THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
1624 U Street, Inc. t/a Chi-Cha Lounge	License No.: Case No.:	026519 13-PRO-00132
Application for Renewal of a Retailer's Class CT License	Order No.:	2014-436
at premises 1624 U Street, N.W. Washington, D.C. 20009		

BEFORE: Ruthanne Miller, Chairperson
Donald Brooks, Member
Mike Silverstein, Member
Hector Rodriguez, Member

ALSO PRESENT: 1624 U Street, Inc., t/a Chi-Cha Lounge, Applicant

Emanuel Mpras, Esq., on behalf of the Applicant

Guangsha Wang, Abutting Property Owner, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING MOTION FOR RECONSIDERATION

INTRODUCTION

In Board Order No. 2014-262, the Alcoholic Beverage Control Board (Board) granted the renewal application submitted by 1624 U Street, Inc., t/a Chi-Cha Lounge ("hereinafter Chi Cha Lounge" or "Applicant"), located at premises 1624 U Street, N.W., Washington, D.C., 20009. *In re 1624 U Street, Inc., t/a Chi-Cha Lounge*, Case Number 13-PRO-00132, Board Order No. 2014-262, 1 (D.C.A.B.C.B. Aug. 6, 2014).

The Abutting Property Owner (Protestant) filed a Motion for Reconsideration, which argues that the Board should reconsider Board Order No. 2014-262 for the following reasons: (1) the Board should not rely on the testimony of Mr. Reed, because he is not qualified in the area of acoustics; and (2) the soundproofing performed by the licensee is not sufficient, because it results in sound readings that are too high and only

covers the front of the establishment. *Protestant's Motion for Reconsideration*, 2 [*Mot. for Recon.*]. The Motion for Reconsideration is opposed by the Applicant. *Opposition to Mot. for Recon.*, 1 [*Opposition*].

The Board affirms its prior Order for the following reasons:

I. THE PROTESTANT WAIVED THE RIGHT TO PRESENT NEW EVIDENCE INTO THE RECORD.

1. The Board will not accept new testimony that the Applicant failed to properly soundproof the front of the establishment after the close of the record. Under a motion for reconsideration, a petitioner may only ask for consideration of new matters if the petitioner ". . . could not by due diligence have known or discovered the new matter prior to the date the case was presented to the Board for decision." 23 DCMR § 1719.4. During the protest hearing, the Protestant did not present evidence that the Applicant did not install sufficient soundproofing in the front of the establishment. Because this fact could have reasonably been discovered before the hearing, the Board will not accept this into evidence on reconsideration.

II. THE APPLICANT DOES NOT POSE A RISK OF VIOLATING THE DISORDERLY CONDUCT LAW.

2. Paragraph 52 of the Board's prior Order fails to address whether the Applicant engaged in commercially reasonable soundproofing, which is a necessary component of the Board's disorderly conduct analysis. *See In re Chi-Cha Lounge*, Board Order No. 2014-262, at ¶ 52.

3. The District's disorderly conduct law provides in § 22-1321(d) that "[i]t is unlawful for a person to make an unreasonably loud noise between 10:00 p.m. and 7:00 a.m. that is likely to annoy or disturb one or more other persons in their residences." D.C. Official Code § 22-1321(d). The Board has previously said that it will not find a licensee's noise-making activities unreasonable under the disorderly conduct law when the ". . . licensee has taken commercially reasonable steps to soundproof its establishment and is not otherwise in violation of the District of Columbia's noise laws." *In re Krakatoa, Inc., t/a Chief Ike's Mambo Room*, Case No. 10-PRO-00160, Board Order No. 2011-205, ¶ 35 (D.C.A.B.C.B. May, 18, 2011).

4. Under the appropriateness test, an applicant's efforts to alleviate operational concerns, such as noise, are relevant under the appropriateness test. *Donnelly v. District of Columbia Alcoholic Beverage Control Board*, 452 A.2d 364, 369 (D.C. 1982); *Upper Georgia Ave. Planning Comm. v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 992 (D.C. 1985).

5. In the 2011 *Chi-Cha Lounge* case, the protestant heard noise from licensee's establishment in his condominium located in a C-2-A zone and above the licensee's premises. *In re 1624 U Street, Inc., t/a Chi-Cha Lounge*, Case No. 10-PRO-00156, Board Order No. 2011-214, ¶¶ 4, 28 (D.C.A.B.C.B. May 25, 2011). The facts further demonstrated that the licensee engaged in extensive soundproofing, which included (1) the

installation of gypsum board on the walls; (2) the installation of a sound limiter; (3) the filling of physical cavities located in the building with denim and rubber; (4) the removal and redirection of speakers; (5) the soundproofing of all of the establishment's air conditioning vents; and (6) the establishment's management committed to testing the sound level generated by the establishment on an hourly basis. *Id.* at ¶¶ 10, 13, 14, 15. Additionally, one of the protestant's relatives prevented the establishment from completing all of tasks recommended by the sound engineer. *Id.* at ¶ 11. There was also no evidence in the record that the establishment was playing amplified music outside the establishment. *See generally In re 1624 U Street, Inc., t/a Chi-Cha Lounge*, Board Order No. 2011-214.

6. Here, the Board agrees with the Applicant that Mr. Reed's testimony for the purpose of showing sound mitigation is sufficient to meet the Applicant's burden of proof. *Opposition*, at 3-4. The Board further agrees with the Applicant that the sound meter readings provided by the Protestant were not sufficiently credible to rebut the Applicant's case-in-chief. *Opposition*, at 4. Moreover, the Protestant has not provided substantial evidence that the operations, physical features, or some other factor has changed in a manner that renders the Board's previous conclusion in 2011 incorrect or no longer relevant. Therefore, the Board affirms its prior determination that the Application will not have a negative impact on peace, order, and quiet.

III. THE BOARD FURTHER AFFIRMS ITS HOLDING THAT THE APPLICANT WILL NOT HAVE A NEGATIVE IMPACT ON QUIET.

7. In this case, the Board is required to examine whether a "reasonable person" would find that the applicant's operations will likely "interfere" with the neighborhood's right to quiet. 23 DCMR §§ 400.1-400.2 (West Supp. 2014). At its heart, the question of appropriateness is one of expectations. Or, to phrase it another way, in the case of "quiet," the primary question before the Board is whether the noise generated by the licensee is reasonable under the circumstances.

8. In *Ozio*, the Board found that it was unreasonable for Ozio to generate amplified music on its roof that could be heard in a commercially zoned residence over 100 feet away from the establishment in combination with using an unreliable means of controlling the emission of sound from the roof. *In re 19th and K, Inc., t/a Ozio Martini & Cigar Lounge*, Case No. 13-PRO-00151, Board Order No. 2014-366, 2, 66 (D.C.A.B.C.B. Oct. 1, 2014) (Supplemental Findings of Fact, Conclusions of Law, and Order Denying Motion for Reconsideration). The Board further found that the consideration of noise under the appropriateness test is not limited to § 25-725. *Id.* at ¶¶ 38-43. Thus, in regards to quiet, the Board's findings amount to saying that licensees that generate music that can be heard in a residence over 100 feet away is unreasonable.

10. Nevertheless, the Board finds this case distinguishable from *Ozio* for several reasons. Under the facts of this case, the Applicant has made a prima facie case of appropriateness based on its soundproofing efforts, which has not been rebutted by the Protestant. *See* 23 DCMR § 400.3. Further, unlike the licensee in *Ozio*, the Applicant is not emanating amplified music throughout the neighborhood, does not have outdoor speakers, and the music is only being heard in a residence located in the same building.

Chi-Cha Lounge, Board Order No. 2014-262, ¶¶ 5, 7 (neither the investigator or officer testified that they heard excessive noise during the hearing).

11. The Board further distinguishes this case from *Ozio*, because a reasonable person would have different expectations when the noise is being heard in a residence located above an establishment.[1] It is well-known that license holders generally provide music for their customers. In the Board's view, a resident assumes the risk of having noise from an establishment located in the same building emanate into their residence when they move into a building that contains or may contain a licensed establishment. While it is reasonable to expect a license to take reasonable steps to soundproof their premises, it is also reasonable that a resident living in the same building as a licensed establishment will also take reasonable steps to soundproof their residence. The Board also notes that this interpretation is reasonable, because in the case of "same building" noise, the developer should be expected to provide sufficient soundproofing between commercial and residential units. Consequently, because the record in this case shows that the Applicant took reasonable steps to soundproof the establishment, while the Protestant has not, the Board finds in favor of the Applicant.[2]

12. The Board notes that this is a limited holding. At this time, the Board is not inclined to extend this holding to abutting properties in different buildings, because in that case, the noise is leaving the property line of the premises, which is an unreasonable intrusion on another's property.

13. Further, unlike in *Ozio*, the Board finds in favor of the Applicant, because the substantial evidence in the record (1) does not show that the Applicant's actions have or will result in a violation of the Applicant's settlement agreement or (2) that the Applicant risks violating the District's other noise laws.[3] *In re 19th and K, Inc., t/a Ozio Martini & Cigar Lounge*, Case No. 13-PRO-00151, Board Order No. 2014-366, 1-30 (D.C.A.B.C.B. Oct. 1, 2014). Consequently, the Board affirms its finding in favor of the Applicant.

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[1] In describing the appropriateness test, it has been said that the test ". . . encompasses evidence relating to noise, rowdiness, loitering, litter, criminal activity, and other elements tending to disrupt the peace, quiet, and order that residents reasonably expect in the area." 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).

[2] The Board notes that if it is shown that a resident in the same building has taken reasonable steps to soundproof their premises, it is reasonable to presume that the Applicant has not, in fact, taken reasonable steps to soundproof their premises. Thus, in this hypothetical, if such a showing were made, it may rebut the Applicant's prima facie case of appropriateness and shift the burden back to the Applicant.

[3] In addition to the issue of whether the sound readings are accurate in this case, it is questionable whether the noise regulations of Chapter 27 of Title 20 apply to a premise located in the same building as the noise maker. D.C. Official Code § 25-725(c). The Board finds this extension of Chapter 27 questionable, because the noise law only regulates noise emanating from the premises based on measurements taken at the "property line." 20 DCMR § 2701.1-2701.2 (West Supp. 2014). This language appears to exclude noise heard inside the building. In addition, because the Board determines that the noise generated by the establishment in this case is reasonable, the Board does not find that the Applicant poses a risk of violating the noise law under the "noise disturbance" standard. 20 DCMR § 2700.3 (West Supp. 2014).

IV. THE RECORD DOES NOT CONTAIN SUFFICIENT EVIDENCE THAT A DECLINE IN PROPERTY VALUES HAS OR WILL OCCUR.

14. In determining whether an establishment is appropriate, the Board must examine whether the establishment is having a negative effect on real property values. D.C. Official Code § 25-313(b)(1). Here, there is insufficient evidence in the record to determine that the Applicant's operations are having or will lead to a negative impact on real property values. While the Protestant provided evidence that the rent of one unit was reduced, this does not mean that the property values of the building or property have decreased. *See In re Chi-Cha Lounge*, Board Order No. 2014-262, at ¶ 22. Further, there is no history of significant violations or crime during the previous licensure period, which would be indicative of a negative impact on property values. Therefore, the Board affirms its prior finding that the Applicant is appropriate.

ORDER

Therefore, this 5th day of November 2014, it is hereby **ORDERED** that Motion to Reconsider filed by the Protestant is **DENIED**.

IT IS FURTHER ORDERED that Paragraph 52 of Board Order No. 2014-262 is **STRUCK**. Board Order No. 2014-262 is affirmed based on the reasoning provided in this Order.

The ABRA shall deliver a copy of this Order to the Applicant and the Protestant.

District of Columbia
Alcoholic Beverage Control Board

Ruthanne Miller, Chairperson

Donald Brooks, Member

Mike Silverstein, Member

Hector Rodriguez, Member

Pursuant to 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, 2000 14th Street, N.W., Suite 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 (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).