

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

In the Matter of:)	
)	
YFE, Inc.)	Case No.: 21-PRO-00079
t/a Eighteenth Street Lounge)	License No.: ABRA-118846
)	Order No.: 2021-155
Application for a New)	
Retailer's Class CT License)	
)	
at premises)	
1230 9th Street, N.W.)	
Washington, D.C. 20001)	

BEFORE: Donovan Anderson, Chairperson
Bobby Cato, Member
Rafi Aliya Crockett, Member
Jeni Hansen, Member
Edward S. Grandis, Member

ALSO PRESENT: YFE, Inc., t/a Eighteenth Street Lounge, Applicant

Andrew Kline and Sidon Yohannes, Counsels, on behalf of the Applicant

John Guggenmos, Commissioner, Advisory Neighborhood Commission (ANC) 2F, Protestants

Ian Thomas and Tracy Buck, Counsels, Blagden Alley Naylor Court Association, Protestant

Jelena Budjevac, Designated Representative, A Group of Five or More Residents and Property Owners, Protestants

Hector Pinto, Designated Representatives, A Second Group of Five or More Residents and Property Owners, Protestants

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

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

INTRODUCTION

The Alcoholic Beverage Control Board (Board) approves the Application for a New Retailer's Class CT License filed by YFE, Inc., t/a Eighteenth Street Lounge (hereinafter "Applicant" or "Eighteenth Street Lounge" or "ESL") but imposes conditions based on its proximity to residences that share Blagden Alley with ESL. Based on these concerns, the Board will restrict the exterior hours of the summer garden; prohibit the use of the alley side of the building as an entrance or exit; prohibit live entertainment outside; require the business to comply with the recommendations provided by its sound consultant; and require compliance with a security plan.

The Board is further aware that after the close of the record and the filing of proposed findings of fact and conclusions of law, the Blagden Alley Naylor Court Association (BANCA) alleges that the owner, Farid Nouri, engaged in criminal conduct and other disorderly behavior and requested the reopening of the record. The Board does not find that reopening the record is merited where the matter at issue is under investigation by the Metropolitan Police Department, and requires comity and deference by the Board to avoid interference with an active police investigation. Furthermore, even if an investigation were not ongoing, the Board does not consider uncharged or unconvicted crimes as part of its character and fitness determination.¹ Therefore, it has not been demonstrated that reopening the record would serve any purpose or change the result in this case.

Nevertheless, while the allegations forwarded by BANCA are not ripe for consideration at this time, the mere fact that the Board will not consider recent criminal allegations does not prevent consideration of these criminal allegations in the future if a criminal conviction is obtained. This means that a future criminal conviction related to these allegations could lead to various collateral consequences, including, but not limited to a finding of bad character under D.C. Official Code § 25-301(a)(1) during a renewal proceeding or the initiation of a summary suspension or revocation action pursuant to D.C. Official Code § 25-826.

Procedural Background

The Notice of Public Hearing advertising Eighteenth Street's Application was posted on August 6, 2021, and informed the public that objections to the Application could be filed on or before October 12, 2021. *ABRA Protest File No. 21-PRO-00079*, Notice of Public Hearing [*Notice of Public Hearing*]. The records of the Alcoholic Beverage Regulation Administration (ABRA) indicate that Advisory Neighborhood Commission (ANC) 2F, BANCA, and two groups have filed a protest against the Application. *ABRA Protest File No. 21-PRO-*, Roll Call Hearing Results.

¹ The Board is also aware of allegations by BANCA that the owner's behavior constituted intimidation or retaliation. Nevertheless, the Board is not a court and cannot issue personal protective orders. Furthermore, even if the Board denied the Application, the Board could not prevent the ownership from occupying the building or opening another business at the same address without alcohol. Therefore, these types of complaints need to be directed to MPD and the court system for an appropriate response and resolution.

The parties came before the Board's Agent for a Roll Call Hearing on November 1, 2021, where all of the above-mentioned objectors were granted standing to protest the Application. On December 1, 2021, the parties came before the Board for a Protest Status Hearing. Finally, the Protest Hearing in this matter occurred on January 19, 2022, and February 2, 2022.

The Board recognizes that an ANC's properly adopted written recommendations are entitled to great weight from the Board. D.C. Code §§ 1-309.10(d), 25-609; *Foggy Bottom Ass'n v. District of Columbia Alcoholic Beverage Control Bd.*, 445 A.2d 643, 646 (D.C. 1982). 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 properly adopted written recommendation from ANC 2F, which indicated that its protest is based on concerns regarding ESL's impact on peace, order, and quiet; residential parking and vehicular and pedestrian safety; and real property values. The ANC's issues and concerns shall be addressed by the Board in its Conclusions of Law below.

The Board notes that it received proposed findings of fact and conclusions of law from BANCA and the Applicant, which have been considered by the Board.

MOTION TO REOPEN RECORD

Before addressing this matter on its merits, BANCA filed a motion to reopen the record to introduce evidence related to allegations that the owner, Farid Nouri, on March 21, 2022, at around 10:45 P.M. arrived in the alley near various Protestants' homes and began honking on his vehicle's horn and blasted music with the intent to disturb and intimidate the Protestants. *Protestant's Motion to Reopen and Supplement Record*, at 1 [*Mot. to Reopen*]. On that same day, BANCA also alleges that Mr. Nouri assaulted one of the protestant's sons. *Id.* at 1. Consequently, BANCA asks the Board to reopen the record so that it may submit additional new evidence related to the ownership's character and fitness and appropriateness based on this incident. *Id.* at 4-6.

The Applicant argues that the motion should be denied because the facts are under dispute and the matter is under investigation by the Metropolitan Police Department (MPD). *Applicant's Response to Protestant's Motion to Reopen and Supplement Record*, at 2 [*Response*]. The Applicant further notes that no arrests, indictments, or charges have been filed.

In reply, BANCA indicates that various members of the community have obtained protective orders against the Mr. Nouri. *Protestant's Reply in Further Support of the Motion to Reopen and Supplement Record*, at 2 [*Reply*]. BANCA asserts that the Board should reopen the subject of Mr. Nouri's character and fitness. *Id.* at 2-3.

The Board denies the motion because the matter is under investigation by MPD and the incident, even if true, is not acceptable as character evidence at this time until the criminal matter leads to a conviction. First, reopening the record is not appropriate because MPD is entitled to comity and deference to properly investigate a matter under its purview without interference.²

² In *Hinfey*, the Supreme Court of New Jersey wrote:

Indeed, permitting this incident to become a part of this case could interfere with MPD's investigation by leading to the spoilation of evidence, creating impeachment evidence, encouraging contradictory witness statements, and forcing a public confrontation between an alleged victim and perpetrator if testimony is required that could impact any possible future prosecution.

Second, the new evidence proffered by BANCA is not eligible for consideration as character evidence at this time because it relates to uncharged criminal conduct. Under the law, “[b]efore the Board may issue a license, it must determine that . . . [t]he applicant is of good character and generally fit for the responsibilities of licensure.” D.C. Code § 25-301(a)(1). The Board “must . . . evaluate each applicant individually, on a case-by-case basis” because “the character of the applicant . . . will necessarily differ from one application to the next” *Gerber v. D.C. Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1195 (D.C. 1985). At the very least, in order to satisfy the requirements of § 25-301(a)(1), the Board must examine “records, covering the last 10 years from the date of application, maintained by ABRA regarding prior violations of the District's alcohol laws and regulations by the applicant or establishments owned or controlled by the applicant.” D.C. Code § 25-301(a-1).

Various court decisions describe relevant facts in determining character and fitness. For example, in *Citizens Association of Georgetown*, Chief Judge Hood, in concurrence, indicated that the Board must satisfy itself that the individual will not abuse or misuse, the privileges of the license if granted, and that a man's past record, as disclosed by his application, and his appearance before the Board, may furnish a sufficient basis for the Board's conclusion.” *Citizens Ass'n of Georgetown, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 288 A.2d 666, 672 (D.C. 1972) (Chief J., Hood concurring). In *Haight*, the court suggested that when a licensee “. . . operates in a lawful manner” the Board cannot deem this evidence of bad moral character or unfitness for licensure, because the licensee would not have “. . . fair notice as to what conduct is proscribed by the statute for purposes of eligibility for a liquor license.” *Haight v. D.C. Alcoholic Beverage Control Bd.*, 439 A.2d 487, 493 n. 10 (D.C. 1981). Therefore, among other factors, the Board may consider illegal conduct in determining whether an Applicant satisfies § 25-301(a)(1).

There is no reason, absent an occlusive statutory bar, for an administrative agency to be obtuse to the genuine concerns of other administrative agencies which possess concurrent jurisdiction over the same subject matter. This is especially so where the controversy is multidimensional and legitimately touches the competence of more than one agency. In that context, administrative agencies should never be encouraged to engage in internecine struggles for jurisdictional hegemony. The unilateral and possessive assumption of jurisdiction by one agency to the exclusion of another, perhaps more suitable, agency creates the risk that, although a many-sided controversy may be laid to rest in whole or in part from the vantage of a single administrative agency, in the process other important interests may be mishandled or neglected. Such considerations make it quite evident that principles of comity and deference to sibling agencies are part of the fundamental responsibility of administrative tribunals charged with overseeing complex and manifold activities that are also the appropriate statutory concern of other governmental bodies.

Hinfey v. Matawan Reg'l Bd. of Educ., 391 A.2d 899, 907–08 (1978).

Nevertheless, in accordance with the Board's precedent, in considering criminal conduct, the Board does not consider conduct that does not or has not led to a criminal conviction. *In re GF, LLC, t/a Il Canale*, Case No. 19-PRO-00033, Board Order No. 202-081, ¶ 20 (D.C.A.B.C.B. Feb. 5, 2020) *citing Coffin v. United States*, 156 U.S. 432, 453 (1895) (saying there is a presumption of innocence). Consequently, no relevant evidence in the record undermines the Applicant's showing that the ownership is of sufficient character and fit for licensure pursuant to § 25-301(a)(1). Therefore, the Board will decide the present case based on the record before it.

PROTEST ISSUES

Based on the issues raised by the Protestants, the Board may only grant the Application if 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. Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2022).³

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. Eighteenth Street Lounge has submitted an Application for a New Retailer's Class CT License at 1230 9th Street, N.W., Washington, D.C. *Notice of Public Hearing*.
2. ABRA Investigator Kevin Puente investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 21-PRO-00079, Protest Report* (Jan. 2022) [*Protest Report*]. The proposed establishment is located in a MU-4 zone. *Protest Report*, at 5. Thirty-one licensed establishments are located within 1,200 feet of the proposed location. *Id.* at 7. Seven are licensed as taverns, eight have summer gardens, and 14 have entertainment endorsements. *Transcript (Tr.)* January 19, 2022 at 43, 50-51. Various establishments in the neighborhood are required to close between 1:00 a.m. and 3:00 a.m. depending on the day. *Id.* at

³ The Board notes that BANCA, in its protest letter, raised issues regarding proximity to schools, recreation centers, day care centers, and other facilities; the impact on the clientele of these facilities; the attractiveness of the establishment to school-age children while in transit to and from school; and overconcentration. *Banca Protest Letter* at 1-2 (Oct. 12, 2022). These issues were not pursued by the Protestants during trial and are deemed waived. Nevertheless, even if this were not the case, there is no reasonable reason to believe that the Applicant will have a negative impact on schools, recreation centers, day care centers, and similar facilities, the clientele of such facilities, or that the establishment will otherwise attract school age children to the business. Likewise, BANCA raised the issue of overconcentration but failed to adequately pursue this line of argument during the hearing. Even if it were properly argued during the hearing, there is no evidence that several licensed establishments are having such a severe negative impact on the neighborhood that it requires a finding of overconcentration. *See* D.C. Code § 25-101(35A). The Board further considered the description of various establishments in the neighborhood and the restrictions they operated under in BANCA's proposed findings but notes that these facts did not provide evidence of a confluence of serious negative impacts as required by the overconcentration standard; therefore, any contention to the contrary is purely speculative. *BANCA's Proposed Findings of Fact and Conclusions of Law*, ¶¶ 65-80, 32.

52-55, 61. There are also various hotels and establishments associated with Events DC operating in the vicinity of the Applicant's proposed location. *Id.* at 52-55, 61. There are no schools or public libraries located within 400 feet of the establishment. *Protest Report*, at 8.

3. ESL proposes to begin operations at 2:00 p.m. and end at 2:00 a.m. on Sunday with matching hours of alcohol sale, service, and consumption, entertainment hours, and summer garden hours. *Id.* at 4, 8. The establishment proposes to begin operations at 4:00 p.m. and end at 2:00 a.m., Monday through Thursday with matching hours of alcohol sale, service, and consumption, entertainment hours, and summer garden hours. *Id.* at 4, 8-9. The establishment further proposes to operate from 4:00 p.m. to 3:00 a.m. on Friday with matching hours of alcohol sale, service, and consumption, entertainment hours, and summer garden hours. *Id.* at 4, 9. Finally, the establishment proposes to begin operations at 2:00 p.m. and end operations at 3:00 a.m. on Saturday with matching hours of alcohol sale, service, and consumption, entertainment hours, and summer garden hours. *Id.*

4. ABRA investigators visited the proposed location on 12 occasions between December 10, 2021, and January 4, 2022. *Id.* at 9-10. The Protest Report indicates that investigators did not observe trash, litter, or loitering in the area during their visits. *Id.* at 10. Investigators noted that parking was limited on 9th Street, N.W. *Id.*

5. The Protest Report described the public transportation and parking resources in the area. *Id.* Specifically, the proposed establishment was located near one bus stop and the Mt. Vernon Square 7th Street-Convention Center Station is located on the 1200 block of 7th Street, N.W. *Id.* The Protest Report further indicates that a small parking lot is located near the corner of 9th Street, N.W., and Blagden Alley, N.W. *Id.* Investigator Puente noted that 9th Street, N.W., has four traffic lanes and two parking lanes. *Tr.*, 1/19/22 at 61.

6. ESL will be in a "medium size, two-floor establishment," which sits "in between two commercial businesses." *Tr.*, 1/19/22 at 43. The Applicant has also requested an entertainment endorsement authorizing a dance floor, live entertainment, and a cover charge. *Id.* The establishment abuts another establishment called Never Looked Better, which operates underneath the Applicant's proposed location. *Id.* at 63, 99. The establishment is also located directly across the street from the Convention Center, which generally operates until 2:00 a.m. and 3:00 a.m. *Id.* at 86.

7. Investigator Puente also walked through the alley behind the establishment, which is L-shaped and connects to other alleys. *Id.* at 46-47, 79; *Protest Report*, at Exhibit No. 9. He estimated that the alley was wide enough for two cars to pass and another to park against a building. *Id.* at 47. He observed that other businesses bordering the alley had entrances and exits facing the alley, including several "ABC establishment[s]," an architect, various retail establishments, and "several art studios." *Id.* at 47, 81-82. He also observed a streatory operating in the alley. *Id.* He further noted that when businesses bordering the alley are in operation, the alley can get crowded when rideshare services engage in drop-offs and pickups and that it may be difficult for emergency vehicles to enter when this occurs. *Id.* at 64, 69. Finally, he observed that houses, apartments, and condominiums also border the alley, but that no residence is located directly across the alley from the establishment. *Id.* at 65, 69-70, 92.

8. Investigator Puente has visited the Applicant's other business on 18th Street, N.W., in Dupont Circle. *Id.* at 88, 103. While there, he observed the business offer live jazz performances and disc jockey entertainment. *Id.* He further noted that ABRA recorded 15 incidents at the other location between 2012 and 2019, but only one of those incidents led to a violation. *Id.* at 90.

II. Mike Silverstein

9. Mike Silverstein is a former Board Member and currently serves as an ANC Commissioner for the area in Dupont Circle where the Applicant's other business is located. *Id.* at 119. In his capacity as an ANC Commissioner, he observed that the Applicant led and participated in a community effort to obtain a trash compactor to address trash issues in the neighborhood. *Id.* at 120-21. He further noted that the Applicant's Dupont location operates in an area with many ABC establishments and many residential buildings. *Id.* at 121. Commissioner Silverstein further indicated that the Dupont location made noise on occasion but that it was not the worst offender. *Id.* at 122.

III. Farid Nouri

10. Farid Nouri owns ESL and a similar business in Dupont Circle. *Id.* at 135. The Dupont Circle location opened in 1995 and has been the sole owner of the Dupont Circle location since 2008. *Id.* at 135-36. The Dupont Circle location occupied three floors, provided music and drinks to customers, and had an occupancy of up to 520 people. *Id.* at 136. He decided to move the business because he believed it would be more successful at another location. *Id.* at 137-38.

11. Mr. Nouri described his previous commitment to address the concerns of residents near the Dupont Circle location. *Id.* at 139. Specifically, in one case, after receiving a noise complaint, he took steps to prevent noise from bothering residents of a condominium building. *Id.* at 139-142.

12. Mr. Nouri discussed his business plans for the new location. *Id.* at 144. Specifically, ESL will have an inside capacity of 268 people and the roof deck will have a capacity of 48 people. *Id.* The first floor will have a stage and standing area located on the 9th Street, N.W., side of the property. *Applicant's Exhibit No. 2.* The middle of the first floor will have a bar area and tables. *Id.* The rear of the first floor, facing Blagden Alley, will have the establishment's restrooms, kitchen, and coat room. *Id.* The second floor will be arranged similarly except the tables, chairs, and customer areas will extend to the rear. *Id.* The roof deck, which extends from the second floor, will be accessible from an interior door, and have a bar and seating for patrons. *Id.; Tr., 1/19/22* at 146. Live entertainment at the establishment will feature bands and disc jockeys. *Id.* at 169. There will be no live entertainment on the roof deck but the establishment will offer prerecorded background music. *Id.* at 154. Finally, the establishment will have a menu and offer food, but the business does not intend to operate as a restaurant. *Id.* at 201.

13. Mr. Nouri described ESL's efforts to mitigate noise. *Id.* First, the establishment is distributing speakers throughout the establishment in order to avoid having to raise the volume to

make music audible. *Id.* at 155. Second, speakers will not be installed directly on any floors or walls, but rather be elevated to minimize vibrations. *Id.* Third, ESL will install various curtains, panels, and other items to mitigate noise. *Id.* at 156. He also hired a professional to conduct a sound analysis of the premises and estimates that the required soundproofing will cost approximately \$200,000. *Id.* at 156-57, 163, 227. Finally, the roof deck will “only have two speakers and a very small woofer” that will face away from the alley. *Id.* at 163. He admitted that sound from inside the establishment may escape when the door to the roof deck is opened during ingress and egress. *Id.* at 172-73. He further admitted that there would be no barrier facing Blagden Alley. *Id.* at 173-74.

14. Mr. Nouri also described his crowd management plans. *Id.* at 159. He indicated that the establishment’s line would run past a neighboring commercial dog groomer’s door. *Id.* at 159, 180. The establishment will also use a cashless application at the door to collect cover charges rather than use cash and will check identifications at the door. *Id.* at 176-77.⁴ Finally, the establishment will use clickers to track compliance with the building’s capacity. *Id.* at 219.

15. Mr. Nouri further described ESL’s parking plans. *Id.* at 160. He anticipated that most of his customers would walk or use rideshare to get to the establishment. *Id.* He observed that a parking lot that is open late at night near the establishment. *Id.* There is also a rideshare drop location in front of the premises. *Id.* at 183.

IV. Jordan Naber

16. Jordan Naber serves as ESL’s Director of Operations and General Manager and discussed security at the establishment. *Id.* at 235. ESL intends to hire a security manager. *Id.* The current plan is that ESL will have at least one security at each entrance and one security at each bar. *Id.* at 236. All security will receive alcohol safety training and fake identification training. *Id.* at 236-37. They will maintain a logbook to track incidents. *Id.* at 237. There will also be security cameras in all common areas. *Id.*

17. ESL is currently discussing obtaining a trash compactor for the neighborhood. *Id.* at 237. If obtained, the trash compactor will be in the alley. *Id.* at 238.

V. Steve Donohoe

18. Steve Donahoe is a licensed retailer in the District of Columbia. *Id.* at 285. Over the past several years, property values in the area around the establishment have increased and the area has become “desirable.” *Id.* at 298. In particular, the area is “walkable,” close to Metro, and has a variety of businesses serving the neighborhood. *Id.* at 301-04. He further indicated that crime, noise, and other nuisances could decrease the value of property in the area. *Id.* at 314.

⁴ ESL indicated that the establishment intends to collect a cover charge using cashless payment methods. *Tr.*, 1/19/22 at 240-41. The Protestant questioned whether ESL’s plan complied with Chapter 54 of Title 28 of the D.C. Official Code (Cashless Retail Prohibition). *Id.* at 252. The Board notes that accepting cover charges through a cashless payment application is not relevant to the Board’s determination regarding appropriateness, as the Board is not persuaded that it will have a sufficiently significant impact under the appropriateness criteria at this time. If ESL intends to go cashless the Board recommends that it consult with the appropriate agency regulating such activities to ensure that its plan is legal under District law.

VI. Lieutenant Colonel Simon Miller

19. Lieutenant Colonel Simon Miller lives across street from the southern entrance of Blagden Alley. *Id.* at 319. ESL's property is visible from his residence. *Id.* In the past, he was a customer of ESL's business when it was in the Dupont Circle neighborhood. *Id.* at 320. He is in support of the Application. *Id.* He indicated that his property in the area has increased in value recently. *Id.* at 323. He also indicated that he does not hear any noise from any currently operating ABC establishment in his residence or otherwise observed any crime or public intoxication in the area. *Id.* at 324, 329-30.

VII. Martin Beam

20. Martin Beam is the owner of Miller, Beam, & Paganelli, Inc., and has a background in acoustical engineering. *Applicant's Exhibit No. 9; Tr.*, 1/19/22 at 335-36. He was hired to evaluate the noise impact of ESL from the rooftop deck. *Id.* at 337. As part of his analysis, he wrote a report and made recommendations to mitigate noise. *Id.* at 339. In particular, he recommended that ESL "add acoustical absorption to the wooden panels" located on the side; adjust the speaker placement; and use a sound limiter. *Id.* at 341. He noted that modern sound limiters can only be changed with a computer command and cannot be adjusted manually. *Id.* at 374. If the establishment follows these recommendations, he believes there will be no noise impact. *Id.* at 342. He further noted that his analysis did not consider any setbacks from the property line maintained by ESL. *Id.* at 345. The analysis also assumed that people on the roof would talk at around 75 decibels. *Id.* at 347. Nevertheless, the analysis did not consider whether noise could be released from the interior of the establishment when the roof door is opened. *Id.* at 352-53.

21. The closest resident is located approximately 110 feet away from the roof deck, while others are farther. *Id.* at 343. In addition, residential homes are visible from ESL's proposed roof deck with no intervening structures. *Id.* at 354-55.

VIII. Patrick Powell

22. Patrick Powell serves as the Senior Director of Operations and Emergency Preparedness for the Golden Triangle Business Improvement District (BID). *Id.* at 378. The BID previously worked with Mr. Nouri and other nightclub owners to address various nightlife issues, including noise. *Id.* at 378. Mr. Nouri helped contact other owners and facilitate meetings between the owners and the BID. *Id.* at 379. As part of the group's efforts, ESL in Dupont Circle volunteered to operate the District's first rideshare pickup and drop-off zone. *Id.* The group also coordinated obtaining a trash compactor through a related District program. *Id.* at 380.

IX. ANC 2F Chair John Guggenmos

23. John Guggenmos serves as the Chairperson of ANC 2F. *Tr.*, February 2, 2022 at 18. ANC 2F is protesting the Application because it was unable to reach an amicable settlement with the Applicant that satisfied its concerns. *Id.* at 18-22, 35.

X. Lieutenant Curtis Miller

24. Metropolitan Police Department (MPD) Lieutenant Curtis Miller is assigned to the police district where ESL proposes to locate. *Id.* at 58. He indicated that the alley behind ESL attracts prostitution, drug activity, public urination, and fighting because it is secluded. *Id.* at 59. He noted that much of the drug activity stems from “unhoused” persons. *Id.* at 60. He did not believe the addition of ESL would exacerbate the drug activity or prostitution activity in the alley. *Id.* at 61. Instead, he believed the addition of a nightclub may encourage “robberies, drunk driving, noise . . . complaints, [and public urination] . . .” *Id.* at 61. In his experience, the majority of the noise complaints in the neighborhood relate to loud patrons traversing through the alley. *Id.* at 62.

XI. Amir Shaikh

25. Amir Shaikh lives on 10th Street, N.W., on or near Blagden Alley and has lived there since 2018. *Id.* at 89. In his experience, he has found needles, condoms, and other litter in the alley and the alley blocked by trash cans. *Id.* at 98, 110. He also found the alley generally quiet until the Never Looked Better nightclub recently opened in the same building as ESL’s proposed location. *Id.* at 97, 99-100. He is also concerned with Never Looked Better’s admission line and litter accumulating in the alley where children play. *Id.* at 100. He has observed rideshare and delivery drivers get stuck in the alley and block traffic. *Id.* at 100-01, 103. He also finds that sound carries in the alley and people talking makes the alley noisy. *Id.* at 101, 108. He also believes that vehicle break-ins in the neighborhood have increased. *Id.* at 125.

XII. ANC Commissioner Sherene Joseph

26. ANC Commissioner Sherene Joseph chairs ANC 2F. *Id.* at 165. The ANC is currently concerned about noise, trash, security, crime, traffic congestion in Blagden Alley. *Id.* at 173.

XIII. Jelena Budjevac

27. Jelena Budjevac owns a condominium unit that faces Blagden Alley and has lived there for eight years. *Id.* at 196, 203. Since she moved into her current home, more and more businesses have opened in the buildings facing the alley. *Id.* at 204-05. As a resident, she has witnessed trucks and deliveries obstruct the flow of traffic in the alley. *Id.* at 203, 205. She further complained that many of the containers in the alley are never closed and trash bags are not always deposited in containers. *Id.* at 208, 210.

28. Ms. Budjevac discussed ESL’s line management plans with the management of the neighboring dog grooming business. *Id.* at 210, 226. The manager of the dog grooming business indicated that ESL had permission to have its line run past his business after 9:00 p.m. *Id.* at 216-17; *see also Tr.*, 2/2/22 at 235.

XIV. Proposed Board Actions and Conditions

29. The Applicant indicated that the ownership had no objection if the Board conditioned licensure on ESL being limited to using the side of the building facing 9th Street, N.W. as an entrance and exit, not Blagden Alley. *Id.* at 246. The Applicant further indicated that the ownership is not seeking an entertainment endorsement for the summer garden. *Id.* at 247.

30. BANCA requested the denial of the Application. *Id.* at 259. In the alternative, if the Application were approved, BANCA requested that (1) the Board impose the Applicant's proposal to limit the use of the Blagden Alley side of the business for ingress and egress; (2) the Applicant be required to adhere to the sound mitigation plan authored by Mr. Beam's firm; (3) that the entertainment endorsement not include permission for a cover charge, valet, or a dance floor; (4) that the summer garden hours be limited to noon to 10:00 p.m.; (5) that no sound be audible on the sidewalk or alley; and (6) that the operational hours be limited to 1:00 a.m. *Id.* at 259-60.

CONCLUSIONS OF LAW

31. 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 the neighborhood. D.C. Code §§ 25-104, 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2022). 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. Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2022). Furthermore, in the case of a new application for licensure or transfer to a new location, "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. Code § 25-314(c).

I. The Establishment is Appropriate for the Neighborhood Subject to Conditions.

32. The Board is persuaded that with the imposition of minimal conditions, ESL can operate without disturbing nearby residents. 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. 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. 2022). The substantial evidence standard requires the Board to rely on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clark v. D.C. Dep't of Employment Servs.*, 772 A.2d 198, 201 (D.C. 2001) *citing Children's Defense Fund v. District of Columbia Dep't of Employment Servs.*, 726 A.2d 1242, 1247 (D.C.1999).

33. In determining appropriateness, the Board must consider whether the applicant's future operations will satisfy the reasonable expectations of residents to be free from disturbances and other nuisances—not just whether the Application complies with the minimum requirements of

the law. 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); *see Panutat, LLC v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 269, 277 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.”). As part of its analysis, the Board should evaluate each “unique” location “according to the particular circumstances involved” and attempt to determine the “prospective” effect of the establishment on the neighborhood. *Le Jimmy, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 433 A.2d 1090, 1093 (D.C. 1981). Furthermore, the analysis may also include the Applicant’s efforts to mitigate or alleviate operational concerns, the “character of the neighborhood,” the character of the establishment, and the license holder’s future plans. *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); *Citizens Ass'n of Georgetown, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 410 A.2d 197, 200 (D.C. 1979); *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, 800-801 (D.C. 1970).

a. ESL will not have a negative impact on peace, order, and quiet so long as the establishment is subject to conditions.

34. “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. Code § 25-313(b)(2); *see also* D.C. 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. 2022).

35. The Board is persuaded that ESL’s proposed location is generally suitable for nightclub and other nightlife activities. Specifically, the property is located across the street from the Convention Center and served by various modes of public transportation that make the area an appropriate and expected location for heavy commercial activity. *Supra*, at ¶¶ 5-6; *see also Applicant’s Proposed Findings of Fact and Conclusions of Law*, at ¶ 58. The Board further considered the Protestants’ concerns regarding trash; nevertheless, the mismanagement of trash in the alley cannot be attributed to ESL and there is no indication that ESL will mismanage its own trash. *Supra*, at ¶¶ 17, 25. Finally, there is no indication that ESL’s presence will encourage any existing crime issues in the neighborhood such as drug activity or prostitution. *Supra*, at ¶ 24. Moreover, even if robberies are an issue, merely attracting innocent people to the area as patrons is not sufficient to hold ESL responsible. *Id.* Nevertheless, in light of the proximity of residents, some curbs on ESL’s privileges are warranted to prevent noise, crime, rowdiness, and other negative impacts near residences, which will be discussed in the section discussing conditions.

b. ESL will not have a negative impact on residential parking needs and vehicular and pedestrian safety.

36. “In determining the appropriateness of an establishment, the Board shall consider . . . [t]he effect of the establishment upon residential parking needs and vehicular and pedestrian safety . . .” D.C. Code § 25-313(b)(3); *see also* D.C. Code §§ 25-101(35A), 25-314(a)(4). Among other considerations, the Board is instructed to consider the availability of both private and public parking, any parking arrangements made by the establishment, whether “[t]he flow of traffic . . . will be of such pattern and volume as to . . . increase the [reasonable] likelihood of vehicular [or pedestrian] accidents . . .” 23 DCMR § 400.1(b), (c) (West Supp. 2022). In this case, ESL is located near a metro station, a bus stop, and a parking lot; as a result, there is no indication that the establishment will have a significant impact on residential parking. *Supra*, at ¶ 5. There is further no evidence of traffic accidents or pedestrian injuries near the proposed location.

37. Finally, as to the issue of traffic in the alley, in *MAHK Meetings*, the Board noted that “. . . the mere fact that an area suffers from congestion or that an establishment will cause congestion through passenger pickups and drop offs or deliveries is not sufficient, on its own, to merit a negative finding,” as traffic congestion is not a factor listed in § 400.1. *In re MAHK Meetings, LLC, t/a TBD*, Case No. 20-PRO-00038, Board Order No. 2021-317, ¶ 59 (D.C.A.B.C.B. Jun. 16, 2021). Thus, the traffic congestion in the alley reported by witnesses does not detract from ESL’s case. *Supra*, at ¶ 25. Therefore, the Board finds that ESL will not have an adverse impact on residential parking or vehicular or pedestrian safety.

c. ESL will not have a negative impact on real property values.

38. In determining whether an establishment is appropriate, the Board must examine whether the establishment is having or will have a negative effect on real property values. D.C. Code § 25-313(b)(1). The Board has noted in the past that the presence of blight may have a negative impact on property values. *In re Historic Restaurants, Inc., t/a Washington Firehouse Restaurant, Washington Smokehouse*, Case No. 13-PRO-0031, Board Order No. 2014-107, ¶ 48 (D.C.A.B.C.B. Apr. 2, 2014) *citing In re Rail Station Lounge, LLC, t/a Rail Station Lounge*, Case No. 10-PRO-00153, Board Order No. 2011-216, ¶ 62 (D.C.A.B.C.B. Jun. 15, 2011). In this case, there is no indication that the property will be blighted once occupied by ESL and property values in the area around the establishment have increased in recent years. *Supra*, at ¶ 18. Finally, the Protestants’ arguments that the addition of ESL to the neighborhood will have a negative impact on property values are purely speculative. Therefore, the Board finds that granting the Application will not have a negative impact on property values.

II. The Board Imposes Conditions on the License to Ensure the Ensure ESL’s Operations Remain Appropriate.

39. In light of the Board’s findings regarding appropriateness, the Board finds it necessary to impose conditions on the Applicant’s license. *See In re Dos Ventures, LLC, t/a Riverfront at the Ball Park*, Case No. 092040, Board Order No. 2014-512. ¶ 49 (D.C.A.B.C.B. Nov. 13, 2013) (saying “[i]n practice, the Board has imposed conditions when it is shown that there are valid

concerns regarding appropriateness that may be fixed through the imposition of specific operational limits and requirements on the license”). Under § 25-104(e), the Board is granted the authority to impose conditions on a license when “. . . the inclusion of conditions will be in the best interest of the [neighborhood]” D.C. Code § 25-104(e).

40. First, the Board conditions approval on ESL refraining from using the Blagden Alley side of the premises for ingress and egress except in the case of an emergency. This condition is warranted because the alley is shared by residents and businesses and patrons traversing the alley late at night may disturb residents if they engage in loud talking, loitering, yelling, or fighting. *Supra*, at ¶¶ 24-25. Furthermore, once imposed, the Board is persuaded that most people will remain on 9th Street, N.W., when entering or exiting the premises, because there will be no way to access ESL from the alley and rideshares directed to ESL will drop off in front of the business due to the presence of a drop off and pickup location in front. *Supra*, at ¶ 15.

41. Second, because ESL’s premises must still be constructed, the Board will cap occupancy of the interior and exterior at the applied for capacity or the final Certificate of Occupancy that will be provided to ABRA. This will ensure that ESL abides by its proposed capacity and that any additional capacity will require the filing of a substantial change.

42. Third, in order to prevent excessive noise reverberating through the alley, the Board will prohibit live entertainment in the establishment’s summer garden.

43. Fourth, the Board will limit the hours of the summer garden to 10:30 p.m. during the week and midnight during the weekend. The Board finds this condition warranted to prevent disturbing late noise in the alley where ESL could not construct a barrier on the roof facing Blagden Alley; patron behavior on the roof, such as yelling, may create unexpected noise; and the opening and closing of the roof door may create noise that disturbs nearby residents during traditional sleeping hours. *In re T.L.*, 996 A.2d 805, 812-3 (D.C. 2010); *Panutat, LLC v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 269, 277 n. 12 (D.C. 2013); *Supra*, at ¶¶ 13, 20. Therefore, limits on the summer garden’s hours are warranted in this case. *In re Amduffy, LLC t/a Duffy’s Irish Restaurant*, Case Number 13-PRO-00004, Board Order No. 2013-343, ¶¶ 21-23 (D.C.A.B.C.B. Jul. 10, 2013); *In re 1001 H Street, LLC, t/a Ben’s Chili Bowl/Ben’s Upstairs*, Case No. 13-PRO-00133, Board Order No. 2014-071, ¶ 46 (D.C.A.B.C.B. Mar. 12, 2014); *see also BANCA’s Proposed Findings of Fact and Conclusions of Law*, at 28 (discussing interior noise escaping from the premises).

44. Fifth, in light of ESL’s proximity to residents, the Board finds that its proposed noise mitigation plan is necessary to prevent a negative impact on nearby residents. *Supra*, at ¶¶ 13, 20. Therefore, the Board will condition licensure on ESL abiding by its noise mitigation plan while in operation.

45. Sixth, because the Applicant intends to operate like a nightclub with live entertainment, the Board will require the filing of a security plan compliant with Title 25 of the D.C. Official Code in order to ensure an appropriate and consistent level of security and crowd management.

46. The Board further considered various alternative conditions proposed by the Protestants but was not persuaded that they are required at this time. In particular, the Board did not agree that restricting the use of a cover charge, valet, or dance floor is appropriate where the Applicant has demonstrated the ability to operate a nightclub in the past and there is no evidence that activity inside ESL will disturb the surrounding neighborhood. *Supra*, at ¶¶ 9, 10-11, 22, 30. Second, there is also no reason to limit the interior hours of the premises where there is no evidence that activity inside the premises will disturb the surrounding neighborhood and the alley side of the business will not be used as an ingress or egress. *Supra*, at ¶¶ 29-30. Third, the Board finds no reason to further limit the hours of the summer garden when the hours set by the Board provide a reasonable balance between residents and businesses located near the Convention Center. Fourth, the Board will not prohibit sound from being heard at all in the sidewalk or alley when the noise conditions set by the Board are sufficient at this time.

47. Therefore, based on the conditions outlined above, the Board finds the Application appropriate.

III. The Applicant Satisfies the Character and Fitness Requirement at this Time.

48. The Board finds that the Applicant satisfies D.C. Official Code § 25-301(a)(1). “Before the Board may issue a license, it must determine that . . . [t]he applicant is of good character and generally fit for the responsibilities of licensure.” D.C. Code § 25-301(a)(1). The Board “must . . . evaluate each applicant individually, on a case-by-case basis” because “the character of the applicant . . . will necessarily differ from one application to the next . . .” *Gerber v. D.C. Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1195 (D.C. 1985). At the very least, in order to satisfy the requirements of § 25-301(a)(1), the Board must examine “records, covering the last 10 years from the date of application, maintained by ABRA regarding prior violations of the District's alcohol laws and regulations by the applicant or establishments owned or controlled by the applicant.” D.C. Code § 25-301(a-1). In this case, it has not been established that the ownership’s prior record of violations are not “so sufficiently egregious, serious, or repetitive” to merit the denial of the Application; therefore, the Applicant merits a finding in its favor on this ground. *In re GF, LLC, t/a Il Canale*, Case No. 19-PRO-00033, Board Order No. 2020-081, ¶ 20 (D.C.A.B.C.B. Feb. 5, 2020).

49. The Board is aware that BANCA has attempted to reopen the record to include alleged criminal conduct that occurred after the close of the record and the filing of proposed findings of fact and conclusions of law. Nevertheless, even if permitted, the Board would not disturb the present determination regarding character and fitness because the key facts are part of an active criminal investigation being conducted by MPD and are not ripe for consideration until the criminal investigation and any attendant criminal proceedings are resolved. *See Id.* (saying “considering offenses not leading to a conviction when making a character determination runs contrary to the Applicant’s right to a “presumption of innocence”).⁵ Therefore, the Board is satisfied that the Applicant has satisfied D.C. Official Code § 25-301(a)(1) at this time.

⁵ It should be further noted that the discretion to determine whether a set of facts merits a finding of bad character under D.C. Official Code § 25-301 rests entirely with the Board. Thus, the Board is entitled to find that uncharged or unconvicted crimes are not sufficient to merit a determination of bad character, which would be the result in this case if the record were reopened and the Board were obligated to consider BANCA’s proposed evidence.

IV. The Application Satisfies All Remaining Requirements Imposed by Title 25.

50. 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. 2022). 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 20th day of April 2022, hereby **APPROVES** the Application for a New Retailer’s Class CT License at premises 1230 9th Street, N.W., filed by YFE, Inc., t/a Eighteenth Street subject to the following **CONDITIONS**:

1. The occupancy of the interior of the premises shall be 268 persons or whatever figure is listed on the establishment’s Certificate of Occupancy, whichever is lower. Any increase in occupancy in the future shall require the filing of a substantial change application.
2. The occupancy of the summer garden shall be 48 persons or whatever figure is listed on the Certificate of Occupancy associated with that portion of the property, whichever is lower. Any increase in occupancy in the future shall require the filing of a substantial change application.
3. No live entertainment shall be provided in the summer garden or outdoors. This restriction does not apply to recorded music or other recorded entertainment (e.g., televised sporting event).
4. The hours of the summer garden are limited to 10:30 p.m. during the week and midnight on Friday and Saturday.
5. No patron shall be permitted to leave or enter the premises through the alley except in the case of an emergency.
6. The establishment shall comply with the noise mitigation recommendations contained in Applicant’s Exhibit No. 3 (Letter from Miller, Beam, & Paganelli, Inc., 1-2 (Jan. 3, 2022)).
7. The establishment shall file a valid security plan under the law and comply with its terms. The Applicant shall file the plan within 30 days of this Order.

The Board **ADVISES** the Applicant that it encourages it to work with other licensees in the area to manage the trash in an appropriate manner.

The Board further **ADVISES** the Applicant that the mere fact that the Board will not consider recent criminal allegations does not prevent consideration of this matter in the future if a criminal conviction is obtained. The Applicant is warned that such an event could lead to various collateral consequences, including, but not limited to, a finding of bad character under D.C. Official Code § 25-301(a)(1) during a renewal proceeding or the initiation of a summary suspension or revocation action pursuant to D.C. Official Code § 25-826.

IT IS FURTHER ORDERED that the Board's findings of fact and conclusions of law contained in this Order shall be deemed severable. If any part of this determination is deemed invalid, the Board intends that its ruling remain in effect so long as sufficient facts and authority support the decision.

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

District of Columbia
Alcoholic Beverage Control Board

eSigned via SeamlessDocs.com
Donovan Anderson
Key: ac43c3b9cb9d45f09e4b730093d1dccc8

Donovan Anderson, Chairperson

James Short, Member

eSigned via SeamlessDocs.com
James Short
Key: 256d3fcaadf0e146d7f4b75bd7917d2bd

Bobby Cato, Member

eSigned via SeamlessDocs.com
Rafi Aliya Crockett, Member
Key: b560e91845e1f9e4016155e5c12f91cc

Rafi Crockett, Member

I concur with the majority's decision to approve the Application but would not grant permission to utilize a cover charge.

eSigned via SeamlessDocs.com
Edward Grandis, Member
Key: 5027bda7ff9f0040ec14adeb52541ce5

Edward S. Grandis, Member

I dissent from the position taken by the majority of the Board.

eSigned via SeamlessDocs.com
Jeni Hansen, Member
Key: 821729312550944749f1b56fbc2a41899

Jeni Hansen, 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).