THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
MAHK Meetings, LLC t/a TBD	Case No.: License No.:	20-PRO-00038 ABRA-116881
Application to Transfer to a New Location a Retailer's Class CT License	Order No.:	2021-420
at premises 1806 Vernon St., N.W. Washington, D.C. 20001		

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

ALSO PRESENT: MAHK Meetings, LLC, t/a TBD, Applicant

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

Suzanne Farmer, Abutting Property Owner, Protestant

Piper Hendricks, Abutting Property Owner, Protestant

Denis James, President, Kalorama Citizens Association, Protestant

Amir Irani, Chairperson, Advisory Neighborhood Commission (ANC 1C), Protestant

Alan J. Roth, on behalf of a Group of Five or More Residents or Property Owners, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER AMENDING BOARD ORDER NO. 2021-317 AND DENYING MOTION FOR RECONSIDERATION

INTRODUCTION

In Board Order No. 2021-317, the Alcoholic Beverage Control Board (Board) approved the Application to Transfer to a New Location a Retailer's Class CT License filed by MAHK Meetings, LLC, t/a TBD (hereinafter "Applicant" or "MAHK") with conditions so that MAHK can operate a small barbershop and lounge at 1806 Vernon St., N.W. *In re MAHK Meetings, LLC, t/a TBD*, Case No. 20-PRO-00038, Board Order No. 2021-317, 2 (D.C.A.B.C.B. Jun. 16, 2021) (Findings of Fact, Conclusions of Law and Order). Specifically, the most significant conditions limited the summer garden hours to "no later than 11:00 p.m. on Friday and Saturday, and 10:00 p.m. on all other days"; required that, when permitted by ridesharing companies, MAHK set the location of pickup and drop offs for Florida Avenue, N.W.; ordered the establishment to keep its trash containers closed except when in use; and not permit amplified music and amplified sounds to be heard in a residence with its windows and doors closed. *Id*. at 18. Subsequently, the Protestants filed a motion for reconsideration, which is opposed by MAHK. Based upon the Board's review of the motions, the Board will make minor amendments to the prior Order, affirm its prior decision, and deny the motion for reconsideration for the reasons stated below.

Motion for Reconsideration

The Protestants' motion for reconsideration and reply asks the Board to impose harsher conditions or deny MAHK's application. *Mot. for Recon.* at 2. The Protestants first argue that the Board made various errors in its Order. *Id*. Notably, the Protestants assert that the Board (1) erred in Paragraph 3 by writing that the residential area outside the proposed location was zoned "RA-4" when it actually is designated RA-2; (2) failed to recognize that various other parties to the protest raised the overconcentration issue; (3) misdescribed the entrance to the second floor speakeasy; (4) did not properly consider the use of the first floor for alcohol service; (5) did not properly consider the use of Vernon Street, N.W., as an entrance and exit; (6) improperly credited evidence related to MAHK's soundproofing efforts; (7) did not properly consider the proximity of residents; (8) improperly described the area as commercial; (9) did not properly consider MAHK's trash plans; (10) did not properly apply D.C. Official Code § 25-314(c) and its past precedent; (11) cannot create a condition that diminishes or violates D.C. Official Code § 25-725; and (12) should impose additional conditions or modify the original conditions placed on MAHK. *Id*. at 1-16; *Reply*, at 2-8.

MAHK opposes the motion for reconsideration for several reasons. MAHK argues that the Protestants are merely restating the arguments made during the hearing and attempting to merely "relitigate" matters "properly considered and decided" by the Board. *MAHK's Opp*., at 2. MAHK asserts that the Order properly described and considered MAHK's entrance and exit plans. *Id*. at 2-3. MAHK further asserts that the Order's factual findings and conclusions regarding noise and noise mitigation are supported by substantial evidence, including the

testimony of various witnesses. *Id*. at 3. Additionally, MAHK argues that the Board's description of the area as commercial is supported by the record. *Id*. at 304. MAHK further notes that case law supports the Board's consideration of the ownership's future plans regarding admission into the establishment and trash management, including potential future plans. *Id*. at 4-5. MAHK further asserts that the Order properly applied § 25-314(c) and prior precedent. *Id*. at 5-6. Finally, MAHK notes that the conditions imposed by the Board do not void or alter D.C. Official Code § 25-725. *Id*. at 6-7.

I. The Board Amends Paragraph 3 to Correct a Clerical Error Related to the Area's Zoning Designation and Affirms the Final Decision.

1. The Board agrees with the Protestants that the Order incorrectly described the zoning designation of the relevant portion of Vernon Street, N.W., as "RA-4." *In re MAHK Meetings, LLC*, Board Order No. 2021-317 at ¶ 3. Instead, the record shows that the correct designation is RA-2. *Protest Report*, at Exhibit No. 6. As noted by the Protestants, the number designation impacts the potential density of the neighborhood. *Mot.* at 4. Therefore, the Board will amend the original Order to reflect the correct zoning designation.

2. Nevertheless, the incorrect factual statement contained in the Order is a clerical error and the Board was aware and considered the true designation when it issued its decision. In adjudicating this case, as well as others, the most weight was given to the overarching nature of the zone as either residential or mixed-use and commercial, the proximity of residents, and the potential for nuisances. Contrary to the argument of the Protestants, the actual or potential density of the neighborhood or the number of residents is not particularly weighty or persuasive. *See* D.C. Code § 25-601(a)(1)(A) (granting standing to protest to a single abutting property owner). Indeed, adopting a density based theory would merely create a hierarchy of residents that favors detached single family homeowners over condominium owners and apartment renters. Furthermore, the decision clearly recognized that the area surrounding the establishment was highly residential and directly addressed the impact on residents. *In re MAHK Meetings, LLC*, Board Order No. 2021-317 at ¶¶ 12, 24, 28, 43, 45. As a result, the clerical error and amendment have no impact on the Board's final decision in this matter.

II. The Board Amends the Order to Recognize that Various Other Parties Raised the Overconcentration Issue.

3. The Board further agrees with the Protestants that various parties raised the overconcentration issue, in addition to the ANC, but were not acknowledged in the prior Order. *Mot. for Recon.*, at 1 n. 1. The Board recognizes that "[t]he residential Protestants and [the] Kalorama Citizens Association (KCA) . . . [also] raised overconcentration pursuant to D.C. Code § 25-314(a)(4)" in their protests. *Id*. As a result, any protestant party that timely raised the overconcentration issue in their protest letter is deemed to have properly raised overconcentration as a protest issue. Accordingly, the Board will amend the order to remove any indication or inference that the ANC was the sole party raising the overconcentration issue.

III. The Board Amends the Description of the Interior Stairs to Clarify the Description of the Layout of the Establishment.

4. The Protestants argue that the Board mischaracterized the Applicant's reason for using the Vernon Street, N.W., side of the premises as an exit. This is incorrect.

> Paragraph 9 of the Board's Order states:
>
> The ownership indicated to Investigator Puente that patrons will enter the establishment through the entrance on Florida Avenue, N.W. *Id*. Patrons will then exit onto Vernon Street, N.W., due to the "narrow stairwell" at the entrance. *Id*.; *see also id*. at 122.

In re MAHK Meetings, LLC, t/a TBD, Board Order No. 2021-317 at ¶ 9 (citing page 46 and 122 of the transcript).

> Paragraph 9 is based on Investigator Puente's testimony, which stated,
>
> Mr. Hughes advised . . . that patrons will enter the establishment through Florida Avenue NW. In order to get to the speakeasy, they'll be escorted by a staff member up a narrow stairwell. Patrons will then have to exit onto Vernon Street *because of that stairwell* and the flow of traffic.

Tr., 4/1/21 at 46 (emphasis added); *see also Tr*., 4/1/21 at 122 (In describing his plans, Mr. Hughes stated that his plan to have patrons exit onto Vernon Street, N.W., and that "in . . . historical speakeasy fashion" the business will have "one entrance and [one] exit."). Moreover, as the finder of fact, the Board is entitled to credit the ownership's stated intent to operate in a specific manner or statements of intent made to third parties; especially, when those parties are available for cross-examination during the hearing. As a result, Paragraph 9's finding reasonably stems from Investigator Puente's testimony and the record.

5. Nevertheless, the phrase "at the entrance" appearing in Paragraph 9 may be too vague to properly convey the layout of the establishment. Moreover, Paragraph 9 does not clearly identify the source of the Board's finding. Therefore, the Board will amend Paragraph 9 to clarify the layout of the premises and the source of the information, which has no impact on the Board's final decision in this matter.

IV. The Board Considered the Operation of a Bar on the First Floor and Reasonably Concluded No Significant Impact Would Occur.

6. The Protestants next argue that the Board minimized or failed to consider the operation of a bar on the first floor. *Mot. for Recon.*, at 3. This is incorrect.

7. The Order, in Paragraph 8 states that "The first floor will operate as a coffee shop, small retail area, *bar*, and barbershop." *In re MAHK Meetings, LLC*, Board Order No. 2021-317 at ¶ 8 (emphasis added). Furthermore, in Paragraph 24, the Board acknowledged ANC Commissioner's Irani's concerns "that *the first floor will also serve as a bar* and admit patrons

from both Florida Avenue, N.W., and Vernon Street, N.W." *Id*. at ¶ 24 (emphasis added). In Paragraph 43, the Board stated that "only the second floor *will likely* be used for traditional bar and nightclub activities" and that the "first floor, either in whole *or in part*, must be reserved for other activities." *Id*. at ¶ 43 (emphasis added). As a result, the Board understood that alcohol service in some capacity may occur on the first floor but did not find it significant for the reasons stated in Paragraph 43. Consequently, the Board's reasoning and conclusions related to alcohol service on the first floor are reasonable based on the proposed layout and business plan, which makes the first floor generally unsuitable and unlikely to be used for concentrated or intensive drinking and nightclub activities, even if permitted. *Id*. at ¶ 14.

V. The Daytime Operations of the Establishment Are Appropriate and Do Not Breach the Reasonable Expectation of Residents.

8. It further appears to the Board that the Protestants are asserting that daytime operations and daytime alcohol service at MAHK will somehow breach the reasonable expectations of residents under the appropriateness test. *Mot. for Recon.*, at 4.[1] Nevertheless, the Protestants' proposed baseline of expectations is incorrect and far exceeds what is reasonable.

9. In the past, the Board has looked to case law and the District's disorderly conduct and other laws for ascertaining the baseline of reasonable expectations and appropriateness. *In re 19th and K, Inc., t/a Ozio Martini & Cigar Lounge*, Case No. 13-PRO-00151, Board Order No. 2014-366, ¶¶ 20-24, 50-51 (D.C.A.B.C.B. Aug. 15, 2014) (In considering appropriateness, the Board looked to the District's disorderly conduct law and related case law and explained that amendments to the disorderly conduct law changed the Board's interpretation of the appropriateness standard). Indeed, case law generally recognizes that residents have an interest in peace and quiet during traditional nighttime and early morning sleeping hours; therefore, activity and noises occurring outside these hours are more acceptable and reasonable. *In re T.L.*, 996 A.2d 805, 813 (D.C. 2010); *see also DeNucci v. Pezza*, 329 A.2d 807, 810 (R.I. 1974) ("the nighttime, and by common consent of civilized man the night is devoted to rest and sleep, and noises which would not be adjudged nuisances, under the circumstances, if made in the daytime, will be declared to be nuisances if made at night.") (quotation marks removed); *Thompson v. Anderson*, 153 P.2d 665, 668 (U.T. 1944) (The court makes a differentiation between noises during the night and those during the day, and takes notice of the fact that what might be a nuisance if occurring during the nighttime, would not be so during the daytime."). The Protestants' argument regarding the reasonable expectation of residents is further rendered unreasonable in light of the District's disorderly conduct law, which does not prohibit "unreasonably loud noise" that may "annoy or disturb" a "person[]" in their "residence[]" after "7:00 a.m." and before "10:00 p.m." D.C. Code § 25-1321(d). Finally, the District's noise laws permit the generation of some noise and fully exempt the unamplified human voice. 20 DCMR §§ 2701.1, 2704.8 (West Supp. 2021).

10. Consequently, even in a residential zone, during the daytime, the level of noise and activity from the mere comings and goings of patrons, the operation of a barbershop, coffeeshop,

[1] The Board is satisfied that its prior Order adequately addresses why it permitted early evening and late-night activity at the establishment. Nevertheless, the Board is specifically addressing the issue of daytime alcohol service because it is a major component of the Protestants' objections.

retail store, and bar, and the activity of patrons engaged in eating and drinking inside and outside the premises of a commercial building would not be excessive, unexpected, or unreasonable in a city, as such activity does not conflict with traditional sleeping hours or the District's disorderly conduct law. Moreover, at this juncture, it is unreasonable and speculative to presume that daytime alcohol service in support of MAHK's expected daytime business model as a barbershop, coffeeshop, and bar will somehow resemble an active nightclub or be of such intensity to cause a disturbance during the daytime. Finally, there is nothing in the record that suggests MAHK will not attempt to operate in accordance with District law related to noise. Therefore, the Protestants have no reasonable appropriateness claims against MAHK's daytime operations.

VI. The Board Properly Considered MAHK's Entrance and Exit Proposal and the Use of Vernon Street, N.W., as an Entrance and Exit.

11. The Protestants further argue that the Board failed to properly consider the use of Vernon Street, N.W., as an entrance.[2] *Mot. for Recon.*, at 3-4. This is incorrect.

12. It is true during the hearing that the ownership indicated that it intended to have its entrance on Florida Avenue, N.W., and its exit on Vernon Street, N.W. *In re MAHK Meetings, LLC*, Board Order No. 2021-317 at ¶ 45 (see also page 123 of the transcript). Nevertheless, during his testimony, Mr. Hughes' testimony suggested that this entrance and exit plan may not always be strict when he stated that patrons on Vernon Street, N.W., could enter and grab coffee. *Tr*., 4/1/21 at 119 (Mr. Hughes stated "if you lived on Vernon . . . you walk down steps . . ." and give those patrons the "ability to walk in" and "grab coffee"). The flexibility of the entrance and exit plan was also raised during the Protestants' case when ANC Commissioner Irani testified that MAHK's first floor "will also be a bar, which can be *entered and exited from both the Vernon Street and Florida Avenue sides of the building*." *Tr*., 4/1/21 at 293 (emphasis added). Moreover, the Board's discussion of various admission scenarios was warranted where the Board has chosen not to convert MAHK's plan into a condition of licensure and the matter was a significant part of the case. As a result, based on the record, the Board's decision to treat the exit and entrance plan as flexible or potentially varied and to address that possibility in its decision reasonably flowed from the record.

13. The Board further notes that it did not impose a condition requiring MAHK to abide by its stated split entrance and exit plan because it did not deem it necessary. Under the appropriateness standard, the Board may consider MAHK's efforts to alleviate operational concerns and the license holder's future plans. *In re MAHK Meetings, LLC*, Board Order No. 2021-317 at ¶ 39. In accordance with D.C. Official Code § 25-104(e), the Board is further empowered to impose conditions when in the best interest of the neighborhood and generally does so to alleviate appropriateness issues. *Id*. at ¶ 62. Furthermore, the Board has generally

[2] The Protestants also complain about the description of the door on Vernon Street, N.W., as the "rear" because it "trivializes" the impact of patrons coming and going to the establishment. *Mot. for Recon*., at 3-4. However, this argument is merely mistaken semantics, as the term "rear" means "the back part of something" and does not imply intensity of usage. Merriam-Webster, "rear," Merriam-Webster.com, (last visited on Jul. 13, 2021), https://www.merriam-webster.com/dictionary/rear#synonyms. (See Entry 2 of 4).

imposed conditions to enforce pledges and promises by the applicant "when they are relied upon to approve the application." *In re HRH Services, LLC, t/a The Alibi*, Case No. 15-PRO-00096, Board Order No. 2016-280, ¶ 94 (D.C.A.B.C.B. May 18, 2016).

14. As noted in Paragraph 43, the Board's findings regarding appropriateness did not primarily rely on MAHK's split entrance and exit plan. *In re MAHK Meetings, LLC*, Board Order No. 2021-317 at ¶ 43. Instead, the Board's conclusion regarding appropriateness is based on the small size of the establishment and the small size of its potential crowds. *Id*. Therefore, the use of MAHK's split entrance and exit plan is not necessary to support the Board's findings regarding appropriateness. Moreover, the Board was not satisfied that it was in the best interests of the neighborhood to impose the plan as a condition because such a condition could prevent the establishment from taking additional reasonable steps to reduce potential nuisances, as discussed in Paragraph 45 of the Order. The Board notes that this is a reasonable course of action when the establishment has not opened, and, at this stage, the Board can only make reasonable inferences about its future impact.[3]

15. The Board is aware that the Protestants further complain that the Board's discussion of alternative entrance and exit plans contained in the Order are unwarranted and speculative. *Mot. for Recon*. at 6. The Board disagrees. First, the consideration of alternative entrance and exit plans reasonably flows from the record and witness testimony, as noted above. Moreover, the discussion in the Order is warranted where one possible admission plan was discussed, but the Board decided not to impose MAHK's suggested admission plan as a condition. Second, the Protestants were aware or should have been aware during the hearing that Vernon Street, N.W., could be used as an entrance and the Florida Avenue, N.W., side could be used as an exit. *Mot. for Recon.*, at 3 (citing Mr. Hughes' testimony that people have the "ability to walk in" from "Vernon"); *see also Tr*., 4/1/21 at 293 (ANC Commissioner Irani testified that MAHK's first floor "will also be a bar, which can be entered and exited from both the Vernon Street and Florida Avenue sides of the building."), 494 (Counsel for the protestants stated during closing "So no matter whether the Applicant uses the Vernon Street doors . . . as an exit at closing time or the Florida Avenue door . . . ."); *Protest Report*, Exhibit No. 16 (picture of MAHK's Vernon Street, N.W. side). As a result, the Protestants had a full and fair opportunity to cross-examine, provide testimony, and present evidence and argument on the issue of various means of ingress and egress from the establishment.

16. Finally, at worst, the consideration of such alternatives amounts to dicta and is not required for the Board to maintain its original decision, as grounds for doing so reside in Paragraph 43 of the Board's Order. Therefore, considering potential entrance and exit scenarios was appropriate and reasonably flowed from the facts adduced during the hearing. *See Children's Def. Fund v. Dist. of Columbia Dept. of Employment Services*, 726 A.2d 1242, 1247 (D.C. 1999) (saying agency findings should "rationally flow[]" from the record and be "supported by substantial evidence").

[3] Nevertheless, the mere fact that the Board declines to convert a promise or pledge made by an applicant into a condition does not prevent any opposing party from using the applicant's statements as impeachment evidence during a future renewal proceeding or as support for reassessing prior appropriateness determinations.

VII. The Board Properly Weighed Evidence Regarding Soundproofing at the Establishment.

17. The Protestants further contest various findings related to noise mitigation at the establishment, including the date of completion and relying on Mr. Sparks' hearsay testimony regarding the completion of the work. *Mot. for Recon.*, at 5.

18. The Board agrees that the Order misstates the date the noise mitigation work was performed. As noted in the record, Mr. Sparks visited the site on July 9, 2020, and was later informed that the work was conducted by the architectural firm. *Tr*., 4/1/21 at 217-18. Therefore, the Board will amend Paragraph 19 to correct this error. Nevertheless, this clerical error has no impact on the Board's final decision or otherwise require any other change to the Board's decision in this case, as the Board remains persuaded that the soundproofing work was performed.

19. The Protestants further challenge the Board's reliance on Mr. Sparks' testimony because his firm's work was limited to reviewing the premises and providing recommendations and third parties were responsible for completing and certifying the work. *Mot. for Recon.*, at 5-6. Nevertheless, during the hearing, the owner testified that he hired a sound consultant and invested in sound mitigation. *In re MAHK Meetings, LLC*, Board Order No. 2021-317 at ¶ 18 *citing Tr*., 4/1/21 at 127. Investigator Puente further testified that he saw double drywall installed at the establishment. *Id*. at ¶ 8. Finally, Mr. Sparks testified that he was advised that the noise mitigation work was performed by the architectural firm. *Tr*., 4/1/21 at 218. As a result, while other witnesses and documents could have been produced to show that the work had been performed, the record contains sufficient testimony and evidence that shows or corroborates that MAHK undertook commercially reasonable soundproofing. Moreover, even if Mr. Sparks' testimony were to be deemed entirely unreliable, there exists sufficient independent evidence in the record to support the Board's conclusions regarding soundproofing and other issues related to noise. Therefore, the Board affirms its findings regarding noise and MAHK's soundproofing efforts.

VIII. The Board Properly Considered the Proximity of Residents.

20. The Protestants further complain that the Board's Order "downplays the proximity of the proposed establishment to neighboring residents." *Mot. for Recon.*, at 4. This is incorrect.

21. The Board fully considered the close proximity of MAHK to residents and a residential zone. In the Order's Introduction section, the Board noted that it approved the application "despite being located in close proximity to residents . . . ." *In re MAHK Meetings, LLC*, Board Order No. 2021-317 at 1. Paragraph 12 states that MAHK "is adjacent to a residential zone"; is located "near the Carswell Condominium building"; and recognized that "Vernon Street, N.W., is highly residential." *Id*. at ¶ 12. Paragraphs 29 and 34 also go into greater detail by acknowledging that Ms. Farmer's home is merely "*one floor above* MAHK's exit door" and that Ms. Hendricks' unit "*abuts* MAHK's proposed location and *shares a wall* with MAHK." *Id*. at ¶¶ 29, 34 (emphasis added). Moreover, the Board's Order fully grappled with the issue of residents living in close proximity to MAHK. *Id*. at ¶¶ 43 (noting that MAHK will not generate

large crowds or have a long "let out period" and that residents should reasonably expect people on the streets at all hours based on Vernon Street, N.W.'s connection to Florida Avenue, N.W.). In its Conclusions of Law, the Board further acknowledged that the establishment would be "*placed four houses deep into a side street*" and noted that the case was similar to past cases where establishments abutted residents; were "located extremely close to residents"; or "share[d] an alley with residential properties." *Id*. at ¶ 40 (emphasis added). Finally, the Board further considered the proximity of residents in reducing MAHK's outdoor seating hours. *Id*. at ¶ 63 ("due to the proximity of residents"). As a result, the Board properly considered the proximity of residents in this case.

IX. The Board Properly Characterized Florida Avenue, N.W., as a Commercial Corridor.

22. The Protestants further argue that the Board unreasonably characterized the relevant portion of Florida Avenue, N.W., as a "commercial corridor" or "major commercial corridor," which undermines the Board's legal conclusions in Paragraphs 66 and 69 related to various conditions suggested by the Protestants. *Mot. for Recon.*, at 4.[4] This argument is incorrect.

23. As noted above, the Board considered the proximity of residents and the highly residential aspects of the area. Nevertheless, the Protest Report notes various businesses on Florida Avenue, N.W., in the protest area, including a Wholesaler, a liquor store, and two restaurants. *Protest Report*, at 7. In addition, one side of the Washington Hilton hotel faces Florida Avenue, N.W., as well. *Protest Report*, at 7, Exhibit Nos. 6, 9. Third, the Protestant's own traffic expert described Florida Avenue, N.W., as a minor traffic artery serving "long trips, high speed, and commercial activity" as opposed to serving as a side or local street. *In re MAHK Meetings, LLC*, Board Order No. 2021-317 at ¶ 28. As a result, the description of Florida Avenue, N.W., as a major commercial corridor is fair and accurate.[5] Finally, nothing in Title 25 requires that the current residential or commercial character of a neighborhood be preserved, or otherwise mandates that such a change in residential or commercial character alone be deemed harmful to appropriateness or the reasonable expectation of residents. Consequently, the Board's conclusion that commercial activity, including late night commercial activity, is expected and reasonable for the neighborhood is supported by the record.

X. The Board Properly Considered MAHK's Trash Plans.

24. The Protestants argue that the Board should not have considered various alternatives to MAHK's initial proposal to store trash, failed to consider the impact of trash stored in other portions of the premises, and improperly ignored 24 DCMR § 111.3 or improperly suggested renting the space, if required. *Mot. for Recon.*, at 7-8. The Board disagrees.

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[4] Even if the Protestants' were correct, the Order contains sufficient alternative findings and reasoning to support the conditions imposed by the Board outside of general observations regarding the commercial nature of the area. *In re MAHK Meetings, LLC, t/a TBD*, Case No. 20-PRO-00038, Board Order No. 2021-317, ¶¶ 63, 69 (D.C.A.B.C.B. Jun. 16, 2021).

[5] And even if the Board's word choice is deemed incorrect, the Board's order demonstrates that it properly considered the character of the neighborhood and its most important features in its Order.

25. As noted in Paragraph 54, the Protestants argued that MAHK's trash plan was impossible; however, this does not appear to be the case based on the authority reviewed by the Board. Indeed, the Protestants have not followed up with any citation to any additional authority or administrative guidance supporting their interpretation or showing that the Board's interpretation that § 111.1 overrides § 111.3 is plainly wrong. *In re MAHK Meetings, LLC*, Board Order No. 2021-317 at ¶ 55.[6] Furthermore, the mere fact that MAHK may have to apply for an additional permit is not fatal to MAHK's case; especially, when viable alternatives exist. Indeed, the Protestants were on notice during the hearing that MAHK could store the trash somewhere else on the property when Mr. Hughes stated on the record that if his plan could not be implemented, then he would store trash in a manner "Similar to all the other properties where their trash is located." *Tr*., 4/1/21 at 175. Indeed, this is a natural and reasonable conclusion if MAHK's first plan fails. As a result, the Protestants had a full opportunity to address the possibility of trash storage on other portions of the property during cross-examination or their case-in-chief, if they truly believed MAHK's first plan was not feasible. On final note, without more, it also seems unreasonable to presume that any property in the District of Columbia is incapable of some form of trash storage and disposal. For these reasons, the Board properly addressed the issue of trash management in its Order and Protestants have waived the right to consider the impact of trash storage on other portions of the property to the extent such matters were not raised during the hearing.[7]

XI. The Board Properly Applied D.C. Official Code § 25-314(c).

26. The Protestants next argue that the Board failed to engage in a "separate and deliberate consideration of D.C. Official Code § 25-314(c)" by failing to consider the residential density, the proximity of residents, the use of Vernon Street, N.W., as an entrance, the non-commercial nature of the area, and failure on the part of the Applicant to establish appropriate soundproofing during their presentation. *Mot. for Recon*., at 8-10. The Board disagrees.

27. D.C. Official Code § 25-314(c) provides that

> In the case of applications for nightclub or tavern licenses, the Board *shall consider* whether *the proximity of the 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.

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[6] The Board notes that the Protestants are asking the Board in this case to make a broad ruling regarding a regulation administered by a separate agency. Nevertheless, the Board is reluctant to make such a ruling where the section in which the regulation is housed appears to apply only to "merchandise" rather than trash, and the list of items listed in § 111.3 may not include trash containers or similar receptacles. 24 DCMR §§ 111.1, 111.3 (West Supp. 2021). For example, in other parts of Title 24 trash containers are called "receptacles" or "containers," which are words that do not appear in the list of containers listed in § 111.3. *See, e.g.,* 24 DCMR §§ 565.2 ("trash receptacles"), 827.6 ("metal trash containers"), 1108.1 ("trash receptacles"), 1301.5 ("trash receptacle"), 4104.2(a) ("trash receptacle").

[7] The Board is further convinced that the Protestants' argument that trash disposal or pickup would cause unreasonable noise is purely speculative where the establishment is small, it is reasonable to expect occasional noise from trash disposal and pickup in a city, and there is no indication in the record that other establishments in the neighborhood are causing disturbances through their regular trash disposal and pickup activity.

D.C. Code § 25-314(c) (emphasis added). In explaining the purpose of § 25-314, the D.C. Court of Appeals explained that "Section 25–314(c) reflects a recognition by the Council of the District of Columbia that "a nightclub, by its very nature, *may be* inappropriate for the [commercial] area where it is to be located when other [commercial] establishments would not be inappropriate." *Panutat, LLC v. Dist. of Columbia Alcoholic Beverage Control Bd.*, 75 A.3d 269, 278 (D.C. 2013) (emphasis added).

28. Contrary to the reading presented by the Protestants, § 25-314(c) merely instructs the Board to consider any substantial adverse impacts a tavern or nightclub may have on residents located in residential zones in the case of a tavern or nightclub application. *Panutat, LLC*, 75 A.3d at 278 (saying Board "on solid ground" when it took into consideration nearby residential premises located in a residential zone). The plain language of § 25-314 contains no explicit reference to additional appropriateness factors; provides no explicit instruction on how to weigh evidence related to negative impacts; provides no guidance on how to determine if a negative impact is substantial, if found; and provides no guidance on specific conditions to implement or when to deny an application. Section § 25-314 also does not explicitly define "proximity" or "substantial adverse impact." § 25-314(c). As a result, the interpretation and application of § 25-314(c) is generally left to the reasonable discretion of the Board. *Dist. of Columbia Office of Human Rights v. Dist. of Columbia Dept. of Corr.*, 40 A.3d 917, 923 (D.C. 2012) (saying administrative agencies are entitled to reasonably interpret the statutes and regulations they "administer" so long as the "interpretation" is not "unreasonable or . . . inconsistent with the statutory language or purpose"). Finally, to the extent § 25-314(c) creates any additional or heightened considerations, it was reasonable for the Board to include or intermingle such discussion in its discussion regarding general appropriateness.

29. In the case of a protested tavern or nightclub application, the likely means of challenging a decision under § 25-314(c) is a showing that the Board failed to weigh a substantial impact or failed to consider the proximity of residents. Nevertheless, the Protestants have not made a showing of any substantial adverse impact on residents that has not been adequately addressed by the Board in its Order or that the Board failed to otherwise consider the impact on residents living in residential zones.

30. In this case in particular, the establishment sits on the border of a MU-4 (commercial) and RA-2 (residential) zone; as a result, the impact on residents was a natural consideration in this case. For example, the Board specifically considered the impact of crowds, patron noise, loitering, and public disorder on nearby residents in Paragraph 43. *In re MAHK Meetings, LLC*, Board Order No. 2021-317 at ¶ 43 (finding MAHK will not generate large crowds, have a long-lasting exit, and will not result in unreasonable usage of residential streets). The Board further considered the impact of amplified music and car horns on nearby residents in Paragraph 46 and 49. *Id*. at ¶¶ 46 (saying MAHK has installed commercially reasonable soundproofing), 49 (saying "the Board has no reason to believe that anyone associated with MAHK will sit outside nearby residences and blast their vehicle horn"). The Board also considered the impact of outdoor seating in Paragraph 51 on nearby residents. *Id*. at 51 (saying permitting outdoor seating with some limitations on hours will not prevent nearby residents from sleeping). The Board also imposed conditions to address potential impacts on the nearby residential zone. *Id*. at ¶¶ 63-64,

69. Therefore, the Board properly considered and applied § 25-314(c) but found in favor of MAHK because there was no showing of a "substantial adverse impact."

31. The Protestants further argue that the cases cited by the Board to show that its present decision follows prior precedent related to the placement of a tavern or nightclub near residences have no bearing on the present case due to differences in zoning, the alleged non-commercial nature of the area, the status of the nearby residents as protestants, and other factual differences in the cases. *Mot. for Recon.*, at 10-12. Nevertheless, such a granular and overparticular reading of the Board's precedent is not required or warranted.

32. In the cited cases, the Board was well aware and recognized that the cases may differ in some respects. *In re MAHK Meetings, LLC*, Board Order No. 2021-317 at ¶ 40 (saying "such an action is not *substantially different* . . . .) (emphasis added). Furthermore, the Board was entitled to extract the overarching legal idea from the cases that approving a nightclub or tavern that abuts or is located extremely close to residents does not necessarily offend appropriateness. *Id*. Moreover, the Protestants fail to compellingly explain how the Board's decision to accord more weight to factors such as the maximum capacity of the premises, the ownership's plans to prevent disturbances, the nature of the business, the commercial nature of the area, and other factors is unreasonable or arbitrary. *Id*. at ¶¶ 43, 45-46, 55. Consequently, it is the prerogative of the Board to deem the additional factors raised by the Protestants as irrelevant, unpersuasive, or trivial when compared to other facts in the record. *Simms v. United States*, 244 A.3d 213, 217 (D.C. 2021) (saying that fact finder retains the "prerogative to weigh the evidence").

33. The Protestants further argue that the Board failed to distinguish the present case from *Saloon 45* in its Order. *Mot. for Recon.*, at 12-13. In particular, the Protestants argue that the Board failed to properly consider the proximity of the outdoor seating area to residents; the proximity of residents on both sides of MAHK, rather than one side of the establishment in *Saloon 45*; the alleged residential character of the neighborhood, and the location of the sidewalk café. *Id*. at 12-13. The Board disagrees that any similarities between the two cases are significant when compared to other differences between the two applicants.

34. First and foremost, MAHK is distinguishable from the tavern in *Saloon 45*, because it will likely operate primarily as a barbershop during the day, not a bar. *In re MAHK Meetings, LLC*, Board Order No. 2021-317 at ¶ 14. This renders the sale and consumption of alcohol incidental to its business during the day, and raises no serious appropriateness concerns, even if patrons travel, enter, or exit the premises through Vernon Street, N.W., as such activities are reasonable during the day when residents have a lower reasonable expectation to peace and quiet or lack of activity in the neighborhood. *See Hank's on the Hill, LLC, t/a Hank's Oyster Bar*, Case No. 16-PRO-00045, Board Order No. 216-471, (D.C.A.B.C.B. Jul 27, 2016) (saying that "not all . . . disturbances require or merit a finding of inappropriateness"). Furthermore, the mere fact that the establishment in *Saloon 45* would have been located on a corner and have one neighbor; whereas, MAHK will be located in between two residences, is not significant. MAHK has also demonstrated that its potential for disturbances is low and that the business has sufficient plans and options in place to likely counter any potential disturbances that could be caused by MAHK's proximity to residents. Indeed, unlike MAHK, the tavern in *Saloon 45*, had no ability to use the commercial side of the property as an entrance due to historic preservation

concerns; thus, unlike MAHK, it had no ability to change its entrance and exit plans. *In re Stephens, David J.W., t/a Saloon 45*, Case No. 14-PRO-00040, Board Order No. 2014-334, ¶ 11 (D.C.A.B.C.B. Sept. 23, 2014). In addition, as noted above, the Board was not persuaded by the Protestants' argument that the area is not sufficiently commercial. Finally, unlike the tavern in *Saloon 45*, the outdoor seating area in this case will face a commercial street, not a residential street. *Compare In re MAHK Meetings, LLC*, Board Order No. 2021-317 at ¶ 8 *with In re Stephens, David J.W.*, Board Order No. 2014-334 at ¶ 49 (saying the sidewalk café would be placed "directly on Swann Street, N.W."). For these reasons, the Board affirms its conclusion that *Saloon 45* is inapposite and does not control the outcome in this case.

XII. The Board May Condition Licensure on the Establishment Preventing Noise from Being Heard in a Residence with its Windows and Doors Closed.

35. In the Board's Order, the Board conditioned licensure on MAHK refraining from producing any "amplified music or other amplified sounds" from being "heard in a residence with its windows and doors closed." *In re MAHK Meetings, LLC*, Board Order No. 2021-317 at 18. The Protestants argue that the Board's noise condition negated or voided D.C. Official Code § 25-725(a)(1), which prohibits licensed retailers from generating certain types of sounds that may be heard in other premises with numerous exceptions. *Mot. for Recon.*, at 13.

36. This assertion is patently incorrect, unsupported by authority, and mischaracterizes the Board's Order, as the condition operates separately from § 25-725(a)(1), § 25-725 remains in full effect and is enforceable against MAHK, and does not operate as a defense to any violation found under § 25-725. Instead, separate and apart from § 25-725(a)(1), the provision merely protects residents living in commercial zones or other areas exempt from the reach of § 25-725. D.C. Code § 25-725(b); *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").

37. It should be further noted that the availability of § 25-725 as an enforcement remedy renders the noise concerns raised by nearby residents living in residential zones as unreasonable and speculative, where such residentially zones residents are protected by § 25-725, MAHK has taken reasonable steps to soundproof its premises, and there is no indication in the record that MAHK's ownership will operate as a scofflaw that will not comply with District law related to noise when it opens.

38. Finally, contrary to the argument raised by the Protestants, the noise condition's requirement that residents seeking enforcement of the condition keep their windows and doors closed represents a reasonable balance between the interests of residents and MAHK. *Mot. for Recon.*, at 14.[8] In particular, where District law does not require silence, requiring residents

[8] The Board further notes that Protestants' reference to § 25-725(e) and the legislative history of that section is unpersuasive where the provision at issue provides direction to the agency on how to investigate a violation § 25-725, while the noise condition imposed by the Board is not governed by § 25-725 and addresses situations not addressed by § 25-725. *Mot. for Recon.*, at 14. As a result, the authority cited by the Protestants is irrelevant in determining the suitability of the Board's condition in this case.

living in commercial zones and other exempt locations to take basic steps to avoid inviting noise into their homes is not unreasonable or otherwise fall below the reasonable expectation of residents under the appropriateness test. As a result, the Board's noise condition does not add a threshold requirement, that to find a violation of § 25-725, a resident must have their windows and doors closed or meet any other standard not listed in that statute. Instead, the condition operates completely separately, does not preclude a separate enforcement action under § 25-725, and has no impact or effect on § 25-725.

XIII. The Board Rejects the New Conditions Suggested by the Protestants.

39. The Protestants, in their motion for reconsideration, suggest various new conditions and modifications to the original conditions. *Mot. for Recon.*, at 15-16. Nevertheless, the time for suggesting new conditions has expired with the closure of the record and are waived. Moreover, the Protestants have not shown that the conditions imposed by the Board fail to uphold the reasonable expectation of residents or fail to cure any defects in appropriateness. For these reasons, and the reasons previously stated in the Board's prior Order, the Protestants' request is denied.

XIV. The Board Recognizes the Waiver of Various Issues Not Raised by the Parties on Reconsideration.

40. The Board notes that no party on reconsideration has challenged the Board's findings and determinations regarding overconcentration; residential parking; vehicular and pedestrian safety; and real property values. Therefore, for the purposes of this case, these specific matters are not subject to further review in this forum. *C St. Tenants Ass'n v. Dist. of Columbia Rental Hous. Comm'n*, 552 A.2d 524, 525 (D.C. 1989) ("[W]hen a statute provides a method of appeal from an administrative ruling, that method must be followed before resorting to any other system of review").

ORDER

Therefore, the Board, on this 28th day of July 2021, hereby **DENIES** the motion for reconsideration.

IT IS FURTHER ORDERED that the first sentence of Paragraph 3 shall be struck and replaced with the following language: "The proposed establishment will have a MU-4 zoning designation, but the rear faces a portion of Vernon Street, N.W., which is zoned RA-2."

IT IS FURTHER ORDERED, in order to clarify the layout of the premises and the source of the statement, Paragraph 9 shall be struck and replaced as follows:

> 9. The ownership indicated to Investigator Puente that patrons will enter the establishment through the entrance on Florida Avenue, N.W. *Id*. The ownership further advised that patrons will then exit onto Vernon Street, N.W., due to the "narrow stairwell" inside the premises. *Id*.; *see also id*. at 122.

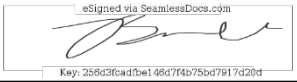
IT IS FURTHER ORDERED, in order to correct Paragraph 19 regarding the date of completion of the work, that the last sentence shall be struck and replaced as follows: "Mr. Sparks noted that the recommended work was performed."

IT IS FURTHER ORDERED, in order to recognize the other parties that raised the overconcentration issue, that in the first paragraph of page 3, the second to last sentence shall be struck and replaced as follows: "Furthermore, the Board will also consider whether approval of the Application will lead to overconcentration or have a negative impact on residential areas." Additionally, the first sentence of Paragraph 61 shall be struck and replaced as follows: "The Board disagrees that the area suffers from overconcentration."

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

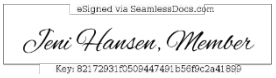
District of Columbia
Alcoholic Beverage Control Board

Donovan Anderson, Chairperson



Bobby Cato, Member

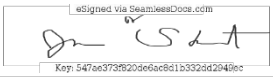
Rafi Crockett, Member



Jeni Hansen, Member

Edward S. Grandis, Member

I dissent for the reasons previously stated in Board Order No. 2021-317.



James Short, 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).