

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

In the Matter of:)

DGB2, LLC)
t/a Dacha Beer Garden)

Application to Renew a)
Retailer's Class CT License)

at premises)
1740 14th Street, N.W.)
Washington, D.C. 20009)

Case No.: 17-PRO-00035
License No: 105719
Order No: 2018-003

BEFORE: Donovan Anderson, Chairperson
Mike Silverstein, Member
James Short, Member
Donald Isaac, Sr., Member

ALSO PRESENT: DGB2, LLC, t/a Dacha Beer Garden, Applicant

Andrew Kline, Counsel, on behalf of the Applicant

Lyle Blanchard, Counsel, on behalf of a Group of Five or More Residents
or Property Owners, Protestants

Jason Forman, Commissioner, Advisory Neighborhood Commission
(ANC) 2F, on behalf of ANC 2F and ANC 1B, Protestants

Elwyn Ferris, President, Shaw Dupont Citizens Alliance, Inc. (SDCA)

Charles Ellis, Vice-President, Dupont Circle Citizens Association (DCCA)

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING MOTION FOR RECONSIDERATION

In Board Order No. 2017-582, the Alcoholic Beverage Control Board (Board) approved “the Application for a New Retailer’s Class CT License filed by DGB2, LLC, t/a Dacha Beer Garden, (hereinafter “Applicant” or “Dacha”) subject to the condition that the total occupancy of the entire premises be limited to 200 people, including the occupancy of any unenclosed outdoor seating areas, [whose occupants shall count towards the total occupancy cap and] be limited to 150 people,” as well as a reduction in the Applicant’s requested hours. *In re DGB2, LLC, t/a Dacha Beer Garden*, Case No. 17-PRO-00035, Board Order No. 2017-582, 2 (D.C.A.B.C.B. Nov. 29, 2017).

The Board noted several factors that influenced its decision to reduce the occupancy and impose the specific occupancy cap described above. First, the outdoor beer garden, Garden District, located “across the street,” whose business model is comparable to Dacha, has a maximum occupancy of 156, and does not disturb nearby residents. *Id.* at ¶¶ 6, 22, 64. Second, the Board found that it was inappropriate to place a large establishment next to a residential street. *Id.* at ¶ 64. Third, the conditions would prevent neighboring sidewalks from becoming too overcrowded and avoid exacerbating existing issues involving pedestrians coming from existing licensees engaging in loud behavior that disturbed residents in their homes. *Id.* at ¶¶ 51, 64. Fourth, in light of the Applicant’s history of occupancy violations, the Board found that the 200 figure was a level of occupancy Dacha could manage. *Id.* at ¶¶ at 63-64. Fifth, witnesses reported a history of accidents and injuries involving vehicles and pedestrians. *Id.* at ¶ 65. Sixth, the Metropolitan Police Department regularly assigns officers to engage in traffic control near Dacha’s proposed location. *Id.* at ¶ 56.

In response to the Board’s decision, Dacha has requested reconsideration of the occupancy condition imposed by the Board. *Mot. for Recon.* at 1; *Reply*, at 4. Dacha does not request that the Board grant it full occupancy; instead, Dacha solely requests that the Board modify the Order to permit Dacha to have a maximum occupancy of 250 persons. *Mot. for Recon.*, at 1. Dacha argues that it has the ability to manage an occupancy of 250 persons and that there is insufficient evidence in the record to justify a reduction of the occupancy to 200 persons. *Id.* at 1-2.

The Board denies this motion for the reasons previously mentioned, and the additional reasoning provided below.

ARGUMENTS OF THE PARTIES

Dacha argues in its Motion for Reconsideration that since the resolution of its occupancy violations at its other establishment in Shaw there have been no violations or evidence of disturbances. *Id.* at 2-3. Dacha further complains that the evidence relied upon by the Board is not sufficient because (1) MPD controls traffic; (2) Dacha is only building a sidewalk café on S Street, N.W.; (3) eye witness testimony did not prove that the sidewalks are overcrowded; and (4) the Public Space Committee will make the necessary determination as to whether the sidewalks can handle the additional people. *Id.* at 3. Dacha further argues that the Board has not adequately justified the 200 figure. *Id.* at 3.

The Protestants respond that the Board's decision is adequately supported by the record and the Applicant's remedy is inappropriate. *Opposition*, at 1. The Protestants cite evidence of loud and disturbing behavior outside nearby residences, a zoning designation that does not promote 24 hour activity, and the proximity to a residential zone as adequate justification. *Id.* at 3. The Protestants note that the 200 occupancy limit was suggested by the ANC as an acceptable condition that would resolve their concerns. *Id.* at 4. Moreover, the Protestants note that the Board was right to rely on witness testimony and "anecdotal evidence" by citizens to reach its conclusion and followed its statutory obligations in imposing conditions. *Id.* at 4-5.

DISCUSSION

1. The Board denies the motion on the merits for the reasons stated by the Protestants and addresses various arguments raised by Dacha below.
2. First and foremost, the Board disagrees with the crux of Dacha's argument that the 200 figure is unsubstantiated. In this case, the Board did not agree with the Protestants that the application merited denial or Dacha's full occupancy request. In choosing a middle ground that addressed the Protestant's valid concerns, the Board chose an occupancy figure justified by the persuasive evidence in the record. Specifically, it has been shown that Garden District, an outdoor beer garden that currently operates across the street, has an occupancy of 156 persons. *In re DGB2, LLC*, Board Order No. 2017-582, at ¶¶ 6, 22, 64. The Board further credited Advisory Neighborhood Commissioner Forman's testimony that Garden District does not bother its immediate neighbors and that the residents would not be disturbed by a comparable establishment on the other side of the street, even if it had an occupancy of 200 people. *Transcript (Tr.)*, October 4, 2017 at 192. It should also be noted that the Board did not solely rely on evidence provided by the Commissioner. As noted in the Protest Report, there is no evidence of noise complaints made against Garden District in the period between September 2016 and September 2017, which supports the Board's conclusion that an establishment similar in size to Garden District would not have a negative impact. *In re DGB2, LLC*, Board Order No. 2017-582, at ¶ 6.
3. Undeniably, this evidence and testimony influenced the Board's final decision and inspired the conditions it imposed. The evidence was so persuasive because it is reasonable for the Board to consider the impact of a similar establishment with a similar business model located in the same neighborhood. This makes sense, as Garden District exists, has a track record, and has had an impact on the neighborhood that can be observed—unlike the currently nonexistent Dacha. *See Panutat, LLC v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 269, 276 (D.C. 2013) ("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).") As a result, there was sufficient evidence in the record to merit the Board using Garden District's occupancy as a lodestar in this case. Moreover, there was also sufficient evidence in the record to raise the final figure to 200 people based on evidence that the addition of 44 people would have a *de minimis* impact, which cannot be said for the 250 figure proposed by Dacha.

4. Dacha argues that the Board should not compare Dacha to Garden District, and essentially that comparing an outdoor beer garden to an outdoor beer garden across the street is comparing “apples to oranges.” *Reply*, at 3. In justifying this reasoning, Dacha argues that Garden District has less floor space. *Id.* Nevertheless, this is irrelevant to the issue of how many people each establishment encourages to use the sidewalks or dumps on the street after the close of business. Further, Dacha argues that the Board cannot consider evidence of Garden District because it was not subject to a protest and that its occupancy was based on the decision of another agency. *Id.* Yet, this reasoning is not relevant or logical, as the veracity and reliability of evidence regarding Garden District’s current impact and effect on the neighborhood does not rely on the existence of a past protest or a decision by a coordinate District agency. *Id.* Dacha also argues that Commissioner Forman had no justification for suggesting 200 persons; nevertheless, this argument is not persuasive, as the testimony of residents regarding their experiences, observations and opinions of specific establishments is relevant to the determination of appropriateness. *Reply*, at 3; *George Washington University v. District of Columbia Bd. of Adjustment*, 831 A.2d 921, 933 (D.C. 2003) (finding it reasonable for the agency to credit “anecdotal evidence from citizens regarding their own personal travails”) As a result, based on the Commissioner’s personal knowledge of the neighborhood, Garden District, and conversations with constituents, it was appropriate for the Board to rely on his observations and views regarding Garden District. Consequently, any comparison between Dacha and Garden District is apt.

5. Second, Dacha’s argument that its current ownership’s operation of an establishment with an occupancy of 250 people merits permitting Dacha to have an occupancy of 250 people in another part of the District is unpersuasive. *Mot. for Recon.*, at 2. Even if Dacha’s self characterization is true, this does not address the nature of the area surrounding Dacha’s proposed location that merits a lower occupancy. For example, no matter how well Dacha manages the premises, it does not change the proximity of the establishment to a residential street that is currently plagued by disturbances and the need for MPD to regularly assign officers to the area to address traffic safety issues—a situation that would be exacerbated if the Board granted Dacha’s request. *In re DGB2, LLC*, Board Order No. 2017-582, at ¶¶ 22, 64, 56, 65. As a result, in light of ongoing neighborhood conditions, the Board is persuaded that granting Dacha a larger occupancy would have a negative impact on the neighborhood.

6. Third, Dacha’s argument that the Board should rely on the determination of the Public Space Committee in its analysis of the sidewalk issues is unpersuasive. Specifically, as noted in *LCP*, compliance with another statute or another’s agency’s rules does not automatically render an establishment appropriate under Title 25 of the D.C. Official Code. *LCP, Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 499 A.2d 897, 904 n.8 (D.C. 1985).

7. Fourth, the Board does not agree with Dacha’s contention that the Findings of Fact related to pedestrian and vehicular safety relied on “beliefs,” “concerns,” or conjecture by witnesses. *Mot. for Recon.*, at 3. The Board notes that it is reasonable to rely on the testimony of residents regarding their experiences in the neighborhood in which they live. One does not require a special degree or training to indicate whether sidewalks are crowded or that a traffic accident has occurred. It should also be noted that Dacha has not provided any official statistics,

expert opinions, or witness testimony that rebuts the information in the record. As a result, the Board is not persuaded that it erred in relying on this type of information in its Order.

8. Fifth, Dacha argues that the Board did not compare Dacha to other establishments in the neighborhood. *Reply*, at 3. Yet, Dacha makes no proffer as to specific comparable establishments, explain why it is not the responsibility of Dacha to present such evidence if it exists, or otherwise indicate that such evidence exists in the current record. Therefore, this point is unpersuasive.

9. Sixth, Dacha argues that the early closing time imposed by the Board is sufficient to mitigate pedestrian street traffic. *Id.* at 3-4. Nevertheless, this argument does not address traffic and sidewalk crowding that currently occurs during Dacha's proposed operating hours due to the presence of other establishments in the neighborhood, address the disturbances reported by nearby residents, or change the fact that Dacha is located on a highly residential street. As a result, this point is also unpersuasive.

ORDER

Therefore, the Board, on this 24th day of January 2018, hereby **DENIES** the Motion for Reconsideration filed by DGB2, LLC, t/a Dacha Beer Garden.

IT IS FURTHER ORDERED that the issue of whether Dacha's proposed remedy contained in its motion is inappropriate, as argued by the Protestants, is deemed moot because the Board denies the motion on other grounds.

The ABRA shall deliver a copy of this order to the Parties.

District of Columbia
Alcoholic Beverage Control Board




Donovan Anderson, Chairperson



Mike Silverstein, Member



James Short, Member



Donald Isaac, Sr., Member

Pursuant to D.C. Official Code § 25-433(d)(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. 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. 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).