THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:	
The New 7307, Inc. t/a Premier Lounge	Case No.: 22-PRO-00022 License No.: ABRA-120372 Order No.: 2022-701
Application for a New Retailer's Class CT License	
at premises 7307 Georgia Avenue, N.W. Washington, D.C. 20012	

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

ALSO PRESENT: The New 7307, Inc., t/a Premier Lounge, Applicant

Naima Jefferson, Designated Representative, on behalf of a Group of Five or More Residents and Property Owners, Protestants

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING MOTION FOR RECONSIDERATION

The Alcoholic Beverage Control Board (Board) approved the Application for a New Retailer's Class CT License filed by The New 7307, Inc., t/a Premier Lounge (hereinafter "Applicant" or "Premier Lounge") with conditions. Specifically, the Board approved the application on the condition that the establishment operate as a restaurant and tavern by (1) not charging a cover charge; (2) only providing entertainment inside the establishment; (3) not operating the sidewalk café past midnight; and (4) limiting the hours of operation, sales, service and consumption to 1:00 a.m. during the week and 2:00 a.m. on Friday and Saturday. *In re The New 7307, Inc., t/a Premier Lounge*, Case No. 22-PRO-00022, Board Order No. 2021-618, at 1-2 (D.C.A.B.C.B. Aug. 31, 2022). Subsequently, the Protestants filed a motion for reconsideration. The Board notes that the Applicant did not respond to the motion. The Board

considered the motion and affirms its prior decision. The Board addresses the specific arguments made by the Protestants below.

I. The Record Contains Sufficient Evidence to Approve the Application.

1. The Board considered the Protestants' argument "that the Applicant failed to present sufficient evidence" that its application satisfied the required criteria. *Mot. for Recon.*, at 2. The Board notes that the Applicant in meeting its burden may rely on the record as a whole, which includes information provided in the Protest Report and the Protestant's case, and not just what the Applicant presents during its case-in-chief. *See e.g., Esgar Corp. v. Commissioner of Internal Revenue*, 744 F.3d 648, 655 (10th Cir. 2014) ("The case law is clear that the determination whether [the Commissioner's burden of proof] has been satisfied *is not limited to [the Commissioner's] affirmative evidence but can be made on the basis of the whole record*.") (emphasis added). The Board further notes that the application process and protest report are designed to elicit sufficient information so that that the applicant can make a *prima facie* case that their application is appropriate and otherwise satisfies the legal requirements of licensure. As such, the record as a whole contained sufficient information to approve the Application with conditions for the reasons provided in the prior Order. Therefore, the Protestants argument on this ground has no merit.

II. The Prior Order Satisfies D.C. Official Code § 25-314(c).

2. The Protestants argue that the Board's Order does not consider the impact of the premises on nearby residences in accordance with § 25-314(c) or otherwise consider the characteristics of the neighborhood. Section 25-314(c) provides that in the case of a new application for licensure "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). Nevertheless, in imposing conditions, the Board considered numerous failures to provide details related to soundproofing, security, crowd control, and other plans required to prevent disturbances in the nearby community. *Board Order No. 2022-618*, at ¶ 21. As a result, the Board clearly considered the impact of the business on nearby residents, including those living in "single family homes directly behind the establishment." *Protest Report*, at 5. Beyond that, the Protestants, in their motion, do not specify any specific burden on residents or specific characteristic of the neighborhood that the Board failed to consider under § 25-314(c) in its prior Order, and which has a material impact on the present case. Consequently, the Board affirms its findings related to appropriateness and § 25-314(c).

III. The Board Affirms its Decision to Reject Evidence and Argument Not Produced or Argued at Trial.

3. The Protestants in their Proposed Findings of Fact and motion continue to improperly raise factual matters and argument not made at trial, which the Board excluded from consideration. *See e.g., Mot. for Recon*, at 4, 11-12; *Board Order No. 2022-618*, at 2, n. 2. This includes numerous matters that were raised in the Protestants' initial Protest Letter and proposed

findings that were not discussed, raised, or supported by the introduction of evidence at the hearing, including information that required the Board to take judicial notice after the close of the record. The Board notes that evidence contained in initial protest letters, protestant information forms, proposed findings, and sources otherwise not provided at trial do not constitute evidence for the record unless entered into evidence at the hearing. To hold otherwise, would blatantly deny the other party its basic right to due process and the right to confront witnesses and evidence used against it. D.C. Code § 2-509(b). As such, where the Protestants do not provide a cite in the hearing transcript to argument, testimony, or exhibits explicitly admitted at the hearing to any alleged matter not addressed by the Board, all such evidence and argument are deemed waived and not subject to consideration in this forum. *Gillespie v. Washington*, 395 A.2d 18, 21 (D.C. 1978) ("It is a well-established rule that a party who fails to raise an issue at trial generally waives the right to raise that issue on appeal."). Therefore, the Board was well justified in limiting its decision to only those matters properly introduced and raised at the Protest Hearing itself.[1]

IV. The Board Affirms its Decision Regarding Noise and Rowdiness.

4. The Protestants argue that the Board failed to adequately consider signage related to noise and the presence of patrons. *Mot. for Recon.*, at 4. However, based on the record, such evidence is purely speculative and does not merit consideration. Furthermore, to the extent patron issues were adequately raised, the Board's conditions address the reasonable concern of residents based on the evidence contained in the record.

V. The Board Affirms its Decision Regarding Trash and Litter.

5. The Protestants argue that the Board did not consider the impact of the business regarding trash and litter and that the Applicant did not have adequate plans regarding trash. *Mot. for Recon.,* at 5. Nevertheless, there is no indication in the record that the ownership will mismanage its trash. Moreover, there no evidence that current law regarding trash practices are inadequate or that the ownership will refuse to follow such rules. *See e.g.,* 21 DCMR 707.1 – 707.13 (requiring, among other things, that premises have sufficient trash containers, trash containers remain in good repair, and that trash containers remain closed when not in use).[2] Furthermore, where the establishment is not operating a fast-food establishment or other carry out focused business, such as a to-go pizza, falafel, or hamburger restaurant, it is unreasonable to speculate that its stated intention to serve "finger foods" will result in trash or litter in the neighborhood, as argued by the Protestants, where the business does not appear focused on carry out sales. *Mot. for Recon.*, at 5. Next, the Board notes that the general testimony regarding litter was not adequately tied to the potential operation of the tavern or its patrons and completely failed to provide a reasonable explanation for how the business could negatively impact trash and litter in the neighborhood; thus, there is no showing that future litter or trash problems will emanate or be "traceable" to the Applicant. *LCP, Inc. v. Dist. of Columbia Alcoholic Beverage*

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[1] To the extent the Board cited the Protestants' proposed findings in its Order, the Board notes that it solely limited consideration to those matters properly tied to argument and evidence presented at trial.

[2] The Protestant has not directed the Board to the location in the transcript or the point in the hearing where the Applicant was confronted with its lack of trash management practices or procedures.

Control Bd., 499 A.2d 897, 899-900, 903 (D.C. 1985). As a result, while the testimony of Mr. Carnes merited consideration, the conclusions reached by the Protestants based on that testimony are simply too speculative to merit crediting. Finally, the Protestants' citation to the *Capitol Market* case is not persuasive where the same level of compelling evidence was not presented. Specifically, Premier Lounge does not intend to operate as a market or like the business in *Capitol Market*; therefore, the case cited by the Protestants is distinguishable from the present matter. *Mot. for Recon.*, at 5. For this reason, the Board affirms its findings regarding trash and litter.

VI. The Board Affirms its Determination Regarding Residential Parking and Vehicular and Pedestrian Safety.

6. The Protestants next argue that the Board's reliance on the availability of public transportation is insufficient in light of the other criteria. *Mot. for Recon.*, at 6. The Board disagrees. First, the availability of public transportation suggests that the operations will not have a significant impact on residential parking because patrons have the option of leaving their vehicles at home. It is also reasonable to presume that the availability of public transportation will prevent a significant increase in traffic or accidents. As a result, the availability of public transportation is sufficient on its own to satisfy the residential parking and vehicular and pedestrian safety criteria. Second, the Protestants' citation to *Club Illusions* is unpersuasive where the club in that case was much larger than Premier Lounge, the club had a unique off-site parking plan, the club had unreliable access to parking lots, the club had no ready access to public transportation, and the location of the club required patrons to walk across a dangerous road, which are not similar to the facts or otherwise established in this case; therefore, *Club Illusions* is easily distinguished and not relevant to the present matter. *In re 2101 Venture, LLC, t/a Club Illusions*, Case No. 12-PRO-00054, Board Order No. 2013-004, ¶¶ 22-28 (D.C.A.B.C.B. Jan. 16, 2022); *Mot. for Recon*, at 6-7. Third, the Protestants have not directed the Board to any evidence in the record that demonstrates a burden on residential parking or a probability of a negative impact on vehicular and pedestrian safety (e.g., traffic studies, accident reports). For these reasons, the Board affirms its findings regarding residential parking and vehicular and pedestrian safety.

VII. The Board Affirms its Determination Regarding Real Property Values.

7. The Protestants further challenge the Board's determination regarding the Applicant's impact on real property values. *Mot. for Recon.*, at 8. In making its determination, the Board relied on the lack of blight and the lack of evidence that the operation of the establishment would cause blight. *Board Order No. 2022-618*, at ¶ 24. The Board notes that the photographs taken by Investigator Ruiz are sufficient evidence of the lack of blight, and the Protestant's argument that the Board must on rely what the Applicant presents has been adequately refuted in Section 1 of this Order. *Protest Report, Exhibit Nos. 13-29*, *Mot. for Recon.*, at 8. The Board further notes that a lack of blight is sufficient on its own to demonstrate a lack of negative impact on property values, and this has been the precedent in this forum since at least 2011. *In re Historic Restaurants, Inc., t/a Washington Firehouse Restaurant, Washington Smokehouse*, Case No. 13-PRO-00131, Board Order No. 2014-107, ¶ 48 (D.C.A.B.C.B. Apr. 2, 2014). Finally, such evidence is sufficient under the appropriateness test and the totality of the circumstances in this

case; especially, where the Protestants failed to dispute this finding with evidence or submit more persuasive evidence, such as expert testimony, official government statistics, or relevant academic studies. Consequently, for these reasons, the Board affirms its findings regarding real property values.

VIII. The Board Affirms its Findings Regarding Character and Fitness.

8. The Protestants makes several arguments disputing the Board's conclusion that the Applicant satisfies D.C. Official Code § 25-301(a). First, the Protestants incorrectly characterize the Board's instructions regarding raising the issue of character in fitness and other legal issues. Specifically, in its motion the Protestants claim that the Board stated that

> the "Board will assess the character and fitness of the ownership based on the objections by the Protestants" but [that the Board] fails to indicate when this will occur and through which means, and how the rights of the Protestants in raising their objections could be preserved.

Mot. for Recon., at 9. This is completely inaccurate. The Board notes that the Protestants ignore the following instruction contained in the continuance order, which stated: "*The Board notes that these allegations may be brought forward at the protest hearing by the Protestant*." *In re The New 7303, Inc., t/a Premier Lounge*, Case No. 22-PRO-00022, Board Order No. 242, 1 (D.C.A.B.C.B. May 18, 2022) (emphasis added). As a result, the Protestants received clear and explicit instructions that the Protest Hearing was the time to attempt to raise all character fitness and other challenges and to present all relevant evidence. Consequently, any failure to do so is the fault of the Protestants and amounts to a waiver of such claims; therefore, the Protestants argument on this point has no merit.

9. Second, the Protestants argue that the Board failed to hold a separate hearing regarding its character and fitness and legal objections to the application. *Mot. for Recon.*, at 9. The Protestant fails to cite any authority requiring the Board to hold a separate hearing, and the Board notes that an adequate opportunity to raise such claims was provided at the Protest Hearing. Consequently, the Protestants argument on this point has no merit.

10. Third, the Protestants claim that the Board failed to adequately consider violations observed by Investigator Ruiz and that the standard used by the Board is incorrect. *Mot. for Recon.*, at 10. Nevertheless, the Board notes that the character and fitness determination as described by statute is set up as a totality of the circumstances test left to the discretion and judgment of the Board. The Board notes that it is reasonable to allow new applicants to obtain a license even if they have committed one or more violations where the Board regularly allows other licensees to renew their licenses even if they have violations in their investigative history. As such, the mere commission of violations prior to licensure is not sufficient to merit a finding that an applicant has bad character or insufficient knowledge of the law to merit a license. Instead, as the Board noted in its prior Order, such a determination depends on the circumstances of each case. Consequently, the Board affirms the findings in its Order related to character and fitness.

11. Finally, the Protestants argue that the Board failed to consider prior violations committed by the establishment before the present ownership owned or controlled the business. *Mot. for Recon.*, at 12-13. Nevertheless, the Protestants failed to present any evidence that the present owners owned or controlled the business at that time; therefore, there is no need for the Board to consider such evidence, as it would be unfair to impute such violations to people who were not involved or had any responsibility to supervise the business when they occurred. To hold otherwise, would be a blatant miscarriage of justice; therefore, this argument has no merit, and even if correct, would not alter the determination in this case.

12. Therefore, for the reasons stated above, the motion for reconsideration is denied. The Board notes that to the extent it did not address any argument raised by the Protestants it either lacked merit or had no bearing on the Board's final decision.

ORDER

Therefore, the Board, on this 19th day of October 2022, hereby **DENIES** the motion for reconsideration. 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

Edward S. Grandis, Member

I abstain from the determination made by the majority in this case.

James Short, Member

I dissent from the determination made by the majority of the Board and would vote to deny the Application.

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).