

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

|                               |   |                        |
|-------------------------------|---|------------------------|
| In the Matter of:             | ) |                        |
|                               | ) |                        |
| Hank's on the Hill, LLC       | ) | Case No.: 16-PRO-00045 |
| t/a Hank's Oyster Bar         | ) | License No.: 089718    |
|                               | ) | Order No.: 2016-471    |
| Application to Renew a        | ) |                        |
| Retailer's Class CR License   | ) |                        |
| at premises                   | ) |                        |
| 633 Pennsylvania Avenue, S.E. | ) |                        |
| Washington, D.C. 20003        | ) |                        |

**BEFORE:** Donovan Anderson, Chairperson  
Nick Alberti, Member  
Mike Silverstein, Member  
Ruthanne Miller, Member  
James Short, Member

**ALSO PRESENT:** Hank's on the Hill, LLC, t/a Hank's Oyster Bar, Applicant  
  
Andrew Kline, Counsel, Veritas Law Firm, on behalf of the Applicant  
  
Ronald J. Tomasso, Abutting Property Owner, Protestant  
  
Kirsten Oldenburg, on behalf of Advisory Neighborhood Commission (ANC) 6B, Protestant  
  
Martha Jenkins, General Counsel  
Alcoholic Beverage Regulation Administration

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**ORDER GRANTING APPLICANT'S MOTION TO DISMISS**

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Hank's on the Hill, LLC, t/a Hank's Oyster Bar, (hereinafter "Applicant" or "HOB") filed a motion to dismiss the protest of Abutting Property Owner Ronald J. Tomasso. Mr. Tomasso protests HOB's renewal application based on claims that HOB is illegally causing flooding and illegally causing disturbing noises, odors, and vibrations through the machinery on its roof.

The Alcoholic Board finds that dismissal is warranted because the issues raised by Mr. Tomasso do not sufficiently relate to the sale, service, and consumption of alcohol or other

activity authorized by Title 25; do not fall within the expertise of the Board; and are more appropriate for another forum. Therefore, even if true, the allegations raised by Mr. Tomasso do not merit a finding of inappropriateness as a matter of law and merit the dismissal of the protest.

### ISSUES RAISED BY THE PARTIES

In its motion, HOB argues that the Board should dismiss Mr. Tomasso's protest for failing to make a proper objection under the appropriateness standards outlined in D.C. Official Code §§ 25-313 and 25-315. *Mot. to Dismiss the Protest of Ronald J. Tomasso*, at 1. HOB specifically argues that Mr. Tomasso has failed to state a proper claim, because alleged rain water flooding and issues related to machines on the roof do not constitute issues of appropriateness. *Id.* at 2. HOB further notes that allegations of illegal activity are unsupported, that no finding of illegality has been made by the District of Columbia Department of Consumer and Regulatory Affairs, and that it seeks to address the rain water issue. *Licensee's Reply to Ronald J. Tomasso's Opposition to Mot. to Dismiss*, at 1-2.

In response, Mr. Tomasso argues that his protest relates to appropriateness and that HOB is engaged in violations of the law. *Response from Ronald J. Tomasso*, at 1 (Jul. 20, 2016).

### FINDINGS OF FACT

1. In resolving a motion to dismiss for failing to state a proper claim, the Board is obliged to ". . . accept[s] the allegations of the complaint as true, and construe[s] all facts and inferences in favor of the [protestant]." *In re Estate of Curseen*, 890 A.2d 191, 193 (D.C. 2006). Thus, the Board "must construe the [protest letter] in the light most favorable to the [protestant]." *Haymon v. Wilkerson*, 535 A.2d 880, 882 (D.C.1987). Therefore, for the purposes of this Order, the Board presumes that the allegations made by Mr. Tomasso are true and correct.

2. The protest letter filed by Mr. Tomasso indicates that his objections are based on the impact of the establishment on "real property values" and "peace, order, and quiet." *Protest Letter*, Ronald J. Tomasso, at 1 (May 31, 2016). Nevertheless, the letter indicates that the protest is limited to two issues. *Id.* ("There are two issues for which Hank's must take responsibility"). The first claim is that HOB is violating an uncited District law by disconnecting its rain leaders, which causes rain water to accumulate on residential property. *Id.* Second, Mr. Tomasso indicates that the Applicant has an "illegal addition" on the property and that the roof is overloaded with mechanical equipment that produces disturbing noise, food odor, and vibrations. *Id.* at 2. For the purposes of this Order, the Board presumes that the mechanical equipment constitutes heating, ventilation, and air conditioning (HVAC) equipment. Mr. Tomasso has not indicated the specific laws that are being violated by HOB in his protest letter.

### CONCLUSIONS OF LAW

3. Under D.C. Official Code § 25-313(a), "To qualify for . . . renewal of a license . . . an applicant shall demonstrate to the satisfaction of the Board that the establishment is appropriate for the . . . section . . . of the District where it is to be located." D.C. Official Code § 25-313(a). Under § 1605.2, "All protests shall be in writing . . . and shall state . . . why the matter being objected to

is inappropriate under one . . . or more of the appropriateness standards . . . .” 23 DCMR § 1605.2 (West Supp. 2016).

4. In this case, Mr. Tomasso indicates that the two issues raised in his protest letter relate to peace, order, and quiet and real property values. *Supra*, at ¶ 2. Under the regulations, the peace, order, and quiet standard is further explained as follows: “The establishment will not interfere with the peace, order, and quiet of the relevant area, considering such elements as noise, rowdiness, loitering, litter, and criminal activity,” while the real property factor is merely parroted in the regulations. 23 DCMR § 400.1(a), (d) (West Supp. 2016).

5. Because we accept Mr. Tomasso’s allegations as true for the purposes of this decision, the Board must answer the following questions: (1) whether the alleged rain water that HOB causes to accumulate on his property allows for a determination of inappropriateness and (2) whether the noise, odor, and vibrations allegedly caused by the mechanical equipment allows for a determination of inappropriateness.

6. The Board answers these questions in the negative because disturbances caused by flooding or mechanical HVAC equipment should not be deemed inappropriate under the law.<sup>1</sup>

7. It has been said that administrative agencies are entitled to make reasonable interpretations of the statutes they administer. *Clark Const. Grp., Inc. v. D.C. Dep’t of Employment Servs.*, 123 A.3d 199 (D.C. 2015). The legislative history of Title 25 of the D.C. Official Code indicates that “The Council of the District of Columbia created the Alcoholic Beverage Control Board with the purpose of “. . . giv[ing] the Board a paramount role in [alcoholic beverage control] matters . . . .” *In re 19th and K, Inc., t/a Ozio Martini & Cigar Lounge*, Case No. 13-PRO-00151, Board Order No. 2014-366, ¶45 (D.C.A.B.C.B. Aug. 15, 2014) *citing Report on Bill 13-449, the “Title 25, D.C. Code Enactment and Related Amendments Act of 2000*, Council of the District of Columbia, 2 (Nov. 20, 2000) [*Report on Bill 13-449*]. The Council further recognized that the sale, service, and consumption of alcohol may create a conflict between the interests of residents and businesses. *Id.* at ¶ 46. In order to resolve potential conflicts between residents and businesses, the Council gave the Board the power to determining whether the establishment is “appropriate” for the neighborhood. *Id.* It should be further noted that the appropriateness test created by Title 25 does not create a bright-line rule; instead, it allows the Board to weigh the totality of the circumstances and facts in each case. This means that the Board is imbued with the discretion to determine whether a specific disturbance, even if established, merits a finding of inappropriateness.

8. In considering whether a matter may result in a determination of inappropriateness, the Board recognizes that the Council created the Board for the purpose of being “paramount” in alcoholic beverage control matters and to combat alcohol-related “public nuisances.” *Report on Bill 13-449*, at 1-2 (“Alcohol can add to the experience of our lives . . . It’s part of our culture. It can also lead to addiction, violence, drunk driving, and the creation of public nuisances.”).

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<sup>1</sup> This analysis does not include mechanical equipment that is meant to amplify sounds, such as microphones and speakers. *See* D.C. Official Code § 25-725(a).

9. Based on this purpose, disturbances that do not relate to alcoholic beverage control or activities authorized by Title 25 should not rise to the level of inappropriateness, even if they cause a disturbance or harm. The justification for this interpretation is threefold. First, the Council did not create the Board with the intent that it morph into the Board of Everything Under the Sun. Disturbances that have little relation to the sale, service, and consumption of alcohol and other activities authorized by Title 25 simply invite the Board to waste its limited resources to meddle in areas that have a tangential relationship to the Board's primary mission of regulating the District's alcohol marketplace. Second, the Board is not well-suited to address issues that fall outside the primary scope of Title 25, because these types of matters fall outside the expertise of the Board and ABRA's staff. Without the requisite expertise, this makes it unlikely that the Board can competently craft an acceptable, appropriate, or fair remedy or otherwise receive deference from the District of Columbia Court of Appeals. *Dorchester House Associates Ltd. P'ship v. D.C. Rental Hous. Comm'n*, 913 A.2d 1260, 1263 (D.C. 2006) (saying that a lack of "special expertise" constitutes grounds for withholding deference). Third, there is no need for the Board to address claims with a tangential relationship to its legislative purpose when other forums that can resolve the dispute exist.

10. Under this reasoning, while Mr. Tomasso likely alleges disturbances that relate to noise and real property values, the Board finds that they do not reach the level of an appropriateness violation. First, flooding and HVAC-related disturbances do not have a significant relationship with alcoholic beverage control or other activities authorized by Title 25. For example, alcohol-related violations generally involve issues related to the sale, service, and consumption of alcohol; patron-related disturbances, whether on the premises, or coming and going to the property (e.g., public urination, shouting); entertainment (e.g., amplified music), security, or anything else that may be deemed a substantial change under D.C. Official Code § 25-762. In contrast, flooding and HVAC-related issues should be treated as a type of construction, engineering, or environmental problem—not an alcohol-related issue. Second, the Board does not have significant expertise or experience addressing these types of issues. Third, these types of problems appear better addressed by the Department of Consumer and Regulatory Affairs or the Superior Court of the District of Columbia. *See, e.g., Wood v. Neuman*, 979 A.2d 64, 79 (D.C. 2009) (indicating that vibrations may constitute a private nuisance); *Neitzey v. Baltimore & P.R. Co.*, No. 24698, 1886 WL 15889, at \*8 (D.C. June 1, 1886) (saying "noxious odors" may constitute a private nuisance); *Carrigan v. Purkhiser*, 466 A.2d 1243, 1244 (D.C. 1983) (indicating that noise may constitute a private nuisance); 12 DCMR § P-1115F (discussing gutters and downspouts).

11. The Board also recognizes that Mr. Tomasso raises issues with uncited violations of District law. *Supra*, at ¶ 2. Under the law, a licensee may violate Title 25 by violating the laws of the District of Columbia and the Board may consider the licensee's compliance during renewal. D.C. Official Code §§ 25-315(b)(1), 25-823(a)(1). As noted above, not all violations of the law or disturbances require or merit a finding of inappropriateness. Moreover, intervening in every portion of the law risks expanding the Board into areas that go beyond its core mission. For example, there appears to be no reason for the Board to get involved in wage disputes between the licensee and its employees, historical preservation violations, or traffic violations related to speeding because they do not have a direct relationship to the sale, service, and consumption of alcohol and other activities authorized by Title 25. Likewise, the Board is not

inclined to find that legal violations relating to flooding or HVAC-related issues fall within the purview of appropriateness.

12. For these reasons, even if Mr. Tomasso's allegations are true, the Board finds that they cannot be used to merit a claim of inappropriateness under the law.

### **ORDER**

Therefore, based on the foregoing, the Board, on this 27th day of July 2016, **GRANTS** the Applicant's motion to dismiss the Abutting Property Owner. ABRA shall deliver copies of this Order to the parties.

District of Columbia  
Alcoholic Beverage Control Board



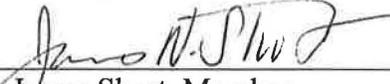
Donovan Anderson, Chairperson



Mike Silverstein, Member



Ruthanne Miller, Member



James Short, Member

I dissent from the position taken by the majority of the Board.



Nick Alberti, Member

Pursuant to 23 DCMR § 1719.1 (West Supp. 2016), 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, N.W., 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, District of Columbia 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, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (West Supp. 2016) 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).