

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

Macon DC, LLC)	Case Number:	14-PRO-00017
t/a Macon DC)	License Number:	093939
)	Order Number:	2014-124
Application for a New)		
Retailer's Class A License)		
)		
at premises)		
5520 Connecticut Avenue, N.W.)		
Washington, D.C. 20015)		

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

ALSO PRESENT: Macon DC, LLC t/a Macon DC, Applicant

Jim McCarthy, Advisory Neighborhood Commission (ANC) 3/4G,
Intervenor

Mara Verheyden-Hilliard, on behalf of a Group of Five or More
Residents or Proeprty Owners, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

**ORDER APPROVING SETTLEMENT AGREEMENT AND DISMISSING
PROTEST**

INTRODUCTION

The Alcoholic Beverage Control Board (Board) approves the settlement agreement entered into by Macon DC, LLC t/a Macon DC (hereinafter "Applicant" or "Macon") and Chevy Chase Advisory Neighborhood Commission 3/4G (ANC). Based on the approval of this settlement agreement, the Board dismisses the Group of Five or More Residents and Property Owners (Protestant) under D.C. Official Code § 25-609(b).

Procedural Background

Macon filed an Application for a New Retailer's Class CR License and Sidewalk Café Endorsement (Application) at 5520 Connecticut Avenue, N.W., Washington, D.C., which is located in ANC 3G06. *ABRA Protest File No. 14-PRO-00017*, Notice of Public Hearing.¹ The Alcoholic Beverage Regulation Administration (ABRA) provided notice of the Application on January 17, 2014. The Protestants, seeking standing as a group of five or more residents and property owners under D.C. Official Code § 25-601(2) filed a timely protest against the Application.

Both Macon and the Protestant appeared at the Roll Call Hearing in this matter occurred on March 17, 2014, and the Board's Agent found that the Protestant had standing to protest the Application. Nevertheless, in a letter dated March 26, 2014, the ANC and Macon submitted a settlement agreement. In addition, the ANC requested the dismissal of the protest upon approval of the agreement by the Board. Letter from Jim McCarthy, Chair, ANC 3/4G to Ruthanne Miller, Chair, Alcoholic Beverage Control (ABC) Board, 1 (Mar. 26, 2014). As a procedural matter, the Board considers the ANC's letter a motion to intervene and a motion to dismiss. 23 DCMR § 1701.4 (West Supp. 2014).²

Jim McCarthy, the Chair of the ANC, supplemented the ANC's submission with additional arguments supporting the ANC's request. Briefly, in pertinent part, he argues that (1) § 25-609(b) requires the dismissal of the protest based on the submission of the settlement agreement; and (2) the ANC is entitled by law to enter into a settlement agreement even though it is not a party to the protest. Concurring Opinion Letter from Jim McCarthy, Chair, ANC 3/4G to the ABC Board, 1-2 (Mar. 29, 2014).

In turn, the Protestants object to the ANC's request on the following grounds: (1) the ANC did not properly serve the Protestants; (2) the legislative history supporting § 25-609(b) requires the Board to only dismiss a group seeking standing under § 25-601(2) when the ANC files a protest; and (3) the Board may only approve a settlement agreement provided by the Applicant and a protestant that files a protest.

DISCUSSION

The Board finds in favor of the ANC and dismisses the Protestants under §25-609(b). Specifically, the Board finds that the ANC's potential failure to serve the Protestant does not bar the Board from rendering a final decision under § 1703.8. In addition, the Board's § 25-446(a) and the Board's prior precedent allows for the Applicant and the ANC to enter into a settlement agreement, even though the ANC did not file a protest. Finally, the Board finds that the plain language of § 25-609(b) requires the dismissal of the Protestant, because the Board approves the settlement agreement filed by the ANC and Macon in this Order.

¹ The Board takes administrative notice of the ANC district where the establishment will be located. The Board relied on the online polling place locator provided by the D.C. Board of Elections. See Polling Place Locator, at https://dcboee.org/voter_info/find_pollingplace/.

² The Board notes that it appears the Protestant has not been served by the ANC.

I. THE FAILURE TO SERVE THE PROTESTANT DOES NOT PREVENT THE BOARD FROM RENDERING A DECISION UNDER § 1703.8.

As a preliminary matter, the Protestant raised concerns that it has not been served with the ANC's submission to the Board. *Protestant's Reply*, 1. Under § 1703.8, the "[f]ailure to serve all parties of record, or their designated representatives, may result in the Board delaying action on the matter at issue until such time as service is properly accomplished." 23 DCMR § 1703.8 (West Supp. 2014) (emphasis added). Based on the plain language of § 25-609(b) and the Board's prior precedent, the Board would have dismissed the protest *sua sponte*, even if the ANC had not formally requested dismissal. Consequently, in light of the Board's discretion in "failure to serve" matters provided by § 1703.8, the Board finds no reasonable basis for delaying the issuance of a final decision in this case.

II. SECTION 25-446(a) PERMITS THE ANC TO ENTER INTO A SETTLEMENT AGREEMENT WITH MACON EVEN THOUGH THE ANC DID NOT FILE A PROTEST.

This Board has previously addressed the Protestant's argument that the Board cannot accept or approve a settlement agreement filed by a non-protestant. D.C. Official Code § 25-446(a) states, "The applicant and any protestant may, at any time, negotiate a settlement and enter into a written settlement agreement setting forth the terms of the settlement." D.C. Official Code § 25-446(a). Since at least 2011, the Board has interpreted § 25-446(a) ". . . broadly to include potential protestants, now and in the future, and not just protestants protesting a current application." Kingman Park Civic Association, et al. v. D.C. Alcoholic Beverage Control Bd., No. 11-AA-831, 4, 6 (D.C. 2012) (The court has previously found this interpretation reasonable).³ As a result, the ANC was well within its rights to enter into a settlement agreement with Macon, even though it is not currently protesting Macon's Application.⁴

III. THE PLAIN LANGUAGE OF § 25-609(b) REQUIRES THE DISMISSAL OF THE PROTEST UPON APPROVAL OF THE SETTLEMENT AGREEMENT.

The Protestant further argue that § 25-609(b) only requires the dismissal of a protest when the ANC is a protestant. The Board disagrees.

Section § 25-609(b) states, when ". . .an affected ANC submits a settlement agreement to the Board on a protested license application, the Board, upon its approval of the settlement agreement, shall dismiss any protest of a group of no fewer than 5 residents or property owners meeting the requirements of § 25-601(2)." D.C. Official Code § 25-609(b).

³ See Coumaris v. D.C. Alcoholic Beverage Control Bd., 660 A.2d 896, 900 (D.C. 1995) (" . . . judicial deference is at its zenith when an administrative construction of a statute has been consistent and of long standing").

⁴ As a matter of policy, it also makes no sense to prohibit parties from resolving their differences in a manner that avoids the need to go through the possibly arduous and time-consuming process of filing a formal protest.

The Protestant argues that the Board should override the plain language of the statute based on the legislative history surrounding the enactment of § 25-601(2). Nevertheless, the Board is guided by the reasoning of the District of Columbia Court of Appeals in Burgess. There, the court stated,

This court has often said that [i]f the meaning of a statute is plain on its face, resort to legislative history or other extrinsic aids to assist in its interpretation is not necessary. It is true that there is no rule of law forbidding resort to *explanatory* legislative history no matter how clear the words may appear on superficial examination. However, . . . the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. What this means, plainly stated, is that if the statute is clear and unambiguous on its face, the motivation of the legislature that enacted it, or of individual legislators, is of no concern to a court that is called upon to enforce it.

Burgess v. United States, 681 A.2d 1090, 1095 (D.C. 1996) (quotation marks and citations removed).

In this case, the pertinent portion of § 25-609(b) states, when “. . . an affected ANC submits a settlement agreement to the Board on a protested license application . . .” the Board shall dismiss any protest filed under § 25-601(2). § 25-609(b). The Board finds that the language “on a protested license application” means that an ANC may use § 25-609(b) to dismiss all protests filed under § 25-601(2) even though an ANC may not be a party to the protest. Id. Indeed, in order to adopt the interpretation forwarded by the Protestant, the Board would have to read the statute as follows: when an affected ANC submits a settlement agreement to the Board *in which it is a protestant* the Board shall dismiss any protest filed under § 25-601(2).

Because the Board finds § 25-609(b) clear on its face, there is no reason to allow the isolated statement in the Committee Report to control the interpretation of this statute. Nevertheless, even if the statute is found to be ambiguous, the Board would still adopt the same position. The Board recognizes that the reports, in explaining § 2-509(a), states, “. . . when a protest is filed by a group-of-five or more individuals and an ANC protests the same license, the protest of the group-of-five or more individuals will be dismissed if the ABC Board approves a voluntary agreement between the ANC and the licensee.” Council of the District of Columbia, Report on B19-824, the Omnibus Alcoholic Beverage Regulation Amendment Act of 2012, Committee on Human Services, 23 (Nov. 8, 2012). Nevertheless, the report contains no explanation as to why the Council would adopt a statute that gives an ANC that opposes an application more power than an ANC that supports an application.⁵ Rather than adopt the strange policy proposed by the Protestant, it is more reasonable to assume that the author of the report did not consider the fact that an ANC could support an application when the report was drafted.

⁵ The Protestant’s interpretation would also encourage ANCs to file bogus protests against applications they support in order to dismiss protests filed under § 25-601(2). The Board sees no reason to adopt a position that would create additional and unnecessary administrative work on the part of ANCs and ABRA.

Consequently, because the applicant is located in ANC 3G, and the Board approves the settlement agreement filed by the affected ANC, the Board determines that § 25-609(b) requires the dismissal of the Protestant.

ORDER

Therefore, for the foregoing reasons, the Board, on this 10th day of April 2014, hereby **GRANTS** ANC 3/4G's request to intervene for the purpose of seeking approval of the settlement agreement.

IT IS FURTHER ORDERED that the settlement agreement submitted by Macon and ANC 3/4G is hereby **APPROVED**.⁶

IT IS FURTHER ORDERED that the Protestant, who was granted standing under § 25-601(2) to protest the Application, is hereby **DISMISSED** under § 25-609(b).

The ABRA shall distribute copies of this Order to Macon, ANC 3/4G, and the Protestants.

⁶ The Protestant is not a party to the settlement agreement submitted by Macon and the ANC; therefore, the Protestant does not have standing to challenge the Board's decision to approve the agreement. See Kingman Park Civic Association, et al. v. D.C. Alcoholic Beverage Control Bd., No. 11-AA-831, at 7 (The court expressed doubt that a non-party to a settlement agreement would have standing to object to the approval of an agreement by the Board).

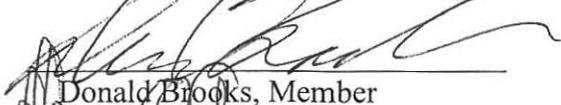
District of Columbia
Alcoholic Beverage Control Board



Ruthanne Miller, Chairperson



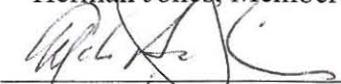
Nick Alberti, Member



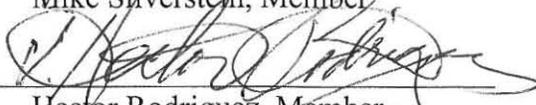
Donald Brooks, Member



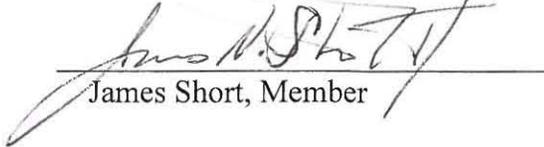
Herman Jones, Member



Mike Silverstein, Member



Hector Rodriguez, Member



James Short, Member

Under 23 DCMR § 1719.1 (2008), 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, under 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, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration under 23 DCMR § 1719.1 (2008) 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).