

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

In the Matter of:)	
)	
Hak, LLC)	Case No.: 13-PRO-00176
t/a Midtown)	License No: 072087
)	Order No: 2016-055
Application to Renew a)	
Retailer's Class CN License)	
)	
at premises)	
1219 Connecticut Avenue, N.W.)	
Washington, D.C. 20036)	

BEFORE: Nick Alberti, Member
Mike Silverstein, Member
Ruthanne Miller, Member
James Short, Member

ALSO PRESENT: Hak, LLC, t/a Midtown, Applicant

Andrew Kline, Counsel, on behalf of the Applicant

Doug Melcher, Counsel, on behalf of the Group of Seventeen Residents and Property Owners (Peck Group), Protestants

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

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

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

INTRODUCTION

In the novel *Gifts*, Ursula K. Le Guin wrote that “the eyes can choose where to look. But the ears can't choose where to listen.” Ursula K. Le Guin, *Gifts* 155 (2004). Nowhere is this truer than Dupont Circle, where residents, from the comfort of their own bedrooms, often have

no choice but to listen to a barrage of late night music emanating from local nightclubs and taverns.

The current protest before the Alcoholic Beverage Control Board (Board) solely addresses the Application to Renew a Retailer's Class CN License filed by Hak, LLC, t/a Midtown, (hereinafter "Applicant" or "Midtown"); therefore, it does not address all of the noise issues raised in this case by the Protestants. Nevertheless, licensed establishments in Dupont Circle and beyond must recognize that they have an obligation to ensure that late night music played on their property does not emanate hundreds of feet away from their premises and into nearby homes. If licensed establishments fail to meet this obligation, then they risk ending up like Midtown, and losing important late night privileges.

In this case, the Board concludes that Midtown contributes to the noise problem experienced by the Dupont Circle community. Specifically, Midtown adds to the problem by failing to have adequate soundproofing on its roof and allowing music played on its roof to be heard in homes located hundreds of feet away from its property. In light of this finding, the Board prohibits Midtown from using the roof after 11:00 p.m., Monday through Thursday, and midnight on Friday, Saturday, Sunday, and other days designated as extended hours holidays.

The Board's reasoning is provided in greater detail below.

Procedural Background

The Notice of Public Hearing advertising Midtown's Application was posted on October 18, 2013, and informed the public that objections to the Application could be filed on or before December 2, 2013. *ABRA Protest File No. 13-PRO-00176*, Notice of Public Hearing [*Notice of Public Hearing*]. The Alcoholic Beverage Regulation Administration (ABRA) received protest letters from Advisory Neighborhood Commission (ANC) 2B and a Group of Seventeen Residents and Property Owners (Peck Group), which was initially represented by Sarah Peck and Carl Nelson (collectively, the "Protestants"). *ABRA Protest File No. 13-PRO-00176*, Roll Call Hearing Results.

The parties came before the Board's Agent for a Roll Call Hearing on December 16, 2013, where all of the above-mentioned objectors were granted standing to protest the Application. On February 19, 2014, the parties came before the Board for a Protest Status Hearing. Finally, after a number of continuances, the Protest Hearing in this matter occurred on October 21, 2015.

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. Official Code §§ 1-309.10(d); 25-609 (West Supp. 2015). 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 2B. The ANC's issues and concerns shall be addressed by the Board in its Conclusions of Law, below.

The Board received Proposed Findings of Fact and Conclusions of Law from the Protestants on December 30, 2015, and from the Applicant on January 3, 2015.

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. Official Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2016).

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. Midtown has submitted an Application to Renew a Retailer's Class CN License at 1219 Connecticut Avenue, N.W., Washington, D.C. *Notice of Public Hearing*.

II. Facts Provided by ABRA Investigator John Suero

2. ABRA Investigator John Suero investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 13-PRO-00176, Protest Report* (Apr. 2014) [*Protest Report*]. The establishment is located in a C-3-C zone. *Protest Report*, at 2. At least 38 licensed establishments are located within 1,200 feet of the proposed location. *Id.*; *Transcript (Tr.)*, October 21, 2015 at 66-67. There are no schools, recreation centers, public libraries, or day care centers located within 400 feet of the establishment. *Protest Report*, at 5. According to the Protest Report, Midtown's hours of operation and hours of alcohol sales both inside the establishment and in the summer garden last from 5:00 p.m. to 2:00 a.m., Monday through Thursday, and 5:00 p.m. to 3:00 a.m. on Friday and Saturday. *Id.* at 6.

3. The Protest Report indicates that the establishment previously violated its Settlement Agreement in 2009, paid a \$1,250 fine for a violation in 2010, engaged in an illegal substantial change in 2010, and violated the sale to minor law in 2011. *Id.* at 8-9 (See Nos. 17, 23, 25, 27). The report further indicates that the Metropolitan Police Department (MPD) received 50 calls for service at Midtown's address between March 27, 2013, and March 21, 2014. *Id.* at 8.

4. Investigator Suero observed that the Midtown operates in a multilevel building. *Tr.*, 10/21/15 at 29. Midtown does not use the first floor, but has a bar and dance floor on each floor. *Id.* The establishment also uses a rooftop deck. *Id.* During a prior visit to the establishment, he observed a large cabinet sized speaker on the roof. *Id.* at 34. He also observed that the establishment had replaced the speaker with smaller speakers and installed new walls with Plexiglas on them. *Id.* at 34, 43. In his opinion, these measures appeared to reduce the sound emanating from the establishment, but did not eliminate the emanation of noise. *Id.* at 40-41, 44. The establishment does not have a retractable roof that totally encapsulates the space. *Id.* at 44-45.

5. According to Investigator Suero, Midtown's location at Connecticut Avenue, N.W., and Eighteenth Street, N.W., attracts a lot of traffic and is very loud. *Id.* at 36, 46, 59-60. Many establishments, such as Midtown, Rosebar and Dirty Martini, and Ozio, contribute to the noise in the neighborhood. *Id.* at 36-37, 45-46. He also has personally heard noise from Midtown emanating into the nearby alley on at least three occasions before Midtown made changes to the rooftop. *Id.* at 50-52, 56. He further observed that Rosebar is often louder than Midtown. *Id.* at 39.

III. Facts Provided by John Fiorito

6. John Fiorito serves as a part owner of Ohm Productions, which is an audio and production company based in the Washington metropolitan region. *Id.* at 83. Ohm Productions provides audio technical services to members of the hospitality industry. *Id.* at 84-85. Mr. Fiorito's experience in the audio technical field comes from on-the-job training and online courses on sound engineering. *Id.* at 85-86. He is not a licensed engineer and does not have a degree in sound engineering from an accredited program. *Id.* at 130-31.

7. Midtown retained Mr. Fiorito to address potential sound issues in May 2015. *Id.* at 91, 97. Each floor of Midtown has its own individual sound system, including the roof. *Id.* at 92. Based on his recommendations, Midtown replaced the establishment's 30,000 watt speaker system on the rooftop with a 1,000 watt system. *Id.* at 91-92. The rooftop sound system has been set to prevent emissions above 70 decibels from the center of the roof. *Id.* at 93, 151. He noted that at this level, he could barely hear the music from the roof in the nearby alley when he tested it. *Id.* at 94. He also noted that another contractor built speaker boxes to reduce noise reverberations, installed reinforced Plexiglas and plywood, and sealed the rear door. *Id.* at 100-01. He noted that the Midtown did not enclose the roof as part of the project. *Id.* at 125.

8. Mr. Fiorito is unaware of the amount of soundproofing provided by Plexiglas. *Id.* at 128. He further noted that Owens acoustical fiberglass insulation layered with plywood would provide superior soundproofing. *Id.* at 143-44.

IV. Joseph Aguilar

9. Joseph Aguilar works as in-house technician for various nightclubs, including Midtown. *Id.* at 169. On May 25, 2015, which was Memorial Day, Mr. Aguilar conducted various noise readings using a decibel meter inside and outside the establishment around midnight. *Id.* at 175-77, 189.

10. On Memorial Day, Mr. Aguilar was standing at the center of Midtown's roof conducting a noise reading that was videotaped. *Id.* at 191, 197. "The video, which was filmed on the Midtown's roof deck *after* the mitigation was completed, shows a sound meter measuring sound levels of 92-94 decibels." *Protestant's Proposed Findings of Fact and Conclusions of Law*, ¶ 20; *id.* at 191-93.

V. Kendall C. Valentine, Jr.

11. Kendall C. Valentine, Jr., lives in a unit located on the sixth and seventh floor of the Jefferson Row Condominiums located on Jefferson Place, N.W., between 18th Street, N.W., and 19th Street, N.W. *Id.* at 211, 229. Midtown is located across the street from his unit. *Id.* at 222-23. Since 2007, music from nightclubs in the neighborhood are audible in his residence. *Id.* at 212. He noted that the noise becomes especially apparent between Thursday and Sunday between 10:00 p.m. and 3:00 a.m. and disturbs his ability to sleep. *Id.*

12. On one occasion in 2013, he “began to notice low-frequency booming noises . . . between 10 p.m. to 3 a.m.” *Id.* at 215. The noise “came through [his] outside walls and soundproof windows that [he and his spouse] installed at [their] expense and awakened [him].” *Id.* Upon hearing this noise, he went outside to determine the source of the noise. *Id.* Upon approaching Midtown, he noticed flashing lights coming from the roof and believed that the noise came from the establishment. *Id.*

13. On the afternoon of May 25, 2015, which was Memorial Day, Mr. Valentine was standing on the terrace of his apartment. *Id.* at 219-20, 225. At that time, he also observed flashing lights on Midtown’s roof, and heard very loud music likely coming from Midtown from his terrace. *Id.* at 216-17, 237-38.

14. Mr. Valentine indicated that he has noticed that the changes Midtown made to the roof reduced the amount of noise entering his residence; nevertheless, in his view, it has not reduced the amount of noise to a reasonable level. *Id.* at 230-32.

VI. Jim King

15. Jim King lives in a condominium located in the Palladium, which is located at 1325 18th Street, N.W. *Id.* at 245. He has lived in the building for eleven years. *Id.* He further noted that the noise in the neighborhood has gotten worse in the past three to four years since establishments began using their rooftops. *Id.* at 248. He further noted that noise coming from licensed establishments occurs often between 10:30 p.m. and 3:00 a.m. in the morning. *Id.* at 249. He has observed that Midtown and Dirty Martini are the primary source of the noise disturbing residents. *Id.* at 252. He noted that noise is so loud that it disturbs his ability to sleep—even with earplugs. *Id.* at 249.

16. Mr. King indicated that he previously visited Midtown’s roof deck while in operation in 2014. *Id.* at 251. He observed that the music outside was “booming.” *Id.*

VII. Settlement Agreement

17. The Board approved a Settlement Agreement between Hak, LLC, t/a Play, which later became Midtown, and ANC 2B on July 6, 2005. *In re Hak, LLC, t/a Play*, Case No. 60936-05/031P, Board Order No. 2005-169, 2 (D.C.A.B.C.B. Jul. 6, 2005).

18. The Settlement Agreement bars Midtown from promoting or participating in “pub crawls.” *Id.* at § 3(a) (quotation marks removed). At the time the agreement was approved, a pub crawl was defined “as an organized group of establishments within walking distance which offer discounted alcoholic drinks during a specified time period.” 23 DCMR § 712.1 (West Supp. 2016) (Adopted at 51 DCR 4309 Apr. 30, 2004); *Akassy v. William Penn Apartments Ltd. P'ship*, 891 A.2d 291, 300 (D.C. 2006) (relying on the principle that when parties to a contract use terms defined in the law, the legal definition in effect at the time the agreement was made may be incorporated into the contract).

VIII. Amended Settlement Agreement

19. The Board approved an Amended Settlement Agreement between Midtown and ANC 2B on November 7, 2012. *In re Hak, LLC, t/a Midtown*, Case No. 12-PRO-00076, Board Order No. 2012, 442, 2 (D.C.A.B.C.B. Nov. 7, 2012).

20. The Settlement Agreement requires Midtown to keep “[t]he doors and windows of the premises . . . closed at all times during business hours when music is being played or a sound amplification device is being employed in the premises, except when persons are in the act of using the door for ingress to or egress from the premises. *Id.* at *Cooperative Agreement Concerning Issuance of License for Sale of Alcoholic Beverages*, § 1. Midtown is further prohibited from providing live music. *Id.*

21. The Amended Settlement Agreement requires Midtown to “conduct sound checks to determine whether noise from the Roofdeck can be heard in, or in areas adjacent to residences located within the neighborhood.” *Id.* at *Amendment and Supplement to Cooperative Agreement*, § 2. Midtown then pledged to set maximum sound levels on the roof’s music system and to undertake “noise abatement measures that shall be adequate to prevent noise from any of the sources identified in DC Code Section 25-725(a) from being heard in any residential premises.” *Id.*

22. Among other noise sources, § 25-725(a)(1) identifies the following as sources of noise: “Mechanical device, machine, apparatus, or instrument for amplification of the human voice or any sound or noise.” D.C. Official Code § 25-725(a)(1). Stereo speakers fall under the definition provided by § 25-725(a)(1) as a type of mechanical device used to amplify human voices, music, and other sounds.

IX. ANC Commissioner Abigail Nichols

23. Advisory Neighborhood Commission (ANC) Commissioner Abigail Nichols lives at 1325 18th Street, N.W., in the Palladium. *Id.* at 252. She has lived at the Palladium since 1987. *Id.* at 253. The Palladium is a mixed-use building that includes a commercial garage, two floors of offices, and eight floors of apartments. *Id.* The Palladium is zoned SP-1. *Id.* The Palladium is located about 600 feet away from Midtown, to the north of the establishment. *Id.* at 254.

24. Commissioner Nichols indicated that she regularly hears music from licensed establishments in her home. *Id.* at 258-59. In response, she spent \$4,000 soundproofing her

home's windows. *Id.* at 261. Nevertheless, even with new windows, the base from the music still enters her home. *Id.* She could not confirm that Midtown is the source of the noise entering her home. *Id.* at 298-99.

25. On February 1, 2014, Commissioner Nichols walked through the neighborhood after midnight and entered the alley near Midtown. *Id.* Inside the alley, she clearly heard music emanating outside from both Midtown and Rosebar. *Id.*

26. Commissioner Nichols also believes Midtown has operated in violation of its Settlement Agreement on occasion. *Id.* at 268. First, she noted that she previously saw advertising in 2014 that indicated Midtown was participating in a pub crawl, and she saw a recent pub crawl advertisement that included Midtown's address as the pub crawl headquarters. *Id.*

X. Carl Nelson

27. Carl Nelson lives at 1325 18th Street, N.W., in the Palladium. *Id.* at 307. He has lived at the Palladium since 1987. *Id.* at 308, 315. He regularly hears loud music from the nearby establishments in his apartment on Friday, Saturday, and Sunday nights. *Id.* The soundproof windows installed in the apartment do not prevent low frequency noises from entering the apartment. *Id.*

28. Mr. Nelson indicated that he heard music inside his apartment on May 25, 2015, which was Memorial Day. *Id.* at 316. On that day, around 5:30 p.m., he heard noise inside his residence and went outside to find the source. *Id.* Outside, he observed that Midtown was the only licensed establishment on the block open for business. *Id.* at 317. Therefore, he clearly heard music from Midtown emanating across Connecticut Avenue, N.W., and into the alley outside Midtown. *Id.*

29. Mr. Nelson indicated that it is often difficult to identify the specific licensed establishments that are causing the noise problems in the neighborhood due to the noise generated by multiple establishments. *Id.* at 317, 333. On some occasions, Mr. Nelson identified Dirty Martini and Rosebar as the source of the music in heard in his residence. *Id.* at 317.

XI. Sarah Peck

30. On the date of the hearing, Sarah Peck was unavailable to testify due to a commitment to her employer, the United States Department of State. *Stipulation of Protestants and Hak, LLC, t/a Midtown*, at ¶ 3. The parties agreed to allow the presentation of her testimony through the submission of interrogatories. *Id.* at ¶ 4.

31. Sarah Peck lives at the Palladium Condominium, located at 1325 18th Street, N.W. *Declaration of Sarah Peck*, at ¶ 1 [*Declaration*]. She has lived in the Palladium since February 2011. *Id.* Midtown is located at least 600 feet away from her apartment. *Id.* at ¶ 3.

32. Ms. Peck has observed that “[w]hen [Midtown’s] roof deck is in use, loud music emanates in all directions.” *Id.* at ¶ 2. She has further heard “music in [her] bedroom—even when [her] window is shut and [her] air conditioner is operating” and indicated that the noise “disturbs [her] sleep.” *Id.* She confirmed that she has heard music emanate from Midtown in the “evening of Memorial Day 2015.” *Id.*

CONCLUSIONS OF LAW

33. The Board may approve an Application to Renew a Retailer's Class CN 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. 2016). 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. Official Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2016).

34. 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 UNREASONABLE NOISE GENERATED BY THE ROOF RENDERS MIDTOWN’S ESTABLISHMENT PARTIALLY INAPPROPRIATE.

35. The Board deems the Application partially inappropriate due to (1) Midtown’s failure to adequately soundproof the roof; (2) Midtown’s inability to control the disturbing noise emanating from the roof during late night hours; and (3) Midtown’s contribution to the noise problems affecting the neighborhood.

36. 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 is further required to rely on the probative and substantial evidence contained in the record. 23 DCMR § 1718.3 (West Supp. 2016).

37. 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).

38. "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." 23 DCMR § 400.1(a) (West Supp. 2016).

a. Midtown has failed to demonstrate the effectiveness or sufficiency of the soundproofing on the roof.

39. The Protestants have persuaded the Board that Midtown's attempt to soundproof the roof is ineffective and insufficient.

40. In considering appropriateness, the Board "may consider an applicant's efforts to address or alleviate operational concerns." *In re Inner Circle 1223, LLC t/a Dirty Maritni Inn Bar/Dirty Bar*, Case No. 13-PRO-00172, Board Order No. 2014-507, ¶ 34 (D.C.A.B.C.B. Dec. 10, 2014). Specifically, "the Board may consider the establishment's soundproofing features and noise mitigation practices related to both amplified music and the human voice." *Id.*

41. Midtown attempted to provide adequate soundproofing for the unenclosed roof in May 2015 by replacing the speakers, installing speaker boxes, installing Plexiglas and plywood, sealing the rear door, and attempting to set the sound system to generate no more than 70 decibels from the center of the roof. *Supra*, at ¶ 7. Despite these efforts, on Memorial Day 2015, the soundproofing installed by Midtown did not prevent Mr. Nelson from hearing amplified music from Midtown's roof inside his home at the Palladium—a building located approximately 600 feet away from the establishment. *Supra*, at ¶¶ 23, 28; *see also supra*, at ¶¶ 13, 32. This result is not surprising when the establishment's own videos shows that Midtown cannot guarantee that the sound level on the roof will not exceed 70 decibels. *Supra*, at ¶ 10. Furthermore, in weighing the effectiveness of the soundproofing, the Board must also consider the sound technician's statement that superior soundproofing materials existed, but were not used on the roof. *Supra*, at ¶ 8. Based on these facts, the record shows that Midtown either did not install an appropriate amount of soundproofing or lacks sufficient operational controls to manage noise generated on the roof.

42. The Board further considered the argument that the noise heard by Mr. Nelson was an isolated incident. *Licensee's Proposed Findings of Fact and Conclusions of Law*, at 1. It should

be noted that Sarah Peck also submitted sworn testimony that she could trace loud noise directly to Midtown. *Supra*, at ¶ 31. In addition, it appears that some witnesses may not have been able to identify Midtown as the source of the noise on other days solely due to the large amounts of noise generated by other establishments in the neighborhood, which hides Midtown's contribution to the noise problem. *Supra*, at ¶ 29. Consequently, Midtown failed to demonstrate that the soundproofing installed on the roof is an effective or sufficient means of mitigating noise.

b. Midtown's roof is generating an unreasonable amount of noise.

43. The Board further finds that Midtown's operation of the roof as a dance and entertainment space creates an unreasonable and inappropriate amount of noise.

In interpreting [appropriateness test], the Board has explained that it may "... consider whether an establishment is generating little or no sound." *In re Solomon Enterprises, LLC, t/a Climax Restaurant & Lounge*, Case No. 13-PRO-00152, Board Order No. 2014-474, ¶ 32 (D.C.A.B.C.B. Nov. 15, 2014) citing *In re 19th and K, Inc., t/a Ozio Martini & Cigar Lounge*, Case No. 13-PRO-00151, Board Order No. 2014-366, ¶ 37 (D.C.A.B.C.B. Oct. 1, 2014); see also *Panutat, LLC, v. District of Columbia Alcoholic Beverage Control Bd.*, 75 A.3d 269, 276-77 n. 12 (D.C. 2013). The Board further explained that the appropriateness test seeks to "... determine the appropriate amount of sound in light of the reasonable expectations of residents." *Id.*; 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, 38 (Nov. 12, 1986).

... Previously, the Board has looked to the court's decision in *T.L.* as a means of determining the reasonable expectations of residents. *Climax Restaurant & Lounge*, Board Order No. 2014-366 at ¶ 33; see also *Ozio Martini & Cigar Lounge*, Board Order No. 2014-366 at ¶ 6. There, the court found that the government has a substantial interest in preventing noise from disturbing people in their homes. *In re T.L.*, 996 A.2d 805, 812 (D.C. 2010). Therefore, the government has the authority to prevent noise so unreasonably loud that it "... unreasonably intrude[s] on the privacy of a captive audience or so loud and continued as to offend[] a reasonable person of common sensibilities and disrupt[] the reasonable conduct of basic nighttime activities such as sleep." *Id.* at 813 (quotation marks removed).

In re Inner Circle 1223, LLC t/a Dirty Martini Inn Bar/Dirty Bar, Case No. 13-PRO-00172, Board Order No. 2014-507, ¶¶ 29-30 (D.C.A.B.C.B. Dec. 10, 2014) (footnote removed)

44. In applying this standard, the Board has previously held that an establishment acts inappropriately when it generates amplified music that may be heard in residences located in another building. "For example, in *Ozio*, the Board determined that it was unreasonable for the licensee to have its amplified music emanate into a residence approximately 100 feet away from the establishment." *Id.* at ¶ 31 citing *Ozio Martini & Cigar Lounge*, Board Order No. 2014-366 at ¶ 59. "Likewise, in *Climax*, the Board found that it was inappropriate for the licensee to have its amplified music emanate into an apartment located 700 feet away from the establishment." *Id.* at *Climax Restaurant & Lounge*, Board Order No. 2014-366 at ¶ 35.

45. As noted previously, the Palladium is located approximately 600 feet away from Midtown. *Supra*, at ¶ 23. Yet, on Memorial Day 2015, Mr. Nelson heard music emanating from Midtown’s roof inside his home at the Palladium. *Supra*, at ¶ 28. The record also shows that Mr. Valentine, who resides in the Jefferson Row Condominiums, heard amplified music from Midtown, which likely emanated from the roof, penetrated his walls, and pierced his soundproof windows in 2013. *Supra*, at ¶¶ 11-12. Similar to our finding above, the Board is not persuaded that the noise experienced by Mr. Nelson and Mr. King are isolated incidents, and that Midtown lacks sufficient soundproofing and operational controls to prevent late night noise. *Supra*, at ¶ 29. It should also be noted that Midtown’s Settlement Agreement bars it from allowing its amplified music from being heard in nearby residences; therefore, the noise identified by Mr. Nelson and Mr. Valentine also constitute a violation of the Settlement Agreement. *Supra*, at ¶ 21; D.C. Official Code § 25-315(b)(1). Based on these circumstances, the Board finds that the late night noise generated by Midtown’s roof is unreasonable and inappropriate.

c. The unreasonable amount of noise experienced by residents indicates that late night outdoor operations are inappropriate and contribute to the noise problem.

46. Midtown’s rooftop operations, along with other license establishments, inappropriately contribute to the noise problem in the neighborhood.

47. As part of the Board’s appropriateness analysis, the Board may consider whether the Application will alter the “character of the neighborhood” or “exacerbate existing issues.” *Foggy Bottom Ass’n v. D.C. Alcoholic Beverage Control Bd.*, 445 A.2d 643, 646 (D.C. 1982) (“character of the neighborhood”); *Panutat, LLC v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 269, 275 (D.C. 2013) (“exacerbate existing issues”).

48. The Board credits the testimony of multiple witnesses that licensed establishments in and around Midtown are generating a large amount of late night noise that disturbs residents in their homes while they attempt to sleep. *Supra*, at ¶¶ 5, 11, 15, 24, 27. Based on this state of affairs, the Protestants have demonstrated that allowing Midtown to operate and play music on the unenclosed roof without restrictions will exacerbate the current noise problem. *Supra*, at ¶¶ 41, 45. Therefore, the Board finds that Midtown’s rooftop operations are inappropriate and merit restrictions.¹

II. EXCEPT FOR THE NOISE CREATED BY OPERATIONS ON THE ROOF, THE APPLICANT HAS DEMONSTRATED APPROPRIATENES AND MERITS RENEWAL.

49. While the Board finds that the noise created by Midtown’s roof is inappropriate for the neighborhood, the Board does not find that Midtown’s license merits revocation. In determining

¹ Unlike in the *Dirty Martini*, the Board does not address the likelihood of the Applicant complying with D.C. Official § 25-725, D.C. Official Code § 22-1321 the noise regulations found in Title 20 of the D.C. Municipal Regulations in this case, because such an analysis would simply bolster the Board’s decision to impose conditions to resolve the noise issue. *In re Inner Circle 1223, LLC t/a Dirty Martini Inn Bar/Dirty Bar*, Board Order No. 2014-507, at ¶¶ 37, 41, 45.

appropriateness, the Board considers “rowdiness, loitering, litter, and criminal activity.” 23 DCMR § 400.1(a) (West Supp. 2016). Here, while Midtown’s record shows a few violations, this history does not merit revocation of the license. *Supra*, at ¶ 3. Moreover, the Protestants have not provided sufficient information to determine whether the police service calls are excessive or otherwise merit concern. *Id.* The Board notes that there is no indication that Midtown’s patrons are overly rowdy or otherwise engage in antisocial behavior when entering or exiting the establishment. There is also no indication that Midtown is generating excessive trash or litter. In addition, allegations that Midtown has illegally participated in pub crawls or allowed overcrowding are better addressed through the enforcement process. *Tr.*, 10/21/16 at 269-70; 291. Therefore, the Board finds that Midtown merits renewal so long as the noise issue created by the roof deck is addressed.

III. THE BOARD REDUCES THE HOURS OF THE ROOF TO RESOLVE THE NOISE ISSUE IDENTIFIED BY THE PROTESTANTS.

50. In light of the Board’s findings regarding appropriateness, the Board finds it necessary to impose conditions on the Applicant’s license in order to justify the renewal of the 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”).

51. 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. Official Code § 25-104(e). The Board is also authorized to reduce the hours of sale and delivery of alcohol at an establishment under § 25-724. D.C. Official Code § 25-724.

52. In prior cases, the Board has restricted outdoor seating hours when faced with potential late night noise problems. For example, in *Romeo & Juliet*, the Board disapproved of full operational hours for an outdoor seating area, because the proposed tree enclosure was not sufficient to prevent the leakage of sound and the prior business generated noise that could be heard by nearby residents on their property. *In re 301 Romeo, LLC, t/a Romeo & Juliet*, Case No. 13-PRO-00136, Board Order No. 2014-045, ¶ 46 (D.C.A.B.C.B. Jan. 29, 2014). The Board then conditioned licensure on the sidewalk café not operating past 11:00 p.m., Sunday through Thursday, and midnight on Friday and Saturday. *Id.* at 11; *see also In re 1001 H Street, LLC, t/a Ben’s Chili Bowl/Ben’s Upstairs*, Case No. 13-PRO-00133, Board Order No. 2014-071 (D.C.A.B.C.B. Mar. 12, 2014) (imposing similar conditions on a restaurant applicant’s sidewalk café and rooftop).

53. The Board conditions renewal on Midtown ceasing usage of the roof at 11:00 p.m., Monday through Thursday, and midnight on Friday, Saturday, Sunday and days designated as extended hours holidays in accordance with D.C. Official Code § 25-723(c). The Board finds that these conditions are in the best interest of the neighborhood for the following reasons: first, the Board finds a reduction in hours necessary, because noise coming from Midtown’s roof will likely disturb residents in their homes in the future, if unabated. *Supra*, at ¶¶ 41, 45. Second, a reduction in hours is the best means of restoring “quiet” to the neighborhood, because an

unenclosed roof with insufficient soundproofing creates too great a risk of generating disturbing late night noise. *Supra*, at ¶ 4. Third, a reduction in hours is an appropriate remedy in a neighborhood suffering from late night noise problems caused by multiple establishments. *Supra*, at ¶ 48. And fourth, the Board's action is consistent with prior decisions of the Board in similar cases. *Supra*, at ¶ 52.

IV. THE BOARD AFFIRMS THE STANDING OF ANC 2B.

54. During the hearing, the Applicant challenged the standing of ANC 2B during the examination of Commissioner Nichols. *Tr.*, 10/21/15 at 278. In a resolution that has been on file with the agency since the beginning of the protest, ANC 2B protested the Application on the basis of peace, order, and quiet through a resolution passed with three "aye" votes and three abstentions. *Letter from ANC 2B to Ruthanne Miller, Chairperson, Alcoholic Beverage Control Board*, 1 (Nov. 25, 2013) [*ANC 2B Protest Letter*].

55. In making the motion, the Applicant did not provide evidence, such as the ANC's bylaws, that the resolution failed due to the abstentions. The Board's regulations, in § 1601.8 indicates that a dispute regarding standing should be raised at the administrative review. 23 DCMR § 1601.8(3)(c) (West Supp. 2016). Moreover, under the District's administrative procedures, the movant has the burden of proof of proof. D.C. Official Code § 2-509(b). The Board is persuaded that the Applicant had an adequate opportunity to raise this issue before the Protest Hearing and failed to provide sufficient evidence that ANC 2B's vote indicates the resolution failed. Therefore, the Board denies the motion and affirms the standing ruling of the Board's Agent at the initial Roll Call Hearing.

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

56. 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 Midtown's impact on peace, order, and quiet. *ANC 2B Protest Letter*, 1. The Board notes that it specifically addressed these concerns in the Board's Conclusions of Law, above.

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

57. 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. 2016). 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

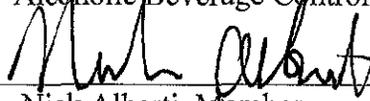
Therefore, the Board, on this 17th day of February 2016, hereby **APPROVES** the Application to Renew a Retailer's Class CN License at premises 1219 Connecticut Avenue, N.W. filed by Hak, LLC, t/a Midtown under the **CONDITION** that it operates in accordance with the following:

1. The license holder's operational hours on the roof, including the ability to allow patrons on the roof, shall end at 11:00 p.m., Monday through Thursday, and midnight on Friday, Saturday, Sunday and days designated as extended hours holidays in accordance with D.C. Official Code § 25-723(c); and
2. The license holder's hours of entertainment on the roof shall end at 11:00 p.m., Monday through Thursday, and midnight on Friday, Saturday, Sunday and days designated as extended hours holidays in accordance with D.C. Official Code § 25-723(c).

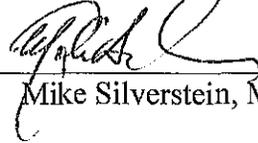
IT IS FURTHER ORDERED that the Board's findings of fact and conclusions of law contained in this Order shall be deemed severable. If any part of this determination is deemed invalid, the Board intends that its ruling remain in effect so long as sufficient facts and authority support the decision.

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

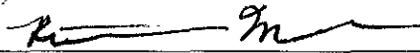
District of Columbia
Alcoholic Beverage Control Board



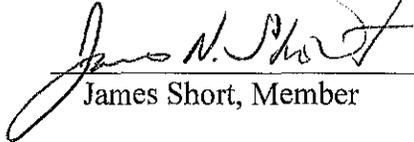
Nick Alberti, Member



Mike Silverstein, Member



Ruthanne Miller, Member



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. 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).