

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

In the Matter of:)		
)	Case No.:	13-PRO-00169
Barcode Corporation)	License No:	ABRA-82039
t/a Barcode)	Order No:	2015-001
)		
Application to Renew a)		
Retailer's Class CT License)		
)		
at premises)		
1101 17th Street, NW)		
Washington, D.C. 20036)		

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Hector Rodriguez, Member
James Short, Member
Mike Silverstein, Member

ALSO PRESENT: Barcode Corporation, t/a Barcode, Applicant

Kwamina Williford, Esq., on behalf of the Applicant

Michael Fasano, Presidential Cooperative Condominium Association,
Protestants

Michael Hibey, on behalf of A Group of Five or More Residents and
Property Owners, Protestants

Abigail Nichols, Advisory Neighborhood Commission (ANC) 2B,
Protestants

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

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

INTRODUCTION

The Alcoholic Beverage Control Board (Board) finds that Barcode Corporation, t/a Barcode, (hereinafter “Applicant” or “Barcode”) is having an adverse impact on the community by allowing an unlimited amount of patrons to convene on its outdoor sidewalk café during its hours of operation. This behavior violates the reasonable expectation of neighboring residents to peace and quiet in their homes. Consequently, the Board hereby approves the Application to Renew a Retailer's Class CT License filed by Barcode subject to the following conditions: (1) the establishment's outdoor seating area is limited to 45 patrons on the outdoor sidewalk café at all times of its hours of operation and (2) Neither Barcode, nor its patrons, shall generate any noise that may be heard in a residence while in operation.

Procedural Background

The Notice of Public Hearing advertising Barcode's Application was posted on October 11, 2013, and informed the public that objections to the Application could be filed on or before November 25, 2013. *ABRA Protest File No. 13-PRO-00169*, Notice of Public Hearing [*Notice of Public Hearing*]. The Alcoholic Beverage Regulation Administration (ABRA) received protest letters from the ANC 2B, Dupont Circle Citizens Association (DCCA), and a Protestant Group of Five or More (Fasano Group) (collectively “The Protestants”). *ABRA Protest File No. 13-PRO-00169*, Roll Call Hearing Results. The Board also takes administrative notice of the letter of support of renewal of Barcode's CT license received from the Golden Triangle Business District. Letter from Leona Agouridis, Executive Director, Golden Triangle Business District, to Ruthanne Miller, Chair, Alcoholic Beverage Control Board (Apr. 21, 2014) [*BID Letter of Support*]. Finally, the Board takes administrative notice of the Dupont Circle Advisory Neighborhood Commission (ANC 2B) Guidelines on Sidewalk Café/Outdoor Restaurant Use and Public Space and Dupont Circle Advisory Neighborhood Commission ANC2B Guidelines on Sidewalk Café/Outdoor Restaurant Use, submitted by ANC 2B (*Dupont Circle-ANC 2B Guidelines*).

The parties came before the Board's Agent for a Roll Call Hearing on December 9, 2013, where all of the above-mentioned parties were granted standing to protest the Application. On March 5, 2014, the parties came before the Board for a Protest Status Hearing.

Finally, the Protest Hearing in this matter occurred on September 17, 2014. At the Hearing, the Applicant requested that the Board recognize that the Protestants have the burden to establish a factual basis to support its request to restrict or deny the renewal of Barcode's CT license. *Transcript (Tr.)*, September 16, 2014 at 9-27; *See also ABRA Protest File No. 13-PRO-00169*, Applicant's Motion to Declare Burden on Petitioner, 1-7 [*Applicant's Motion*]. In its Motion, the Applicant argues that the shift of the burden to the Protestants is both supported by law and the “practical realities of the proceedings.” *Id.* at 3-4.

Preliminary Matters

Title 25 of the District of Columbia (D.C.) Official Code (Title 25), Title 23 of the D.C. Municipal Regulations (Title 23), and case law make it clear that the burden of proof to

demonstrate appropriateness initially rests with the licensee during a renewal hearing; therefore, the Board denies Barcode's request to shift the burden of proof on the matter of appropriateness to the Protestants. *Applicant's Motion*, at 1.

On its face, Title 25 assigns the burden of proof in a renewal hearing to the applicant. 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. Official Code § 25-311(a); *Opp.*, at 1. Section 25-313 goes on to state, "To qualify for . . . renewal of a license . . . an applicant shall demonstrate to the satisfaction of the Board that the establishment is appropriate . . ." D.C. Official Code § 25-313(a). Only when no valid objection is filed may the Board presume that the application is appropriate. *Id.*

The Board's regulations then state,

400.1 For purposes of establishing the appropriateness of the establishment under D.C. Official Code § 25-313(b)(1) through (3), *the applicant shall present to the Board such evidence and argument* as would lead a reasonable person to conclude [the establishment is appropriate] . . .

400.3 Whenever an applicant has *initially presented evidence* to show that the establishment is appropriate, any person opposing the license shall present to the Board such evidence and argument as would establish the inappropriateness of the establishment, and as would overcome, to the satisfaction of a reasonable person, the evidence and argument presented by the applicant. ¹

23 DCMR §§ 400.1, 400.3 (West Supp. 2014) (emphasis added).²

In this case, three parties have been granted standing to protest Barcode's renewal application; therefore, as a matter of law, the burden of proof lies with Barcode.³ Furthermore, on its face, § 400.3 specifically requires Barcode to make a prima facie case of appropriateness before the Protestants presents their case-in-chief.

This interpretation is further supported by case law. In *Minkoff*, the court said that ". . . proceedings for renewal should conform with those for an original application." *Minkoff v. Payne*, 210 F.2d 689, 693 (D.C. Cir. 1953). In *Gallothom*, the court also stated,

¹ It is error for the Board to determine appropriateness in the licensee's favor based solely on the protestant's failure to present evidence. *Haight v. D.C. Alcoholic Beverage Control Bd.*, 439 A.2d 487, 494 (D.C. 1981).

² In light of this clear language, Barcode is hard pressed to argue that ". . . the Code is silent on burden of proof" or the order of presentation in the case of renewal. *Mot.* at 2.

³ The Board further agrees with the Protestants that placing the burden on Barcode in this case is consistent with the District of Columbia Administrative Procedure Act, because Barcode is the "proponent" of its renewal application. *Opp.* at 2-3.

[b]efore renewing the license . . . the statute requires the Board to make new findings, separate and apart from any prior findings, that the establishment is appropriate . . . The statute on its face explicitly provides for a new finding and it is clear that prior adjudications are subject to modification and reexamination. To conclude otherwise would lead to an absurd result because the factors impacting the renewal of a license are based on events subsequent to an establishment's last hearing.

Gallothom, Inc. v. D.C. Alcoholic Beverage Control Bd., 820 A.2d 530, 533 (D.C. 2003) (quotation marks removed).

Thus, the burden is on Barcode to demonstrate through evidence that its operations “remain[] appropriate” for the location. *K.G.S., Inc. v. D.C. Alcoholic Beverage Control Bd.*, 531 A.2d 1001, 1005 (D.C. 1987).⁴

Even if Barcode’s citation to *Donnelly* were on point, it is not persuasive; especially, when *Donnelly*’s reasoning argues against Barcode’s interpretation of the law.⁵ As noted in *Donnelly*,

This court has carved out two exceptions to the rule transferring the burden of proof to petitioners 1) when the information on which the Board based its finding was not made available to petitioners, *id.*, or 2) when there is no evidence *in the record* directed to and in support of the Board's finding . . .

Donnelly v. D.C. Alcoholic Beverage Control Bd., 452 A.2d 364, 370 (D.C. 1982). As noted in *Gallothom*, a renewal hearing focuses on “. . . events subsequent to an establishment's last hearing.” *Gallothom, Inc.*, 820 A.2d at 533. In this case, neither the Protestants nor the Board have access to evidence in the record related to events subsequent to the prior decision; as a result, the Protestants satisfy both tests 1 and 2 described above. As such, Barcode has no authority to support its position.⁶

Therefore, the Applicant’s Motion to Declare Burden on the Petitioner is denied.

⁴ Even if the Board had the authority to grant Barcode’s request, the Board sees no reason to depart from a long standing practice; especially, when an applicant can merely ask to present rebuttal evidence if it is surprised by any information contained in the protestant’s case-in-chief. Nevertheless, this should not often be the case given the information that can be gleaned from the initial protest letter, mediation, the protest information form, and the protest report.

⁵ The Board further agrees with the Protestants that *Donnelly* does not apply to this case, because that case solely addresses the burden of proof for the purposes of qualifications under D.C. Official Code § 25-301. *Opp.* at 3.

⁶ Based on D.C. Official Code §§ 25-311 and 25-313, the Board does not have the authority to shift the burden of proof from the applicant to protestants during a renewal hearing. *Opp.*, at 3; *see also* 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, 30 (Nov. 12, 1986) (“To demonstrate appropriateness, the burden of proof is on the applicant to submit evidence . . .”). If Barcode seeks to change the law, it should address its concerns to the political branches, which have the authority to make such a change. *Opp.*, at 3.

The Board recognizes that an ANC's properly adopted written recommendations are entitled to great weight from the Board. *See Foggy Bottom Ass'n v. District of Columbia Alcoholic Beverage Control Bd.*, 445 A.2d 643, 646 (D.C. 1982); D.C. Code §§ 1-309.10(d); 25-609 (West Supp. 2014). 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 written recommendation from ANC 2B. The ANC's issues and concerns shall be addressed by the Board in its Conclusions of Law.

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; residential parking and vehicular and pedestrian safety; and real property values of the area located within 1,200 feet of the establishment. D.C. Official Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2014).

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. Testimony of ABRA Investigator Mark Brashears

1. ABRA Investigator Mark Brashears investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 13-PRO-00169, Protest Report* (Sept. 2014) [*Protest Report*].

2. The proposed establishment is located in a commercial (C-4) zone. *Protest Report*, at 3. twenty-eight licensed establishments are located within 1,200 feet of the proposed location. *Id.* There are no schools, recreation centers, public libraries, or day care centers located within 400 feet of the establishment. *Id.* at 5.

3. According to the public notice, Barcode's hours of operation are as follows: 8:00 a.m. to 5:00 a.m., Sunday through Saturday. *Notice of Public Hearing*. The establishment's hours of alcoholic beverage sales, service, and consumption are as follows: 8:00 a.m. to 2:00 a.m., Sunday through Thursday, and 8:00 a.m. to 3:00 a.m. on Friday and Saturday. *Id.* The establishment's hours of entertainment are as follows: 6:00 p.m. to 2:00 a.m., Sunday through Thursday, and 8:00 a.m. to 3:00 a.m. on Friday and Saturday. *Id.* The establishment's sidewalk café hours are as follows: 8:00 a.m. to 5:00 a.m. Sunday through Saturday. *Id.* Finally, the establishment's hours of alcoholic beverage sales, service and consumption in the sidewalk cafe are as follows: 8:00 a.m. to 2:00 a.m., Sunday through Thursday, and 8:00 a.m. to 3:00 a.m. on Friday and Saturday. *Id.*

4. According to Barcode's Sidewalk Café Permit, issued March 26, 2010 by the District of Columbia Department of Transportation (DDOT), Public Space Management Administration, the unenclosed sidewalk café contains 13 tables, 48 chairs and 0 umbrellas. *See* Protestant

Exhibit 61; *Tr.*, 9/24/14 at 47. The establishment's sidewalk café permit has an approved square feet use of 670 ft. *See* Protestant Exhibit 61.

5. While monitoring the establishment for ABRA violations, Investigator Brashears observed that the sidewalk café was at times crowded. *Id.*

6. ABRA personnel monitored Barcode on twelve separate occasions from Thursday, March 20, 2014 to Friday, April 18, 2014. *Id.* at 46. ABRA Investigators did not observe any criminal activity, excessive trash, or hear excessive noise during monitoring visits to Barcode. *Id.*

7. On Sunday, April 13, 2013, ABRA investigators observed a large number of patrons on the sidewalk café and more patrons loitering in the bike lane. *Id.*; *See also Protest Report*, Exhibit 37-38. During some monitoring visits, music and crowd noise could be heard from the establishment and the sidewalk café. *Id.* at 46-48. There were times when the cars were staged in the bike lane momentarily while the valets moved the vehicles, but no cars were left in the bike lane. *Id.* at 47.

8. ABRA investigators conducted a Regulatory Inspection on April 9, 2014 and the establishment received a warning citation for not having the required Pregnancy Warning sign posted. *Id.* In addition, Barcode committed a violation when it did not have the required ABRA window lettering posted. *Id.*

9. The Noise Taskforce, comprised of the Metropolitan Police Department (MPD), DCRA, and ABRA, monitored Barcode on five separate occasions from March 23, 2014, until April 19, 2014, and found no noise violations. *Id.* at 48.

10. On Sunday, April 5, 2014, there was use of marijuana on the premises, resulting in an ABRA violation. *Id.* Investigator Brashears also observed patrons loitering on the sidewalk that night and in the bike lane and there was trash in the street. *Id.* at 48-49. This violation has been forwarded to the District of Columbia Office of the Attorney General for prosecution. *Id.* at 49.

11. With regards to available parking in the neighborhood surrounding the establishment, there are pay-to-park spaces on L Street at a central parking garage, pay-to-park spaces on 17th Street, two PMI parking garages, and pay-to-park spaces on 16th Street, N.W. *Id.* at 49.

II. Testimony of Arman Amirshahi

12. Arman Amirshahi is one of the owners and Director of Operations for Barcode. *Tr.*, 9/24/14 at 100. In this capacity, he is responsible for the operations of Barcode's multiple locations including the management of liquor, beer and wine, insurance, licenses, security, and leases. *Id.* He also handles all of the permits associated with the establishment. *Id.* at 101.

13. Mr. Amirshahi obtained the sidewalk café permit on May 23, 2013 through the DCRA. *Id.* at 120; *See also* Applicant's Exhibit 4. He also obtained the establishment's Certificate of Use which limits the sidewalk café's seating capacity to 40 patrons. *Id.* at 121; Applicant's Exhibit 4.

14. Barcode is a restaurant with upscale food. *Id.* at 121. It is located in the heart of the business district. *Id.* On the weekends, the establishment has select evenings where it targets patrons who want to socialize at a bar that offers music. *Id.*

15. An integral part of the establishment's business plan is the sidewalk café. *Id.* at 102. The establishment wants to cater to people who want to be outdoors when the weather permits. *Id.* The sidewalk café provides great visibility for the patrons. *Id.*

16. The establishment has an entertainment endorsement that allows it to have a disc jockey (DJ) on selected nights and weekends. *Id.*

17. Barcode offers a valet service to its patrons. *Id.* at 123. The valet parking was previously located in front of Barcode, in the same location as a bike lane. *Id.* at 123.

18. The valet parking was relocated to 17th Street, N.W., out of concern for the safety of city residents and patrons entering and exiting the establishment. *Id.*

III. Testimony of Michael Fasano

19. Michael Fasano testified on behalf of the Fasano Group of Protestants. *Id.* at 258. He is a resident of The Presidential Cooperative apartment building, located at 1026 16th Street, N.W. Tr., 9/24/14 at 255. He has resided at this address for approximately 11 years and serves as the building President. *Id.* at 256. The apartment building is located in a special purpose zone. *Id.* at 367.

20. As President, Mr. Fasano works with the Cooperative's Board of Directors and Board Members. *Id.* at 257. In this role, Mr. Fasano has received numerous complaints about the noise, parking and safety issues at Barcode. *Id.* at 257, 365. He has also filed complaints with ABRA in the past. *Id.* at 366. However, to date, he has not contacted the MPD to complain about the noise from the motorcycles that often congregate in front of the establishment. *Id.* at 337-38.

21. On April 6, April 13, May 18, August 10 and September 7, Mr. Fasano took video footage outside of the establishment. *Id.* at 269; *See also* Protestant's Exhibit 31-44. The videos depict a crowded and loud outdoor café located on the sidewalk. *Id.* at 269-74; Protestant's Exhibit 31-44. Mr. Fasano also took several pictures that depict approximately seventy-five people standing and drinking in the outside café area. *Id.* at 264; Protestant's Exhibits 22-30.

22. The Fasano Group's main concern is the noise that emanates from the outdoor sidewalk café, primarily on Sunday nights. *Id.* at 349. The Fasano Group requests that if the establishment continues to take the position that the standing capacity is unrelated to the seating capacity of the sidewalk café, then Barcode not be allowed to operate. *Id.* at 340. However, if the establishment would limit patrons in the sidewalk café sitting, eating and drinking to a capacity of 40, the Fasano Group requests that the occupancy of the sidewalk café be limited to 40 people. *Id.* at 340-41. Further, the Fasano Group would like for the establishment's sidewalk

café hours to be limited to 11:00 p.m. during the week and 12:00 a.m. on the weekends. *Id.* at 341⁷.

23. With regards to the inside operations of the establishment, the Fasano Group requests that the establishment close its doors so that the establishment's interior music is not heard outside the establishment. *Id.* at 342.

IV. Testimony of Michael Brennan

24. Mr. Michael Brennan is a resident of The Presidential whose apartment faces L Street. *Tr.*, 9/24/14 at 371. Mr. Brennan has resided at this address for two and a half years. *Id.*

25. Mr. Brennan is negatively impacted by the excessive noise caused by the establishment. *Id.* On multiple occasions, the noise emanating from the establishment awakened him and his three year old daughter at night. *Id.* At times, Mr. Brennan reports that the noise can be heard after 1:00 a.m. in the morning. *Id.*

V. Testimony of Douglass Koehn, M.S.

26. Mr. Koehn is a consultant for Miller Beam & Paganelli. *Tr.*, 9/24/14 at 388. The company performs a variety of acoustical AV and vibration work, in addition to providing expert testimony. *Id.*

27. Mr. Koehn received his Master of Science and Acoustics from Pennsylvania State University and has been a professional acoustical engineer for over fifteen years. *Id.* at 389-90. The Protestants contacted Mr. Koehn to take accurate noise readings of the establishment and testify about his findings in this case. *Id.* at 390; *See also* Protestant's Exhibits 55-57.

28. On Sunday, April 13, 2014, at approximately 6:00 or 7:00 p.m., Mr. Koehn took some noise measurements around the perimeter of the establishment with a professionally calibrated Type 1 sound level meter. *Id.* at 390-91. The noise during this period was generally in the 75 to 77 dBA range, which exceeds the noise code by about ten decibels. *Id.* at 391. Mr. Koehn also took noise measurements of two nearby establishments, McCormick and Schmick's and PJ Clark's, on the same evening. *Id.* These establishments' measurements were approximately at the noise code level.

29. Mr. Koehn returned to the establishment to take additional measurements on Sunday, September 14, 2014. *Id.* at 393. The results of the noise measurements were similar to those taken previously on April 13, 2014. *Id.*

VI. Testimony of ANC 2B

The ANC offered no testimony, but adopted the testimony of the other Protestants.

⁷ These hours are consistent with those set forth in the Dupont Circle ANC 2B Guidelines.

CONCLUSIONS OF LAW

30. The Board may approve an Application to Renew a Retailer's Class CT License when the proposed establishment will not have an adverse impact on the neighborhood. D.C. Official Code §§ 25-104, 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2014). Specifically, the question in this matter is whether the Application will have a negative impact on the peace, order, and quiet; residential parking and vehicular and pedestrian safety; and real property values of the area located within 1,200 feet of the establishment. D.C. Official Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2014).

31. Furthermore, “. . . 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. Official Code § 25-314(c).

I. THE BOARD FINDS THAT THE APPLICATION FILED BY BARCODE IS APPROPRIATE FOR THE NEIGHBORHOOD SUBJECT TO CONDITIONS BASED ON THE DISTURBING NOISE GENERATED BY THE ESTABLISHMENT.

32. 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. Official 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. 2014).

33. The Board finds that the application for renewal of Barcode’s license is appropriate for the neighborhood subject to the following conditions: (1) the establishment’s outdoor seating area is limited to 45 patrons on the outdoor sidewalk café at all times of its hours of operation and (2) Neither Barcode, nor its patrons, shall generate any noise during Barcode’s operation that may be heard in a residence.

a. The noise generated by the Applicant violates the peace, order and quiet standard.

34. The Board finds that Barcode’s generation of excessive noise render the Application inappropriate unless subject to conditions. “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. Official Code § 25-313(b)(2); *see also* D.C. Official 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. 2014).

35. The appropriateness test has never been limited to mere compliance with the law. See *Panatut, 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”). It has been said, that each location where an establishment is located is “unique,” which requires the Board to evaluate each establishment “...according to the particular circumstances involved.” *Le Jimmy, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 433 A.2d 1090, 1093 (D.C. 1981). Under this test, the Board must consider the “prospective” effect of the establishment on the neighborhood.” *Id.* Among other considerations, this may include the Applicant’s efforts to mitigate or alleviate operational concerns⁸, the “character of the neighborhood,”⁹ the character of the establishment¹⁰, and the license holder’s future plans¹¹.

36. The Board notes that there has been a documented violation of marijuana use at this establishment and will review the evidence supporting the allegations should the OAG decide to prosecute this particular matter. *Supra*, at ¶ 10. Further, the Board acknowledges that while Barcode committed two violations during a Regulatory Inspection on April 9, 2014, it does not find that failing to post ABRA-required signage and window lettering rise to a level that would disrupt the peace, order, and quiet of the neighborhood. *Supra*, at ¶ 8. However, the key issue of concern for the Protestants in this case is the establishment’s use of the sidewalk café. *Supra*, at ¶ 22. There are several instances in the record where Mr. Brennan attests to “noise that wakes [him] at night” and “noise that has gone past 1:00 a.m. in the morning.” *Supra*, at ¶ 25. There is also evidence in the record where the sidewalk café is crowded with a minimum of 75 people. *Supra*, at ¶¶ 5, 22; *See also* Protestant’s Exhibit 3, 4, 34, 40. Furthermore, the Board credits the testimony of Mr. Koehn who took noise measurements of the establishment and found that it was higher than the noise level allowable by law. *Supra*, at ¶ 28.

37. Under D.C. Code § 25-104(e), the Board, in issuing licenses, “may require that certain conditions be met if it determines that the inclusion of the conditions will be in the best interest of the locality, section, or portion of the District where the licensed establishment is to be located.” D.C. Official Code § 25-104(e). The Board also takes administrative notice of the International Building Code (2006), Table 1004.1.1, which provides the guideline for the standard of measurements governing building occupancy relied upon by District of Columbia regulatory agencies including the Department of Consumer Regulatory Affairs. Under these guidelines, the evidence in the record showed the demonstrated use of Barcode’s sidewalk café space is consistent with the ‘unconcentrated tables and chairs’ standard for a use which is 15

⁸ *Donnelly v. District of Columbia Alcoholic Beverage Control Bd.*, 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).

⁹ *Citizens Ass’n of Georgetown, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 410 A.2d 197, 200 (D.C. 1979).

¹⁰ *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, 801 (D.C. 1970).

¹¹ *Sophia’s Inc.*, 268 A.2d at 800.

square feet per occupant. International Building Code (2006), Table 1004.1.1. The Board also takes administrative notice of Barcode's Public Space Permit issued by the District of Columbia Department of Transportation (DDOT) which permits the establishment to occupy 670 square feet of public space for its sidewalk cafe. Based on the permitted area of Barcode's sidewalk, the guidelines contained in the International Building Code suggest a total occupancy of less than 45 persons. Here, based on the evidence available within the record regarding the proximity of residences to the establishment and repeated issues of noise emanating from the sidewalk cafe, the Board finds that the capacity of individuals in the sidewalk cafe, both standing and seated, shall be kept to a 45 patron limit while in operation.

b. There is insufficient evidence on the record to find that Barcode will adversely impact the residential parking needs and vehicular and pedestrian safety of the neighborhood.

38. The Board finds that the Applicant will not adversely impact the residential parking needs and vehicular and pedestrian safety. "In determining the appropriateness of an establishment, the Board shall. . . [t]he effect of the establishment upon residential parking needs and vehicular and pedestrian safety" D.C. Official Code § 25-313(b)(3); *see also* D.C. Official Code §§ 25-101(35A), 25-314(a)(4). Among other considerations, the Board is instructed to consider the availability of both private and public parking, any parking arrangements made by the establishment, whether "[t]he flow of traffic . . . will be of such pattern and volume as to . . . increase the [reasonable] likelihood of vehicular [or pedestrian] accidents" 23 DCMR § 400.1(b), (c) (West Supp. 2014).

39. Here, the Board credits the testimony of Mr. Amirshahi who attests to the establishment's proactivity in relocating its valet parking to protect the safety of bike riders and patrons entering and exiting the establishment. *Supra*, at ¶¶ 17-18. Moreover, the Board finds that there are several parking alternatives located in close proximity to the establishment. *Supra*, at ¶ 11. Accordingly, the Board finds that the application is sufficient on this basis.

c. There is insufficient evidence on the record to find that real property values would be blighted by this establishment.

40. The Board finds that Applicant will not adversely impact the real property values of the surrounding neighborhood. In determining whether an establishment is appropriate, the Board must examine whether the establishment is having a negative effect on real property values. D.C. Official Code § 25-313(b)(1). The Board has noted in the past that the presence of blight may have a negative impact on property values. *In re Historic Restaurants, Inc., t/a Washington Firehouse Restaurant, Washington Smokehouse*, Case No. 13-PRO-0031, Board Order No. 2014-107, ¶ 48 (D.C.A.B.C.B. Apr. 2, 2014) *citing In re Rail Station Lounge, LLC, t/a Rail Station Lounge*, Case No. 10-PRO-00153, Board Order No. 2011-216, ¶ 62 (D.C.A.B.C.B. Jun. 15, 2011). In the instant matter, there is not sufficient evidence on the record to suggest that the establishment's operations will have an adverse impact on real property values. *Supra*, at ¶¶ 1-29; *See also* Protestant's Exhibit 41-42; *See also* Applicant's Exhibit 2. Accordingly, the Board finds that Barcode's Application for renewal of its CT license is sufficient on this basis.

II. THE BOARD HAS SATISFIED THE GREAT WEIGHT REQUIREMENT BY ADDRESSING ANC 2B'S ISSUES AND CONCERNS.

41. ANC 2B's written recommendation submitted in accordance with D.C. Official Code § 25-609(a) indicated that its protest was based on concerns regarding Barcode's impact on peace, order, and quiet; residential parking and safety. Letter from Will Stephens, Chair, ANC 2B, to Ruthanne Miller, Chair, Alcoholic Beverage Control Board (Nov. 25, 2013) [*Protest Letter of ANC 2B*]. The Board notes that it specifically addressed these concerns in Paragraphs 30 through 40 of this Order.

III. THE APPLICATION SATISFIES ALL REMAINING REQUIREMENTS IMPOSED BY TITLE 25.

42. 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. 2014). 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

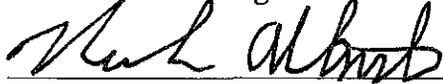
Therefore, the Board, on this 4th day of February 2015, hereby **APPROVES** the Application to Renew a Retailer's Class CT License at premises 1101 17th Street N.W., Washington, DC, filed by Barcode Corporation t/a Barcode. The Board also hereby **DENIES** the Applicant's Motion to Declare Burden on the Petitioner.

It is **FURTHER ORDERED** that the capacity of the outdoor sidewalk café shall not exceed forty-five patrons at any given time during the hours of operation of the sidewalk cafe.

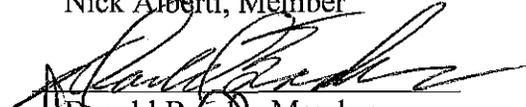
It is **FURTHER ORDERED** that neither Barcode, nor its patrons, shall generate any noise during Barcode's operation that may be heard in a residence.

The ABRA shall deliver a copy of this order to the Applicant, ANC 2B, DCCA, and The Fasano Group.

District of Columbia
Alcoholic Beverage Control Board



Nick Alberti, Member



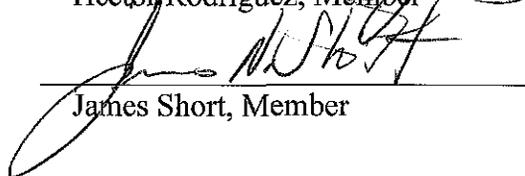
Donald Brooks, Member



Herman Jones, Member

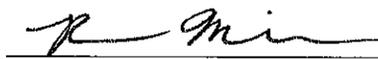


Héctor Rodríguez, Member



James Short, Member

I concur with the majority's decision on the merits of the Application. I also concur with the Majority's conclusion that the Applicant in a renewal case has the ultimate burden of proof to show that the establishment meets the appropriateness standards. However, in my view, the Applicant has raised a legitimate argument regarding the Protestant's burden to articulate with specificity the basis of its protest. While the majority opinion identifies procedural rules setting forth the Applicant's burden of proof, it is silent with respect to the Protestants' responsibilities. While I do not find that the Applicant has made the case that the Protestants as a matter of law have the burden of proof or production in a renewal case, I conclude that the Board does have the discretion to require the Protestants to articulate with specificity the underlying basis of their protest at whatever stage of the proceedings would, for good cause shown and in the interest of justice, prevent hardship and that the Board has the discretion to change the order of production of evidence for those reasons. 23 DCMR §§ 1600.2, 1600.5.



Ruthanne Miller, Chairperson

I concur with the majority but would prefer additional limits on the operating hours for the sidewalk café.



Mike Silverstein, Member

Pursuant to 23 DCMR § 1719.1, 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. Official 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; (202/879-1010). 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).