

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

In the Matter of:)
)
)
Wyoming Cube & Bale, LLC)
t/a Sandbox Restaurant)
)
Application for a New)
Retailer's Class CR License)
)
at premises)
3251 Prospect Street, N.W.)
Washington, D.C. 20007)
_____)

Case No.: 18-PRO-00081
License No: ABRA-110062
Order No: 2019-165

BEFORE: Donovan Anderson, Chairperson
Mike Silverstein, Member
James Short, Member
Rema Wahabzadah, Member

ALSO PRESENT: Wyoming Cube & Bale, LLC, t/a Sandbox Restaurant, Applicant

Robert Elliot, Owner, on behalf of the Applicant

Karen Cruse, Designated Representative, Citizens Association of Georgetown, Protestant

Elizabeth Emes, Designated Representative, A Group of Five or More Residents or Property Owners, Protestants

Commissioner Rick Murphy, Advisory Neighborhood Commission (ANC) 2E, Protestant

Benjamin Dower, Designated Representative, A Group of Five or More Residents or 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 CR License filed by Wyoming Cube & Bale, LLC, t/a Sandbox Restaurant, (hereinafter "Applicant" or "Sandbox") subject to conditions in order to protect nearby residents from unreasonable noise and to prevent safety and overcrowding issues in the courtyard outside the restaurant. Specifically, while the Board will approve the creation of an outdoor seating area, the Board denies the request for twenty-four hour operations and a cover charge endorsement. Furthermore, the Board limits the occupancy of the summer garden to 120 persons, prohibits live entertainment or amplified sounds in the outdoor seating area, and imposes other appropriate restrictions on the operations, which are discussed below.

Procedural Background

The Notice of Public Hearing advertising Sandbox Restaurant's Application was posted on February 13, 2019, and informed the public that objections to the Application could be filed on or before December 3, 2018. *ABRA Protest File No. 18-PRO-00081*, Notice of Public Hearing [*Notice of Public Hearing*]. The records of the Alcoholic Beverage Regulation Administration (ABRA) indicate that Advisory Neighborhood Commission (ANC) 2E, Two Groups of Five or More Residents and Property Owners, and the Citizens Association of Georgetown (CAG) (collectively, the "Protestants") have filed a protest against the Application. *ABRA Protest File No. 18-PRO-00081*, Roll Call Hearing Results.

The parties came before the Board's Agent for a Roll Call Hearing on December 17, 2018, where all of the above-mentioned objectors were granted standing to protest the Application. On January 16, 2019, the parties came before the Board for a Protest Status Hearing. Finally, the Protest Hearing in this matter occurred on February 13, 2019.

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 2E. During opening statements, the Protestants indicated that they did not oppose the granting of a license, but solely oppose the summer garden request, twenty-four hour operations, and the approval of a cover charge endorsement. *Transcript (Tr.)*, February 13, 2019 at 31-32. The ANC's issues and concerns shall be addressed by the Board in its Conclusions of Law, below.

Based on the issues raised by the Protestants, the Board may only grant the Application if the Board finds that the request will not have an adverse impact on the peace, order, and quiet 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. 2019).

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. Sandbox has submitted an Application for a New Retailer's Class CR License at 3251 Prospect Street, N.W., Washington, D.C. *Notice of Public Hearing*.
2. ABRA Supervisory Investigator Mark Brashears investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 18-PRO-00081, Protest Report* (Feb. 2019) [*Protest Report*]. The proposed establishment is located in a Mixed Use (MU-4) zone. *Protest Report*, at 5. Thirty-seven licensed establishments are located within 1,200 feet of the proposed location. *Id.* Thirteen have summer garden endorsements, seventeen have entertainment endorsements, and five have cover charge endorsements. *Id.* at 8. The French Maternal School and Saint John's Preschool are located within 400 feet, but do not bar the issuance of the license at issue in this case due to the exception provided by D.C. Code § 25-314(b)(2). *Id.* at 8-9. Sandbox proposes to operate twenty-four hours per day, seven days per week. It proposes alcohol sale, service, and consumption hours of 8:00 a.m. to 2:00 a.m., Sunday through Thursday, and until 3:00 a.m. on Friday and Saturday. *Id.* at 11. The proposed summer garden hours are from 8:00 a.m. to 10:00 p.m. seven days per week. *Id.* Sandbox proposes to have entertainment hours extending between 12:00 p.m. and 10:00 p.m. *Id.*
3. The establishment is mostly located underground. *Tr.*, 2/13/18 at 56-57. The front of the premise has high glass windows. *Id.* Sandbox is located in the back of a large enclosed courtyard. *Id.* at 57-58. The establishment is located between Café Milano and Peacock Café. *Id.* at 56. Condominiums look down on the courtyard. *Id.* at 57. No other establishment facing the courtyard has outdoor seating. *Id.* at 79. A pay parking lot is located across the street from Sandbox. *Id.* at 56.
4. Previously, eight noise complaints were made regarding the prior establishment located at Sandbox's proposed location. *Id.* at 62, 76. Half of the noise complaints were made by the current owner of Sandbox, Mr. Elliot, and they were in regard to patrons in the courtyard. *Id.* at 62.
5. Based on Investigator Brashears' observations, Sandbox appears to be constructing a full-service restaurant with a coffee bar. *Id.* at 66. In particular, in comparison to the prior business, Sandbox has added tables and chairs, has a smaller bar, and appears to be adding food and coffee service facilities to the premises. *Id.* at 67-68. In remodeling the premises, Sandbox has also installed a new camera system. *Id.* at 68.

II. Rona Leff

6. Rona Leff is working for Sandbox in setting up the restaurant. *Id.* at 82. Sandbox seeks to revitalize the courtyard and make it an attractive place for the public to visit. *Id.* at 85. In the future, the courtyard may host art and sculpture walks. *Id.* at 85-88. She also noted that various entrances into the courtyard, except for the one leading to Prospect Street, N.W., could be locked. *Id.* at 104-05, 119.

7. Ms. Leff also presented the establishment's proposed menu. *Id.* at 95-96. At this time, the establishment plans to have a variety of vegetarian and meat dishes available to customers. *Id.* at 95. Sandbox also has hired a full-time chef. *Id.* at 94, 148.

8. Ms. Leff also conducted a sound test in the courtyard. *Id.* at 100. With a sound producing device producing sounds at 75 decibels, the sound by the nearby school was approximately 48 decibels. *Id.* at 100, 102. She did not visit the condominium units or the other restaurants during the test. *Id.* at 111-12. She is also not a trained sound engineer. *Id.*

III. Robert Elliott

9. Robert Elliott is the owner of Sandbox. *Id.* at 17. He previously operated a French restaurant in 1989 and 1990. *Id.* at 172. He noted that the location is one of the few areas in Georgetown that can support a large sidewalk café. *Id.* at 22. Sandbox has applied for an occupancy of 121 persons indoors and 168 outdoors. *Id.* at 17. He expects that the outdoor seating will have no more than 120 people using the outdoor area on a regular basis. *Id.* at 120. He further indicated that he has no interest in operating a tavern or having the restaurant turn into "a late night rowdy place." *Id.* at 144. He has invested over \$400,000 into the restaurant. *Id.* at 160

10. Mr. Elliott is also the landlord of the premises and the other restaurants operating in the courtyard. *Id.* at 144, 178-79, 180. In his role as the landlord, he has hired security for the restaurant and residents at no cost. *Id.* at 144-45. His business office overlooks the courtyard. *Id.* at 145. He also is aware that residents of the condominiums overlooking the courtyard have complained about the noise generated by patrons passing through the courtyard late at night. *Id.* 184-85.

11. The interior of the restaurant has a large amount of seating and tables for patrons with minimal standing room. *Id.* at 147; *Applicant's Exhibit Nos. 27-29*. The restaurant also has a full coffee bar and a \$16,000 espresso machine. *Tr.*, 2/13/19 at 146. In remodeling the premises, commercial dish washing equipment and hot surfaces have been installed in the kitchen. *Id.* at 148.

12. Sandbox has taken several steps to address noise concerns. First, the establishment will use pads on the tables to prevent the clanging of dishes, glasses, and silverware. *Id.* at 166-67, 202, 216. Second, Mr. Elliott would institute last call at 9:00 p.m. in the outdoor seating area in order to begin clearing the courtyard. *Id.* at 191.

13. Mr. Elliott committed to not permitting amplified sounds or providing outdoor entertainment in the outdoor seating area. *Id.* at 176. He also indicated that he will forgo using promoters. *Id.* at 216.

14. Mr. Elliott indicated that he has no objection to the hours of the establishment being limited to 2:00 a.m. or 3:00 a.m. *Id.* at 175. He also had no objection to having alcohol service start at 11:30 a.m. *Id.* at 293.

IV. Benjamin Dower

15. Benjamin Dower is a resident of the Madelon Condominium. *Id.* at 229. His unit overlooks the courtyard and is located approximately 40 feet above the floor of the courtyard. *Id.* at 229-30. He has lived there since 2007. *Id.* When he bought the condominium, he was notified that his condominium is “near . . . restaurants, bars, [and] entertainment . . . and . . . may be subject to certain street and neighborhood noises, light sources and odors.” *Id.* at 235-36.

16. Before Sandbox filed its application, a billiard parlor and a bar operated in Sandbox’s proposed location. *Id.* at 231. The bar often had disc jockeys perform but did not use any outdoor seating. *Id.* at 232. While the bar did not have outdoor seating, Mr. Dower found the presence of the bar created noise disturbances. *Id.* Specifically, patrons would loiter, hang out outside with open containers, urinate, and vomit. *Id.* at 232-33.

V. Kevin Edgar

17. Kevin Edgar lives in the Madelon Condominium and has lived there since 2007. *Id.* at 238-39. His condominium overlooks a passageway that leads to the courtyard. *Id.* at 239. When he purchased his unit he received the same notification regarding noise that was given to Mr. Dower. *Id.* at 240.

18. When the bar was in operation he experienced regular noise disturbances in his home. *Id.* at 241. Specifically, he was disturbed by the sounds of intoxicated patrons and patrons coming and leaving the establishment. *Id.* He noted that the noise would regularly wake him up while he was sleeping. *Id.* at 243.

VI. Philippe Reines

19. Philippe Reines lives in the Madelon Condominiums. *Id.* at 248. She has resided in the building since 2015. *Id.* at 249. She indicated that she experienced noise issues in her home similar to those reported by Mr. Dower and Mr. Edgar. *Id.* at 250.

CONCLUSIONS OF LAW

20. The Board may approve an Application for a New Retailer's Class CR 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. 2019). Specifically, the question in this matter is whether the Application will have a negative impact on the peace, order, and

quiet 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. 2019). As the Protestants have limited their objections to the creation of a summer garden in the courtyard, twenty-four hour operations, and the issuance of a cover charge endorsement, the Board solely addresses those issues in this Order. *Supra*, at 2.

I. The Establishment with a Summer Garden is Appropriate for the Neighborhood Subject to Conditions.

21. 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. 2019). 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).

22. 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. Sandbox will not adversely impact nearby residents if operated with restrictions.

23. The Board approves the Application with restrictions. Under the law, “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. 2019).

24. In protest proceedings, the impact of outdoor seating on peace, order, and quiet is a frequent issue. For example, in *Duffy’s Irish Restaurant*, the Board limited the hours of the sidewalk café to 11:00 p.m. during the week and midnight during the weekend based on the presence of residences near the establishment’s outdoor seating area. *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). Moreover, in *Romeo & Juliet*, the Board restricted the restaurant’s outdoor seating to 11:00 p.m. during the week and midnight during the weekend based on the lack of soundproofing. *In re 301 Romeo, LLC t/a Romeo & Juliet*, Case Number 13-PRO099136, Board Order No. 2014-045, ¶¶ 45-46 (D.C.A.B.C.B. Jan. 29, 2014). In *Dacha*, the Board permitted an unenclosed sidewalk café located near residents to operate until 11:00 p.m. during the week and midnight during the weekends. *In re DGB2, LLC, t/a Dacha Beer Garden*, Case No. 17-PRO-00035, Board Order No. 2017-582, 1, ¶ 49 (D.C.A.B.C.B. Nov. 29, 2017).

25. In this case, Sandbox shares a courtyard with a large number of residents, but has solely requested to operate its outdoor seating area until 10:00 p.m. *Supra*, at ¶ 2. The outdoor seating area has no soundproofing that would prevent noise from escaping into the courtyard. In light of the Board’s precedent in *Duffy’s Irish Restaurant*, *Romeo & Juliet*, and *Dacha*, the operation of a large sidewalk café in the courtyard until 10:00 p.m. does not threaten the ability of nearby residents to sleep late at night and does not breach any reasonable expectation on the part of neighbors. Moreover, it is unreasonable to completely bar the operation of an outdoor seating area when Sandbox will operate as a legitimate restaurant, as evidenced by the presence of tables and chairs and the installation of equipment related to the service of food. *Supra*, at ¶¶ 5, 7, 9, 11.

26. The Board further notes that in reaching this decision, the Board considered testimony regarding noise issues created by patrons of the bar that previously operated in the proposed location. *Supra*, at ¶¶ 16, 18-19. In that vein, in order to avoid the creation of a tavern or bar with similar issues, the Board denies the request for a cover charge endorsement. Moreover, in light of the presence of nearby residents, the Board denies the request for twenty-four hour operations, as this would unduly burden residents by risking too much noise in the early morning as patrons traverse through the courtyard. Finally, in the interest of preventing noise and overcrowding issues in the courtyard, the Board restricts the occupancy of the outdoor seating area to 120 persons. *Supra*, at ¶ 9.

27. Therefore, the Board grants the request subject to conditions.

II. The Board Imposes Conditions on the License.

28. 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).

29. In light of the proximity of the outdoor seating area to residents, and in order to prevent noise, overcrowding, public safety issues, the Board imposes a number of conditions. Specifically, the license holder shall (1) prohibit amplified music or live entertainment in the outdoor seating area; (2) limit the sale, service, and consumption of alcohol to between 11:30 a.m. and 2:00 a.m.; (3) limit the hours of operation to between 6:30 a.m. and 2:00 a.m.; (4) limit the sale, service, and consumption of alcohol in the outdoor seating area to between 11:30 a.m. and 10:00 p.m.; (5) limit the operation of the outdoor seating area to between 6:30 a.m. and 10:00 p.m.; (6) limit the total occupancy of the summer garden to 120 people; and (7) the license holder shall ensure that all gates blocking the public from entering the courtyard have features that allow patrons within the courtyard to exit the area even if the gate is locked.

III. The Board Has Satisfied the Great Weight Requirement By Addressing ANC 2E's Issues and Concerns.

30. ANC 2E's written recommendation submitted in accordance with D.C. Code § 25-609(a) indicated that its protest was based on concerns regarding Sandbox Restaurant's impact on peace, order, and quiet. The Board notes that it specifically addressed these concerns in its Conclusions of Law.

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

31. 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. 2019). 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 3rd day of April 2019, hereby **APPROVES** the Application for a New Retailer's Class CR License at premises 3251 Prospect Street, N.W. filed by Wyoming Cube & Bale, LLC, t/a Sandbox Restaurant, subject to the following **CONDITIONS**:

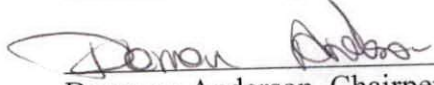
- (1) The license holder shall not play amplified music or sounds or provide live entertainment in the outdoor seating area;
- (2) The license shall limit the sale, service, and consumption of alcohol to between 11:30 a.m. and 2:00 a.m. in the interior portions of the premises;
- (3) The license shall limit the hours of operation of the interior portions of the premises to between 6:30 a.m. and 2:00 a.m.;
- (4) The license shall limit the hours the sale, service, and consumption of alcohol in the outdoor seating area to between 11:30 a.m. and 10:00 p.m.;
- (5) The license shall limit the operation of the outdoor seating area to between 6:30 a.m. and 10:00 p.m.;
- (6) The maximum occupancy of the summer garden shall be 120 persons; and
- (7) The license holder shall ensure that all gates blocking the public from entering the courtyard have features that allow persons within the courtyard to exit the area even if the gate is locked. This provision may be satisfied by the installation of gates with push bars allowing egress from the courtyard.

IT IS FURTHER ORDERED that the request for a cover charge endorsement and twenty-four hour operation is **DENIED**.


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.

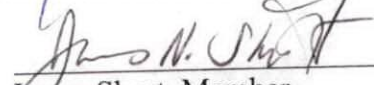
District of Columbia
Alcoholic Beverage Control Board



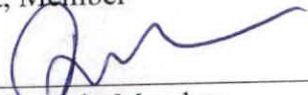
Donovan Anderson, Chairperson



Mike Silverstein, Member



James Short, Member



Rema Wahabzadah, 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).