

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

In the Matter of:)		
)		
)	Case No.:	14-PRO-00040
Stephens, David J.W.)	License No:	94842
t/a Saloon 45)	Order No:	2014-334
)		
Application for a New)		
Retailer's Class CT License)		
)		
at premises)		
1821 18th Street, N.W.)		
Washington, D.C. 20009)		

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

ALSO PRESENT: Stephens, David J.W., t/a Saloon 45, Applicant

Paul Pascal, of the firm Pascal & Weiss, P.C., on behalf of the Applicant

Caroline Mindel, on behalf of the Mindel Group, Protestant

Abigail Nichols, Commissioner, on behalf of Advisory Neighborhood Commission (ANC) 2B, Protestant

Peg Simpson, on behalf of the DuPont Circle Village Group, Protestant

Frederick Michaud, on behalf of the Michauld Group, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

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

INTRODUCTION

The Alcoholic Beverage Control Board (Board) hereby denies the Application for a New Retailer's Class CT License filed by Stephens, David J.W., t/a Saloon 45, (hereinafter "Applicant" or "Saloon 45"). Specifically, the Board finds the Application inappropriate, because the establishment's intention of having its entrance on Swann Street, N.W., along with outdoor seating, will bring loitering and other patron-related disturbances to a residential area. The Board further denies the Application, because Saloon 45's Application and presentation lacked sufficient specificity for the Board to determine whether the establishment could satisfy the appropriateness criteria.

Procedural Background

The Notice of Public Hearing advertising Saloon 45's Application was posted on April 25, 2014, and informed the public that objections to the Application could be filed on or before June 9, 2014. *ABRA Protest File No. 14-PRO-00040*, Notice of Public Hearing [*Notice of Public Hearing*]. The Alcoholic Beverage Regulation Administration (ABRA) received protest letters from a group of residents and property owners associated with the nonprofit Dupont Circle Village (Dupont Circle Village Group); Advisory Neighborhood Commission (ANC) 2B; a group of seven residents or property owners, represented by Caroline Mindel (Mindel Group); and another group of residents and property owners, represented by Frederick Michaud (Michaud Group). *ABRA Protest File No. 14-PRO-00040*, Roll Call Hearing Results.

The Dupont Circle Citizens Association also filed a protest, but the Board dismissed this organization, because it filed an untimely petition. See *In re Stephens, David J.W., t/a Saloon 45*, Case No. N/A, Board Order No. 2014-278 (D.C.A.B.C.B. Jul. 9, 2014) (Order Denying DCCA Standing to Protest the Application).

The Board also denied a motion filed by Saloon 45 to continue the hearing and dismiss the Dupont Circle Village Group and ANC 2B. See *In re Stephens, David J.W., t/a Saloon 45*, Case Number 14-PRO-00040, Board Order No. 2014-303 (D.C.A.B.C.B. Jul. 30, 2014) (Order Denying Motion for Continuance and Dismissal of Protestants).

The parties came before the Board's Agent for a Roll Call Hearing on June 23, 2014, where the parties were granted standing to protest the Application. On July 9, 2014, the parties came before the Board for a Protest Status Hearing. Finally, the Protest Hearing in this matter occurred on August 6, 2014.

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. 2012). Accordingly, the Board "must elaborate, with precision, its response to the ANC[s] issues and concerns." *Foggy Bottom Ass'n*, 445 A.2d at 646. The Board notes that it received a written recommendation from ANC 2B. The ANC's issues and concerns shall be addressed by the Board in its Conclusions of Law, below.

Based on the issues raised by the Protestants, 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; 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).

DISPOSITION OF PRELIMINARY MATTERS

At the beginning of the protest, Saloon 45 made a number of preliminary motions, which the Board discusses briefly, below.

I. SALOON 45'S RECUSAL MOTION IS MOOT.

First, Saloon 45 orally moved that Board Member Silverstein recuse himself. *Transcript (Tr.)*, August 6, 2014 at 12. This motion was rendered moot by Board Member Silverstein's voluntary recusal from the proceedings. *Id.* at 33.

II. SALOON 45'S MOTION TO AMEND THE APPLICATION IS MOOT.

Second, Saloon 45 orally moved to convert the applicant to a limited liability company and to change the trade name. *Id.* at 12. The Board notes that this motion is moot based on the Board's denial of the application.

III. SALOON 45'S MOTION TO DISMISS IS DENIED.

Third, Saloon 45 moved to dismiss the protest based on an alleged ex parte communication. The subject of the motion is a letter submitted by Councilmember Jack Evans where he expressed support for denying the Application.¹ Letter from Jack Evans, Councilmember, to the Alcoholic Beverage Control Board (Jul. 21, 2014). The letter was presented to the Board as part of its meeting agenda on July 23, 2014. *Notice of Meeting, Second Supplemental Legal Agenda (Jul. 23, 2014) (No. 2) [Notice of Meeting (July 23)]*. While counsel for Saloon 45 may not have been served with the letter, it is clear from the record that he had an opportunity to read the letter before the hearing, as he quoted statements from the letter during oral argument. *Tr.*, 8/6/14 at 15-16.

An ex parte communication is defined generally as “[a] communication between counsel and the court when opposing counsel is not present.” BLACK'S LAW DICTIONARY, 119 (3rd Pocket Ed. 1996) (“ex parte communication”). Section 1720.1(a) prohibits knowingly making or causing ex parte communications to the Board. 23 DCMR § 1720.1(a). This regulation does not provide for a penalty when the rule is violated; as a result, such matters are left to the discretion of the Board.

¹ The Board's regulations permit members of the community to weigh in on proceedings so long as such testimony is not irrelevant or repetitious. 23 DCMR § 1701.6 (West Supp. 2014).

The Board notes that dismissal of an action with prejudice is an extreme remedy.² In Fair Care Foundation, the court found that the Department of Insurance and Securities Regulation (DISB) improperly considered an ex parte communication by modifying a prior order based on communications with two parties. Fair Care Foundation, A.G. v. District of Columbia Dept. of Ins. And Securities Regulation, 716 A.2d 987, 995. The court's remedy in that situation was to vacate the offending order with the caveat that DISB could reissue the order so long as the disadvantaged party received notice and an opportunity to be heard. Id. at 996.

In this instance, neither counsel nor any of the parties contacted the Board. Rather, a public official, who was not a party to this proceeding, submitted a letter to the Board that was immediately placed on the public record for all, including Applicant and Applicant's counsel to read. Accordingly, the Board does not consider this letter to be an ex parte communication or a violation of § 1720.1(a).

Even if this were to be considered a technical violation of § 1720.1(a), which the Board does not find, it was clearly inadvertent, unintentional, and harmless.³ The letter was received and read by the Board before the Protest Hearing—a fact that was announced on its public agenda dated July 23, 2014. See Notice of Meeting (July 23). Counsel had an opportunity to read the letter and respond to it during his case-in-chief. Tr., 8/6/14 at 15-16. Consequently, unlike Fair Care Foundation, the record shows that Saloon 45 had actual notice of the letter and an opportunity to reply to any statements made by Councilmember Evans before the Board reached a decision in this matter. Saloon 45 has not suffered any prejudice related to the submission of the letter; therefore, the motion to dismiss is denied.⁴ Id. at 40.

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. Saloon 45 has submitted an Application for a New Retailer's Class CT License at 1821 18th Street, N.W., Washington, D.C. Notice of Public Hearing. The establishment is not currently open for business at this time.

² Even if dismissal were warranted, there are multiple parties in this case and counsel did not present any proffer or evidence that all of the protestants are responsible for the communication. The Board cannot punish all of the parties for the mistakes of one or a few.

³ A better way to characterize the failure to notify counsel of the letter is as failure to serve situation, which is an excusable error under the Board's regulations. 23 DCMR § 1703.8 (West Supp. 2014).

⁴ Board Member Alberti abstained from this vote. Tr., 8/6/14 at 38, 40.

II. ABRA Investigator Felicia Dantzler

2. ABRA Investigator Felicia Dantzler investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 14-PRO-00040*, Protest Report (Aug. 2014) [*Protest Report*].

3. The proposed establishment is located in a C-2-A zone. *Protest Report*, at 4. Thirty-three licensed establishments are located within 1,200 feet of the proposed location. *Id.* The thirty-three establishments are comprised of twenty restaurants, five taverns, three Off-Premise Retailer's Class B Licenses, three Off-Premise Retailer's Class A Licenses, and two hotels. *Id.* There are no schools, recreation centers, public libraries, or day care centers located within 400 feet of the establishment. *Id.* at Exhibit 8.

4. According to the public notice, Saloon 45's proposed hours of operation 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. *Notice of Public Hearing*. The establishment has proposed hours of alcoholic beverage sales, service, and consumption, which are as follows: 10:00 a.m. to 2:00 a.m., Sunday through Thursday, and 10:00 a.m. to 3:00 a.m., on Friday and Saturday. *Id.* The establishment's proposed summer garden hours 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.* The establishment's proposed hours of alcoholic beverage sales, service, and consumption are proposed to run from 8:00 a.m. to 2:00 a.m., Sunday through Thursday, and 11:00 a.m. to 3:00 a.m., on Friday and Saturday. *Id.*

5. The Protest Report describes the public transportation resources in the neighborhood. *Protest Report*, at 6. Metro bus routes 90, 93, 96, and X3 stop at the corner of U Street, N.W., and Florida Avenue, N.W., which is approximately three to four blocks away from the establishment. *Id.* The Dupont Circle Metro Station is located approximately six blocks from the establishment. *Tr.*, 8/6/14 at 110.

6. Investigator Dantzler monitored the proposed location from July 15, 2014, to July 23, 2014. *Protest Report*, at 7. She observed that patrons of Lauriol Plaza, a nearby establishment, were obstructing the sidewalk while they waited for seating. *Id.* at 8. She also noticed that Lauriol Plaza's valet permitted patrons seeking valet parking to double park their cars, which obstructed traffic. *Id.* She heard patrons talk loudly in the establishment's outdoor seating areas, but did not believe the noise was loud enough to disturb residents. *Id.* Finally, she also noted that there was an absence of parking in the area at night. *Tr.*, 8/6/14 at 77, 91.

7. The premises where the establishment will be located does not have an alley. *Id.* at 76-77. Instead, a driveway sits next to the establishment. *Id.* at 102.

8. The nearby areas of Swann Street, N.W., and S Street, N.W. are located in an R-5 residential zone. *Id.* at 77.

9. The proposed building for the establishment has three exits. *Id.* at 93. One exit fronts 18th Street, N.W., while the other exit fronts Swann Street, N.W. *Id.* The establishment also has a back door. *Id.* at 95.

III. William Couch

10. Saloon 45 hired William Couch as an architect. Id. at 114-16. Mr. Couch has worked on 1821 18th Street, N.W., since June 2014. Id. at 136-37. The building is made of solid masonry and located on a corner lot. Id. at 137-38. The building has a turret and a bay window. Id. at 138. The ground floor has 840 square feet of space and will be the sole space occupied by the establishment. Id. at 183. The two levels above the ground floor are currently used as office space. Id. at 138. The establishment will not have a full kitchen. Id. at 210. The building shares a party wall with its neighbor and has a rear yard. Id. The building directly to the east of the establishment is a residence. Id. at 180-81.

11. Mr. Couch described the property as “small.” Id. at 139. In order to accommodate a tavern in such a small space, Saloon 45 will have its entrance face Swann Street, N.W. Id. at 139, 154. Mr. Couch further noted that the establishment would be unable to use the 18th Street, N.W., entrance, because the Historic Preservation Board would likely object to modifications to that portion of the building. Id. at 139, 154; see also 313. Mr. Couch believes that once the premises are remodeled, the establishment will only hold thirty-two people. Id. at 140. The establishment plans to install double-pane glass windows, which mitigate more sound than single-pane windows. Id. at 144.

12. Mr. Couch also presented “early concepts” of its plan to make the rear yard into a summer garden. Id. at 142-43. The rear yard is twenty feet long and twenty-five feet wide. Id. at 142-43. At most, the summer garden will have room for twenty-four people sitting and twelve standing. Id. at 143. The summer garden would not have an entrance facing Swann Street, N.W. Id. at 142. Mr. Couch proposed building a large fence and install plantings to separate the summer garden from residents. Id. at 146, 158.

13. The establishment will have its trash area located by the curb cut on Swann Street, N.W., near the rear fence. Id. at 145, 152. Mr. Couch proposed building an enclosure to cover the trash area. Id. at 145. Mr. Couch could not estimate the potential size of the trash area during the hearing. Id. at 152. As proposed, the establishment’s summer garden will be twenty feet closer to Swann Street, N.W., than Bar Charley’s summer garden. Id. at 167.

14. Mr. Couch admitted that none of the establishment’s plans are firm at this time. Id. at 143, 159, 162-63, 187-88; see also id. at 289, 303-04, 320, 360, 521-22.

IV. Salwa Chamma

15. Salwa Chamma owns 1821 18th Street, N.W., since 1998. Id. at 212. Ms. Chamma owned the flower shop that previously resided in the building. Id. at 213. The tenant on the upper levels of the building is a German finance company that operates during regular business hours. Id. at 214. David Stephens is the brother-in-law of Ms. Chamma’s daughter. Id. at 217.

16. In the past, Ms. Chamma has slept in the building. Id. at 215. She never experienced problems with noise. Id. She also noted that the flower shop used to keep its trash receptacle in

the last parking space in the shop's parking lot. Id. at 222. Ms. Chamma noted that real estate values in the neighborhood have only increased during her time in the neighborhood. Id. at 223.

V. David Stephens

17. David Stephens serves as the sole proprietor of Saloon 45. Id. at 252-53. Mr. Stephens has a B.A. in Psychology and previously served in the military. Id. at 254-55. As part of his duties, Mr. Stephens received alcohol awareness training. Id. at 258. He also took the orientation classes provided by the District of Columbia Department of Consumer and Regulatory Affairs and ABRA, as well as an identification checking class provided by ABRA. Id. at 268-69.

18. The United States Census Bureau reports the following statistics about zip code 20009. *Applicant's Exhibit C*. Forty-one percent of people use public transportation to commute to work. Id. Twenty-percent walk to work, while 22 percent drive. Id. at 262. The median age in the neighborhood is thirty-two. *Applicant's Exhibit D*.

19. Saloon 45's business model includes providing the neighborhood with a "small bar." Id. at 266. The bar will provide "small plates," along with "beer, wine, [and] cocktails." Id. Saloon 45 has not applied for an entertainment endorsement. Id. at 267.

20. Mr. Stephens stated that he intends to have all of his staff receive alcohol awareness training. Id. at 268. He further intends to have trash pickup occur no earlier than 8:00 a.m. and no later than 10:00 p.m. Id. at 269.

21. Saloon 45 presented crime statistics for a 400 foot area surrounding 18th and Swann Street, N.W. *Applicant's Exhibit F*. The Metropolitan Police Department's statistics show one possession of alcohol violation in the period between July 2012 and July 2013. Id. The statistics also show two public urination violations and one prostitution violation occurred in the period between July 2013 and July 2014. Id.

22. Information provided by the Office of Tax and Revenue show that property values in the neighborhood have generally increased. *Applicant's Exhibits G, H, I*.

23. Mr. Stephens does not have plans to provide parking for employees. *Tr.*, 8/6/14 at 368.

VI. Eleanor Collinson

24. Eleanor Collinson lives at the Cygnet Condominium Complex, located on the corner of 18th Street, N.W., and Swann Street, N.W. Id. at 397. Ms. Collinson can see the proposed establishment's parking lot from her windows on Swann Street, N.W. Id.

25. Ms. Collinson discussed the traffic and parking situation in the neighborhood. Id. at 399. On weekends, vehicles regularly create traffic jams on Swann Street, N.W., as they search for parking. Id. at 399, 424-25, *see also id.* at 551-52. Parking in the neighborhood is generally accessible between 8:00 a.m. and 4:00 p.m. Id. Like many residents of apartment complexes in

the neighborhood, Ms. Collinson lacks a dedicated parking space and must use the public streets for parking. Id. at 400. She has also observed many vehicles double park while dropping off patrons and waiting for valet service in the area. Id. at 400, 423. Ms. Collinson further observed that approximately half the vehicles she sees are registered in other jurisdictions. Id. at 434.

26. Ms. Collinson is concerned about patrons entering the establishment through the building's Swann Street, N.W. entrance. Id. at 401. Unlike 18th Street, N.W., Swann Street, N.W., is highly residential. Id. Swann Street, N.W., does not have wide sidewalks and is obstructed by tree boxes. Id. at 402.

27. Ms. Collinson also described the disturbances she has observed from her home. Id. at 409. Ms. Collinson has witnessed two car crashes, three bike accidents, and observed three occasions where patrons engaged in fighting. Id.

VII. Caroline Mindel

28. Caroline Mindel lives directly across the street from 1821 18th Street, N.W. Id. at 441. Ms. Mindel rents her English basement to a tenant. Id. at 442. Her tenant is not renewing his or her lease due to the noise caused by Bar Charley and the possible addition of Saloon 45. Id. at 442-43.

29. Ms. Mindel discussed her concerns regarding noise. Id. at 443. On August 1, 2014, Ms. Mindel could clearly hear the conversations occurring in Bar Charley's terrace around 9:30 p.m., while walking her dog five houses away from Bar Charley's location. Id. at 443. She noted that Bar Charley's outdoor seating area has a fence, which does not help reduce the noise from that portion of the establishment. Id. at 454. Ms. Mindel is concerned that the establishment will create noise when it dumps bottles in the trash. Id. at 445. She also observed that the neighborhood suffers from a rat problem. Id. at 457.

30. Ms. Mindel observed that patrons in the neighborhood often crowd around the entrance of restaurants and bars. Id. at 444. Ms. Mindel also complained that bar patrons leaving establishments in the neighborhood regularly engage in conversations in the street that cause her to wake up between 1:00 a.m. and 3:00 a.m. Id.

VIII. Peggy Simpson

31. Peggy Simpson lives on Swann Street, N.W. Id. at 462. Ms. Simpson is a founding member of the Dupont Circle Village, which is part of the "National Aging-in-Place Movement." Id. at 463.

32. Ms. Simpson expressed concerns over noise. Id. at 465. Bar Charly is only located fifty feet from her home. Id. at 465. Two weeks prior to the hearing, Ms. Simpson could clearly hear noise from Bar Charley's patrons outside her home. Id. at 465; see also 492-93. Ms. Simpson is regularly awoken by patrons returning to their vehicles between 1:00 a.m. and 2:00 a.m. Id. at 466.

33. Ms. Simpson also expressed concern regarding the establishment's impact on peace and order. Id. She noted that she and her neighbors have had plants uprooted and planters toppled by patrons. Id.

IX. Jason Fitzsimmons

34. Jason Fitzsimmons lives on Swann Street, N.W. Id. at 481. Mr. Fitzsimmons opposes the Application due to concerns regarding noise, late-night disturbances, and traffic. Id. at 483

X. Nell Payne

35. Nell Payne lives on Swann Street, N.W., approximately one-hundred and fifty feet from the establishment's proposed location. Id. at 495.

36. Ms. Payne discussed her concerns regarding peace, order, and quiet. Id. at 495. First, Ms. Payne cannot keep her window open at night, because noise from Bar Charley's sidewalk café can be heard in her residence. Id. at 495. She also can hear noise from Rebellion's rooftop bar. Id. Second, she is regularly disturbed by patrons in the area fighting, playing radios, conversing too loudly, engaging in public urination, and vandalizing plantings. Id. at 496.

37. Ms. Payne also discussed her concerns regarding traffic and parking. Id. at 497. She noted that Lauriol Plaza's employees regularly park on Swann Street, N.W. Id. Lauriol Plaza also attracts patrons from other neighborhoods and outside the District. Id. Finally, she has observed regular traffic congestion during the spring, summer, and fall. Id. at 498.

XI. Frederick Michaud

38. Frederick Michaud lives on Swann Street, N.W. Id. at 505. A few months before the hearing, Ms. Michaud observed a young woman get attacked by a young man outside the establishment's proposed location. Id. at 505-06. After he yelled at the man to stop, the individual started moving towards him but stopped when Mr. Michaud's dog began to bark. Id. at 506.

XII. Commissioner Will Stephens

39. ANC Commissioner Will Stephens serves as the Chair of ANC 2B and represents ANC 2B08. Id. at 510-11. Commissioner Stephens lives approximately one block north of the establishment's proposed location. Id. at 511. He emphasized that the establishment is located in the Dupont Circle neighborhood. Id. at 512. He further noted that the establishment is a seven to eight minute walk from the Dupont Circle Metro Station. Id.

40. Commissioner Stephens explained the ANC's justifications for protesting the Application. Id. at 516. First, Saloon 45 is requesting longer hours than the neighboring establishment, Bar Charley. Id. Second, unlike Bar Charley, Saloon 45 would not be subject to a minimum food sales requirement or even have a kitchen. Id.; *ANC 2B Resolution*, New Application (ABRA-094842), 2 (May 21, 2014). Third, the ANC is concerned that the operator

has no experience operating a licensed establishment. *Tr.*, 8/6/14 at 521. Fourth, the ANC is concerned that the proposed hours for the outdoor seating area exceed 11:00 p.m. during the week and midnight during the weekend. *Id.* at 524. Fifth, the ANC is concerned that Saloon 45's business model is solely as a beer garden, which is not an appropriate based on its close proximity to residents. *Id.* at 518.

41. Commissioner Stephens noted that Bar Charley's operations are more compatible with the neighborhood. *Id.* at 527. Unlike Saloon 45's proposal, Bar Charley closes its outdoor seating area at 11:00 p.m. during the week and midnight during the weekend. *Id.* at 528. Bar Charley does not permit new patrons inside the establishment after 12:30 a.m. during the week and 1:30 a.m. during the weekend and ends operations at 1:00 a.m. during the week and 2:00 a.m. during the weekend. *Id.* Bar Charley also does not permit patrons to stand in the outdoor seating area. *Id.* Finally, the establishment also prohibits trash removal from 11:00 p.m. to 8:00 a.m. *Id.* at 528-29.

CONCLUSIONS OF LAW

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

43. 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 THE APPLICATION FILED BY SALOON 45 INAPPROPRIATE FOR THE NEIGHBORHOOD.

44. The Board denies Saloon 45's Application, because the establishment will have an adverse impact on peace, order, and quiet.

45. 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).

a. Saloon 45 will have an adverse impact on the peace, order, and quiet of nearby residents.

46. “In determining the appropriateness of an establishment, the Board shall consider all relevant evidence of record, including: . . . The effect of the establishment on peace, order, and quiet, including the noise 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). As part of this determination, the Board considers “. . . noise, rowdiness, loitering, litter, and criminal activity. 23 DCMR § 400.1(a) (West Supp. 2014). Finally, in accordance with § 25-314(c), the Board is also required to consider whether a new tavern or nightclub will create “. . . a substantial adverse impact on residents of the District . . .” living in nearby residence districts. § 25-314(c).

47. The Board finds that the establishment’s proposed operations as a new tavern will adversely impact nearby residences. Supra, at ¶ 11. Swann Street, N.W., a highly residential street that is designated an R-5 residential zone. Supra, at ¶¶ 8, 26.

48. The Board disapproves of Saloon 45’s stated intention of having its main entrance face Swann Street, N.W., rather than the commercial corridor of 18th Street, N.W. Supra, at ¶¶ 11, 26. An entrance on Swann Street, N.W., will encourage Saloon 45’s patrons to loiter on Swann Street, N.W., like other patrons in the neighborhood, which will bring noise and other patron-related disturbances to a residential area. Supra, at ¶¶ 6, 21, 27, 30, 33, 36, 38.

49. Separately, the Board also finds that having a large outdoor seating area near Swann Street, N.W., will cause an unreasonable amount of late-night noise to the neighborhood. Supra, at ¶ 12. Section 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”). Here, the record shows that residents on Swann Street, N.W., are already disturbed by noise from Bar Charley and other patrons. Supra, at ¶¶ 28-29, 32, 36. Consequently, placing a large outdoor seating area directly on Swann Street, N.W., will simply increase the amount of noise disturbances experienced by the neighborhood.

50. Consequently, the Board denies the Application, because it will cause an adverse impact on the peace, order, and quiet of residents living on Swann Street, N.W.⁵

b. Saloon 45’s Application merits denial, because the Applicant did not adequately explain the nature of the operations.

51. The Board must rely on substantial evidence, not assumptions when reviewing an Application. Saloon 45 did not present the Board with a clear picture of the nature of its operations and business model during its presentation. In this case, Mr. Couch and others noted that the establishment’s plans remain in flux, which prevents the Board from determining that its operations satisfy the appropriateness standards. Supra, at ¶ 14. In *Sophia’s*, the Board was

⁵ The Board notes that the remaining protest issues are moot based on the Board’s determination regarding peace, order, and quiet.

operations satisfy the appropriateness standards. *Supra*, at ¶ 14. In *Sophia's*, the Board was entitled to find an application inappropriate when it lacked "vital" details, such as plans regarding "music, dancing, seating capacity, and parking." *Sophia's Inc. v. Alcoholic Beverage Control Bd.*, 268 A.2d 799, 800 (D.C. 1970). Here, the Applicant could not give the Board a firm answer to key facts, such as the maximum occupancy of the outdoor seating area, the layout of the outdoor seating area, the soundproofing features of the outdoor seating area, or the establishment's food service plans. *Tr.*, 8/6/14 at 143, 159, 162, 187-88, 303-04, 360. Without firm information regarding these key details, similar to *Sophia's*, the Board is not in a position to evaluate the appropriateness of the establishment. For this separate reason, the Board finds that the Application is too unclear to merit approval at this time.

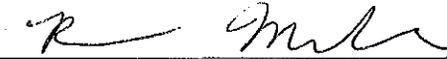
II. THE BOARD HAS SATISFIED THE GREAT WEIGHT REQUIREMENT BY ADDRESSING ANC 2B'S ISSUES AND CONCERNS.

52. ANC 2B's written recommendation submitted in accordance with D.C. Official Code § 25-609(a) indicated that its protest was based on concerns regarding Saloon 45's impact on peace, order, and quiet; residential parking and safety; and real property values. *ANC 2B Resolution*, New Application (ABRA-094842), 1-2. The Board notes that it agrees with the recommendation of the ANC regarding its concerns related to peace, order and quiet, which it addressed above. Based on this agreement, the remaining issues and concerns are moot.

ORDER

Therefore, the Board, on this 23rd day of September 2014, hereby **DENIES** the Application for a New Retailer's Class CT License at premises 1821 18th Street, N.W. filed by Stephens, David J.W., t/a Saloon 45. The ABRA shall deliver a copy of this order to the Applicant, ANC 2B, and the Protestants.

District of Columbia
Alcoholic Beverage Control Board



Ruthanne Miller, Chairperson



Donald Brooks, Member



Herman Jones, Member



Hector Rodriguez, Member



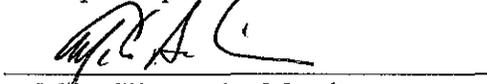
James Short, Member

I concur with the decision reached by the majority of the Board. I only write separately to note that I voted to abstain from the vote related to the Applicant's motion to dismiss based on an alleged ex parte communication.



Nick Alberti, Member

I have recused myself from this matter and did not participate in the deliberations of this case.



Mike Silverstein, Member

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

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b) (2004).