

INTRODUCTION

The Alcoholic Beverage Control Board (Board) denied 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"). *In re Stephens, David J.W., t/a Saloon 45*, Case Number 14-PRO-00040, Board Order No. 214-334, 2 (D.C.A.B.C.B. Sept. 23, 2014). Specifically, the Board found 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. *Id.* The Board further denied 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. *Id.*

Saloon 45 filed a Motion for Reconsideration (Motion) asking the Board to reverse its denial. *Mot. for Recon.*, 1.¹ The Applicant argues that the Board should not have relied on "subjective claims of disturbing noise emanating from Bar Charley's operations . . ." *Id.* Saloon 45 also found the Board's determination unreasonable based on the lack of noise violations by the establishment and the lack of measurements in the record. *Id.* The Applicant further argues that the Board could not deny the Application based on a lack of details. The Board disagrees and affirms its prior Order.

The Board's decision rests on credible, reliable, and probative evidence. Each location where an establishment seeks to be located is "unique"; therefore, the Board must evaluate each establishment ". . . according to the particular circumstances involved." *Le Jimmy, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 433 A.2d 1090, 1093 (D.C. 1981). Under this test, the Board must consider the "prospective" effect of the establishment on the neighborhood." *Id.* Among other considerations, this may include the applicant's efforts to mitigate or alleviate operational concerns,² the "character of the neighborhood,"³ the character of the establishment,⁴ and the license holder's future plans.⁵

The Board finds it appropriate to look to the impact of Bar Charley's operation on the neighborhood to extrapolate the impact of Saloon 45's operations. In its prior Order, the Board credited the evidence of disturbing noise provided by Caroline Mindel, Peggy Simpson, and Nell Payne. *In re Stephens, David J.W., t/a Saloon 45*, Case Number 14-PRO-00040, Board Order No. 214-334, ¶¶ 28-29, 32, 36, 49 (D.C.A.B.C.B. Sept. 23, 2014). The Applicant has provided

¹ The Board did not receive a response from the protestants.

² *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).

³ *Citizens Ass'n of Georgetown, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 410 A.2d 197, 200 (D.C. 1979).

⁴ *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, 801 (D.C. 1970).

⁵ *Sophia's Inc.*, 268 A.2d at 801.

no reason for discrediting these individual complaints regarding noise in the neighborhood. *Panutat, LLC v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 269, 277 n. 12 (D.C. 2013) (saying the Board may consider the noise created by the human voice when determining appropriateness).

The Board also finds Saloon 45's other arguments unpersuasive.

First, the Board is not required to rely on Saloon 45's history of violations on an application for a new license. The only reason Saloon 45 has no history of violations is because it is not open; therefore, relying on this as a factor would be irrational and defeat the purpose of the appropriateness test, which seeks to determine the "prospective" effect of the establishment. *Le Jimmy, Inc.*, 433 A.2d at 1093; *Panutat, LLC*, 75 A.3d at 276 ("Thus, under the plain terms of the statute, the Board is not excused from considering 'the effect of the establishment' in cases where the applicant seeks a liquor license for a not-yet-located establishment that is without a track record (i.e., that cannot possibly have had any effect on the statutory factors by the time its application is under consideration)").⁶

Second, the lack of measurements in the record is not significant to the Board's determination. If Saloon 45 wants to argue that it is farther away from residents than Bar Charley, then it should have submitted measurements into the record or provided testimony on that point. *See* D.C. Official Code § 25-311(a) (placing the burden of proof on the Applicant). Based on the record before the Board, it appears eminently reasonable to look to a neighboring establishment's operations to extrapolate the impact of a new establishment.

Third, Saloon 45 argues that the Board misinterprets *Sophia's Inc. v. Alcoholic Beverage Control Bd.*, 268 A.2d 799, 801 (D.C. 1970). D.C. Official Code § 25-311(a). The Board finds its interpretation of *Sophia's* reasonable, because Saloon 45 carries the burden of proof. D.C. Official Code § 25-311(b)(1). This means that when there is a lack of evidence in the record, the Board cannot make the necessary finding that the establishment is appropriate. *Haight v. D.C. Alcoholic Beverage Control Bd.*, 439 A.2d 487, 494 (D.C. 1981) (saying the Board should avoid statements indicating that it solely relies on the protestant's failure to present evidence, because this type of phraseology gives the appearance that the burden is on the protestants). Saloon 45 has not directed the Board to any information in the record that renders its determination that there is a lack of evidence in the record incorrect or unreasonable.

ORDER

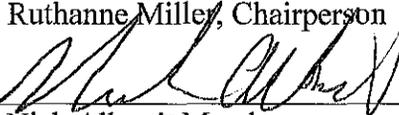
Therefore, the Board, on this 12th day of November 2014, hereby **DENIES** the Motion for Reconsideration filed by Stephens, David J.W., t/a Saloon 45. The ABRA shall deliver a copy of this order to the Applicant, ANC 2B, and the Protestants.

⁶ It should be noted that compliance with the law becomes an issue when an applicant files a renewal application. D.C. Official Code § 25-315(b)(1).

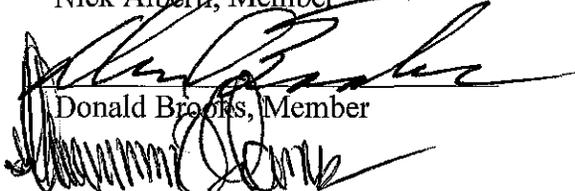
District of Columbia
Alcoholic Beverage Control Board



Ruthanne Miller, Chairperson



Nick Albertz, Member



Donald Brooks, Member



Herman Jones, Member

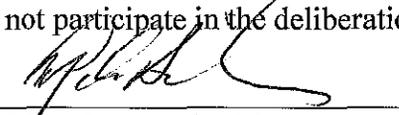


Hector Rodriguez, Member



James Short, 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).