peace, order, and quiet, including the noise and litter provisions set forth in §§ 25-725 and 25-726." D.C. Official Code § 25-313(b)(2); *see also* D.C. Official Code §§ 25-101(35A), 25-314(a)(4). Among other considerations, the Board is instructed to consider ". . . noise, rowdiness, loitering, litter, and criminal activity. 23 DCMR § 400.1(a) (West Supp. 2014).

41. The Board notes that the key issue of concern for the Abutting Property Owner in this case is the establishment's use of the Summer Garden. *Supra*, at ¶ 22. There are several instances in the record where Mr. Riley and Ms. Poole testify to noise that keeps them from the full use and enjoyment of their property. The Board credits the testimony of Ms. Poole who stated that the noise from the interior of the establishment enters her residence through the venting system, and that noise generated by the Summer Garden can be heard through her bedroom window. *Supra*, at ¶ 30; 33.

42. The Board also credits Mr. Riley who testified that the violations of peace, order and quiet have affected his economic interests due to the difficulty in retaining tenants. *Supra*, at ¶ 26.

43. Under D.C. Official Code § 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." D.C. Official Code § 25-104(e).

44. Here, based on the evidence available within the Board's record regarding the proximity of residences to the establishment and repeated issues of noise emanating from the establishment, the Board finds that the Applicant shall not generate any noise that can be heard in a residence. Additionally, the establishment's hours of operations in the Summer Garden shall be reduced as set forth below.

II. THE BOARD HAS SATISFIED THE GREAT WEIGHT REQUIREMENT BY ADDRESSING ANC 2B'S ISSUES AND CONCERNS.

45. ANC 1B's written recommendation submitted in accordance with D.C. Official Code § 25-609(a) indicated that its protest was based on concerns regarding Darnell's impact on peace, order, and quiet; residential parking and safety. Letter from James A. Turner, Chair, ANC 1B, to Ruthanne Miller, Chair, Alcoholic Beverage Control Board (Dec. 5, 2014) [*Protest Letter of ANC 1B*]. The Board notes that the previously approved Settlement Agreement satisfies the concerns of ANC 1B.

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

46. 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).

47. 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 1st day of July, 2015, hereby **APPROVES** the Application to Renew a Retailer's Class CT License at premises 944 Florida Avenue, N.W., Washington, D.C., filed by Darnell Perkins & Associates, LLC, t/a Darnell’s.

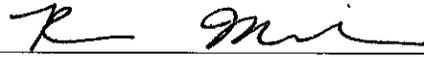
It is **FURTHER ORDERED** that the hours of operation, sales, service and consumption of alcoholic beverages of the Summer Garden be limited to 10:00 p.m. Sunday through Thursday, and 11:00 p.m. on Friday and Saturday.

It is **FURTHER ORDERED** that Darnell’s, shall submit a new Certificate of Occupancy reflecting the Summer Garden by no later than thirty (30) days from the date of this Order or its Summer Garden Endorsement shall be rescinded.

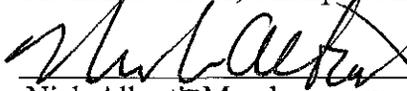
It is **FURTHER ORDERED** that Darnell’s, nor its patrons, shall generate any noise that may be heard in a residence while in operation.

The ABRA shall deliver a copy of this order to the Applicant, ANC 1B, and David Riley.

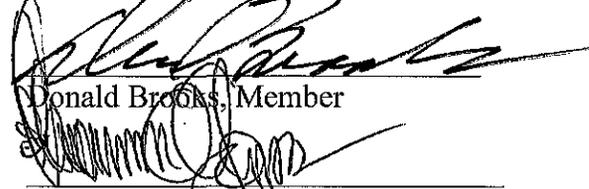
District of Columbia
Alcoholic Beverage Control Board



Ruthanne Miller, Chairperson



Nick Albert, Member



Donald Brooks, Member



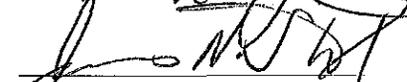
Herman Jones, Member



Mike Silverstein, Member



Hector Rodriguez, Member



James Short, 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, N.W., 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, 430 E Street, N.W., Washington, D.C. 20001; (202/879-1010). However, the timely filing of a Motion for Reconsideration pursuant to 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).