

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

In the Matter of:)	
)	
Don Juan Restaurant, Inc.)	License Number: 21278
t/a Don Juan Restaurant & Carryout)	Case Number: 21278-07/59P
)	10-PRO-00114
)	Order Number: 2011-166
Application for Renewal)	
Voluntary Agreement Termination, and)	
Entertainment Endorsement)	
)	
at premises)	
1660 Lamont Street, N.W.)	
Washington, D.C. 20010)	

ALSO PRESENT: Don Juan Restaurant, Inc., t/a Don Juan Restaurant & Carryout,
Petitioner

Rick Massumi, on behalf of the Applicant

Gregg Edwards, Chairperson, Advisory Neighborhood Commission
(ANC) 1D

Claudia Scholsberg, on behalf of A Group of Five or More
Individuals

Sam Broeksmit and Laurie Collins, on behalf of the Mount Pleasant
Neighborhood Alliance (MPNA), Protestant

BEFORE: Charles Brodsky, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Calvin Nophlin, Member
Mike Silverstein, Member

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

In 2008, Don Juan Restaurant, Inc., t/a Don Juan Restaurant & Carryout (Petitioner), filed a Petition to Terminate a Voluntary Agreement (2008 Petition), Application for an Entertainment Endorsement (2008 Application), and an Application to Renew a Retailer's Class CR License (Application to Renew) in order to terminate the Mount Pleasant Neighborhood Alliance (MPNA) Voluntary Agreement, dated January 9,

1998, and amended on June 29, 2001. *Don Juan Restaurant, Inc., t/a Don Juan Restaurant & Carryout, Board Order No. 2008-233, 1.*

The Petitioner attempted to terminate the MPNA Voluntary Agreement and substitute a Voluntary Agreement negotiated with Hear Mount Pleasant. The Alcoholic Beverage Control Board (Board) subsequently denied the Petitioner's request to terminate the MPNA Voluntary Agreement and approved the 2008 Application and Application to Renew in Board Order No. 2008-233. *Don Juan Restaurant, Inc., t/a Don Juan Restaurant & Carryout, Board Order No. 2008-233, 21.*

The Board then, under D.C. Code § 25-104(e) (2001), attached a number of conditions to the Petitioner's license. *Board Order No. 2008-233, para. 81.* First, the Order amended the MPNA Voluntary Agreement by deleting Item A and Item D of the 2001 Addendum to the MPNA Voluntary Agreement (2001 Addendum), replacing the phrase "at least once a month" in Item F of the 2001 Addendum with "as needed," and provision 7 was amended by placing the phrase "after 7 p.m." after the word "by." *Board Order No. 2008-233, 22.* Second, the Order attached the Hear Mount Pleasant Voluntary Agreement to the Petitioner's license and deleted paragraphs 6 and 23 and the first sentence of paragraph 5 of that agreement. *Board Order No. 2008-233, 21-22.* Third, the Order allowed the Petitioner "to have karaoke and dancing until 1:40 a.m. on Sunday through Thursday and until 2:40 a.m. on Friday and Saturdays." *Board Order No. 2008-233, 22.* Fourth, the Petitioner was "permitted to have roaming mariachi bands until 11:00 p.m. on Sunday through Wednesday; 12:00 midnight on Thursday; and 1:00 a.m. on Friday and Saturday." *Board Order No. 2008-233, 22.* Fifth, the Board allowed the Petitioner to charge a cover. *Board Order No. 2008-233, 22.*

The Petitioner appealed Board Order No. 2008-233 and the District of Columbia Court of Appeals remanded the case back to the Board on May 11, 2010, for further hearings. In *Don Juan Restaurant, Inc.*, the court ordered the Board to "consider the ANC's written resolutions supporting live music entertainment at Don Juan Restaurant, and to conduct further hearings to fully explore whether there would be an adverse impact on the Mount Pleasant neighborhood if the MPNA agreement is terminated and replaced with the new agreement Don Juan Restaurant reached with the Hear Mount Pleasant organization." *Don Juan Restaurant, Inc. v. District of Columbia Alcoholic Beverage Control Board*, Nos. 09-AA-29, 09-AA-30, 09-AA-31, 1-2 (D.C. 2010).

In accordance with the court's ruling, the Board scheduled the Remand Hearing for July 14, 2010. The parties requested two continuances, which were granted by the Board. The Remand Hearing was rescheduled for November 10, 2010.

In addition, on March 16, 2010, Don Juan Restaurant, Inc., t/a Don Juan Restaurant & Carryout (Petitioner), filed another Petition to Terminate a Voluntary Agreement (2010 Petition) during its renewal period in order to terminate the MPNA Voluntary Agreement and requested that the Board remove the conditions and limits placed on the Petitioner's entertainment endorsement. Protests against the Petition were timely filed by the MPNA, by letter dated August 2, 2010. A Roll Call Hearing was held on August 30, 2010, and a Status Hearing was held on September 22, 2010.

The Board consolidated both the Remand Hearing and Protest Hearing. Both the Remand Hearing and the Protest Hearing were held on November 10, 2010.

The parties attended mediation on September 7, 2010. The Petitioner and the Protestant could not agree on a revised Voluntary Agreement before the Protest Hearing. The Board notes that Advisory Neighborhood Commission (ANC) 1D timely submitted its recommendations under D.C. Code § 25-609 (2001) regarding the 2010 Petition. In addition, the Board recognizes the recommendations submitted by ANC 1D regarding the 2008 Petition and the 2008 Application.

On March 4, 2011, the Petitioner filed a Proposed Findings of Fact and Conclusions of Law, which has been included in the record. *See* 23 DCMR 1717.2 (2008). The MPNA did not submit Proposed Findings of Fact and Conclusions of Law. The Board notes that the Petitioner requested to file its Proposed Findings of Fact and Conclusions of Law after the deadline, which was unopposed by the MPNA and approved by the Board.

Pursuant to D.C. Code §§ 25-602(a) (2001) and 25-446(d)(4)(C), the protest issues raised by the MPNA are whether the petitions and applications adversely impact the peace, order, quiet, residential parking, and pedestrian safety of the neighborhood. Furthermore, in respect to Board Order No. 2008-233, the Board has given great weight to ANC 1D's written recommendation and has "explore[d] whether there would be an adverse impact on the Mount Pleasant neighborhood if the MPNA [Voluntary] Agreement is terminated" and replaced by the Hear Mount Pleasant Voluntary Agreement.

The Board, having considered the evidence, the testimony of witnesses, the arguments of counsel, the Petitioner's Proposed Findings of Fact and Conclusions of Law, and the documents comprising the Board's official file, makes the following:

FINDINGS OF FACT

1. The Board incorporates the Findings of Fact contained in paragraphs 1 through 74 in Board Order No. 2008-233 into this Order.
2. The Petitioner's establishment is located at 1660 Lamont Street, N.W. *ABRA Licensing File No. 21278*. It is located within a C-2-A zone. *ABRA Protest File No. 21278-07/59P, Protest Report, 7*. There is a day care center located within 400 feet of the establishment. *ABRA Protest File No. 21278-07/59P, Protest Report, 9-10*. Finally, there are 15 ABC licensed establishments within 1200 feet of the Petitioner. *ABRA Protest File No. 21278-07/59P, Protest Report, 8*.
3. The Petitioner's current hours of operation and hours to sell and serve alcoholic beverages are from 11:00 a.m. to 1:40 a.m., Sunday through Thursday, and 11:00 a.m. to 2:40 a.m., Friday and Saturday. *ABRA Licensing File No. 21278*. The Petitioner's current hours of operation and hours to sell and serve alcoholic beverages for its sidewalk café are from 11:00 a.m. to 12:00 a.m. on Sunday; 11:00 a.m. to 1:40 a.m., Monday through Thursday; and 11:00 a.m. to 2:40 a.m. on Friday and Saturday. *ABRA Licensing File No. 21278*.

4. The establishment's entertainment hours are from 7:00 p.m. to 1:40 a.m., Sunday through Thursday, and 7:00 p.m. to 2:40 a.m. on Friday and Saturday. *ABRA Licensing File No. 21278.*
5. The Board called Investigator Tyrone Lawson to testify. *Transcript (Tr.)*, November 11, 2010 at 16. Investigator Lawson noted that three establishments within 1200 feet of the Petitioner have entertainment endorsements. *Tr.*, 11/11/10 at 29. He further stated that two of the establishments within 1200 feet of the Petitioner have dancing and cover charge endorsements. *Tr.*, 11/11/10 at 29.
6. Investigator Lawson described the parking situation near the establishment. *Tr.*, 11/11/10 at 29. He noted that there are metered spaces near the establishment. *Tr.*, 11/11/10 at 29. There are no parking lots or other parking structures nearby. *ABRA Protest File No. 21278-07/59P, Protest Report, 9.*
7. The establishment uses KMJ Home to remove its trash and waste. *Tr.*, 11/11/10 at 30. Investigator Lawson stated that the establishment's trash area was clean and free of debris. *Tr.*, 11/11/10 at 30. In addition, he observed that the establishment was in compliance with its voluntary agreements regarding the storage of trash. *Tr.*, 11/11/10 at 30.
8. ABRA investigators monitored the establishment on 24 separate occasions between September 28, 2010, and October 29, 2010. *ABRA Protest File No. 21278-07/59P, Protest Report, 13-14; Tr.*, 11/11/10 at 30. Investigator Lawson testified that no investigator observed loitering, noise, criminal activity, or excessive trash. *Tr.*, 11/11/10 at 30, 40. Investigator Lawson noted that the Metropolitan Police Department received six calls for service at the establishment's address, none of which involved the establishment. *Tr.*, 11/11/10 at 37. In addition, investigators observed that parking was available on the 3100 and 3200 block of Mount Pleasant. *Tr.*, 11/11/10 at 30.
9. Investigator Lawson noted that the establishment is surrounded by residentially zoned properties. *Tr.*, 11/11/10 at 32. He estimated that the nearest residentially zoned property is approximately 25 feet from the establishment. *Tr.*, 11/11/10 at 33.
10. The Petitioner called Ken Goldstein to testify. *Tr.*, 11/11/10 at 48. Mr. Goldstein has lived in Mount Pleasant since 1980 and lives "directly behind" the establishment. *Tr.*, 11/11/10 at 49. His property is approximately "35 paces" from the establishment. *Tr.*, 11/11/10 at 49. Mr. Goldstein stated that he has a friendly relationship with the owner of the establishment, Alberto Ferrufino. *Tr.*, 11/11/10 at 50. He supports terminating the MPNA Voluntary Agreement and granting the establishment's request for additional entertainment privileges. *Tr.*, 11/11/10 at 54-55. He admitted that he is a member of Hear Mount Pleasant. *Tr.*, 11/11/10 at 58.
11. Mr. Goldstein has only had one complaint regarding the establishment in the past six years. *Tr.*, 11/11/10 at 50. He stated that six years ago he was disturbed by the establishment's trash removal service, which arrived at 7:30 a.m. on a Saturday. *Tr.*, 11/11/10 at 50. He stated that he complained to Mr. Ferrufino's wife and she immediately called the establishment's trash removal service. *Tr.*, 11/11/10 at 51. He stated that he has never been disturbed by the establishment since that time. *Tr.*, 11/11/10 at 51.

12. Mr. Goldstein also noted that he is about “40 paces” from the establishment’s sidewalk café. *Tr.*, 11/11/10 at 52. He stated that he has never been disturbed by the establishment’s sidewalk café. *Tr.*, 11/11/10 at 52.

13. Mr. Goldstein believes that the establishment is a neighborhood asset. *Tr.*, 11/11/10 at 53. He noted that the owner has painted the exterior of the establishment three times and had landscaping work performed on the rear of the establishment. *Tr.*, 11/11/10 at 53. He also noted that the interior of the establishment has been renovated several times. *Tr.*, 11/11/10 at 54. Finally, he noted that he has never heard noise emanating from the establishment. *Tr.*, 11/11/10 at 56.

14. The Petitioner called Claudia Schlosberg to testify. *Tr.*, 11/11/10 at 69. Ms. Schlosberg has lived in Mount Pleasant since 1997. *Tr.*, 11/11/10 at 69. Ms. Schlosberg testified that the MPNA Voluntary Agreement micromanages the establishment by getting involved in how patrons are seated in the establishment. *Tr.*, 11/11/10 at 87. In addition, she testified that it is inappropriate for the MPNA Voluntary Agreement to forbid the establishment from advertising in its windows or displaying banners because small businesses need to be able to “publicize what they’re offering.” *Tr.*, 11/11/10 at 88. She also believes that it is inappropriate for the MPNA Voluntary Agreement to require the owner to “cooperate with community organizations[,] . . . engage [in] activities to alleviate alcohol abuse and undertake leadership in [the] Mount Pleasant business community.” *Tr.*, 11/11/10 at 88. She believes that the provision regarding loitering is unnecessary, because there is no loitering issue near the restaurant. *Tr.*, 11/11/10 at 90. Ms. Schlosberg also believes that the portion of the MPNA Voluntary Agreement, which prohibits drink specials and serving pitchers, is inappropriate because many other establishments in Mount Pleasant engage in such activities. *Tr.*, 11/11/10 at 92.

15. Ms. Schlosberg testified that she does not believe that terminating the MPNA Voluntary Agreement will adversely impact traffic and parking in Mount Pleasant. *Tr.*, 11/11/10 at 99. She stated that the establishment serves the local community and the majority of the establishment’s patrons walk, bike, or utilize public transportation. *Tr.*, 11/11/10 at 99-100. She noted that the Metro is nearby and that the D.C. USA shopping plaza has “thousands of parking spaces” that are not being used. *Tr.*, 11/11/10 at 100.

16. The Petitioner submitted a report written in 2009 by Daniel Consultants, Inc., for the District Department of Transportation (DDOT), titled: “Mt. Pleasant Transportation Study.” *Tr.*, 11/11/10 at 397. The report projected that the delays at the intersection of 16th Street, N.W., and Irving Street, N.W., and the intersection of 16th Street, N.W., and Lamont Street, N.W., will degrade to between 55 seconds and 80 seconds per vehicle over the next 10 years during the morning peak traffic period and over the next 20 years during the afternoon peak traffic period. *Mt. Pleasant Transportation Study, I-53*. However, the study also notes that: “The Mt. Pleasant community is unique, in that it is a “walking and biking” community unlike other neighborhoods that rely on the “motor vehicle” as their primary source of transportation. Their choice to walk and bike is reflected in the community togetherness, pride, and vitality.” *Pleasant Transportation Study, I-33*.

17. The “Mount Pleasant Street Commercial Revitalization Strategy” report states that it would be desirous to “create and implement a new pilot program to replace existing

voluntary agreements and create a new process for managing alcohol licensure in the neighborhood.” *Mount Pleasant Street Commercial Revitalization Strategy*, 8; *ABRA Protest File 10-PRO-00114, Petitioner’s Exhibit A7*.

18. The Petitioner called Janelle Treibitz to testify. *Tr.*, 11/11/10 at 131-32. Ms. Treibitz stated that her home is almost directly behind the establishment and has lived there for approximately four and a half years. *Tr.*, 11/11/10 at 132. She neighbors Mr. Goldstein. *Tr.*, 11/11/10 at 132. She stated that she works as a waitress and a puppeteer. *Tr.*, 11/11/10 at 133. She stated that the current restrictions attached to the Petitioner’s license prevent her from performing at the establishment. *Tr.*, 11/11/10 at 133.

19. Ms. Treibitz testified that she has never been disturbed by the Petitioner’s operations. *Tr.*, 11/11/10 at 134. She stated that she has never heard noise emanating from the establishment. *Tr.*, 11/11/10 at 135. She stated that she fully supports the Board granting the petitions. *Tr.*, 11/11/10 at 136.

20. The Petitioner called Olivia Cadaval to testify. *Tr.*, 11/11/10 at 148-49. Ms. Cadaval stated that the restrictions on the establishment prevent the Petitioner from providing entertainment to working class Latinos. *Tr.*, 11/11/10 at 152. She believes that the restrictions on the establishment are an attack upon the Mount Pleasant Latino community. *Tr.*, 11/11/10 at 153.

21. The Petitioner called Jane Zara to testify. *Tr.*, 11/11/10 at 162. She stated that she served as an ANC Commissioner in 2007 and 2008 and represented single-member district 1D01. *Tr.*, 11/11/10 at 163. She stated that her ANC concluded that the community opposed the MPNA Voluntary Agreement and supported allowing live entertainment in Mount Pleasant. *Tr.*, 11/11/10 at 168-69. Commissioner Zara stated that the ANC wanted the Petitioner to utilize all forms of live entertainment, not just karaoke. *Tr.*, 11/11/10 at 203. Finally, ANC 1D supports terminating the MPNA Voluntary Agreement. *Tr.*, 11/11/10 at 229.

22. Commissioner Zara testified that ANC 1D passed a resolution on February 5, 2008, which asked the Board to allow live entertainment in Mount Pleasant. *Tr.*, 11/11/10 at 222. She stated that the ANC supported the Petitioner receiving the entertainment hours contained in the Hear Mount Pleasant Voluntary Agreement, because the establishment has adequate soundproofing. *Tr.*, 11/11/10 at 223, 225.

23. The Petitioner called Alberto Ferrufino to testify. *Tr.*, 11/11/10 at 233. Mr. Ferrufino described the public transportation available near his establishment. A bus stop for the 42 bus is 25 feet from his establishment. *Tr.*, 11/11/10 at 234-35. In addition, the S1, S2, and S4 buses stop on the corner of Lamont Street, N.W., and 16th Street, N.W. *Tr.*, 11/11/10 at 235. The H bus passes by his restaurant as well. *Tr.*, 11/11/10 at 236. Finally, the Columbia Heights Metro Station is located near his establishment. *Tr.*, 11/11/10 at 236.

24. Mr. Ferrufino stated that he has owned the establishment for approximately 18 years. *Tr.*, 11/11/10 at 237. The establishment has about 12 employees. *Tr.*, 11/11/10 at 237. The inside of the establishment has an occupancy of 100 people and the sidewalk

café has an occupancy of 24 people. *Tr.*, 11/11/10 at 237. Mr. Ferrufino stated that his establishment provides karaoke and mariachi music as entertainment. *Tr.*, 11/11/10 at 242.

25. Mr. Ferrufino discussed the parking situation near his establishment. *Tr.*, 11/11/10 at 252. He noted that parking in Mount Pleasant is limited but stated that many of his patrons arrive by bus or subway. *Tr.*, 11/11/10 at 252.

26. The Board called Commissioner Edwards to testify. *Tr.*, 11/11/10 at 296. Commissioner Edwards lives 182 feet from the front door of the establishment and can see the establishment from his residence. *Tr.*, 11/11/10 at 298. Commissioner Edwards believes that the establishment is “one of the better managed restaurants in Mount Pleasant.” *Tr.*, 11/11/10 at 299. Commissioner Edwards noted that Mr. Ferrufino “frequently” attends ANC meetings and is involved in “other community activities.” *Tr.*, 11/11/10 at 300.

27. Commissioner Edwards testified that ANC 1D has asked the Board to terminate the MPNA Voluntary Agreement. *Tr.*, 11/11/10 at 301. Commissioner Edwards further stated that ANC 1D supports granting the Petitioner’s request for entertainment, beyond karaoke and roaming mariachis. *Tr.*, 11/11/10 at 302. Commissioner Edwards added that ANC 1D supports granting the Petitioner’s request to provide live entertainment until closing. *Tr.*, 11/11/10 at 303.

28. Commissioner Edwards believes that the petitions are appropriate for Mount Pleasant. *Tr.*, 11/11/10 at 303. He stated that his ANC has previously recognized that property values in the neighborhood have been increasing. *Tr.*, 11/11/10 at 303. Furthermore, the peace, order, and quiet situation has been steadily improving. *Tr.*, 11/11/10 at 303. However, he testified that many businesses in Mount Pleasant are experiencing an economic decline. *Tr.*, 11/11/10 at 304, 322-323. Commissioner Edwards is concerned that businesses will close and create empty storefronts in the neighborhood. *Tr.*, 11/11/10 at 304. He believes that if the Board does not grant the petitions, then the commercial corridor in Mount Pleasant will collapse. *Tr.*, 11/11/10 at 320.

29. The MPNA called Sam Broeksmit to testify. *Tr.*, 11/11/10 at 331. Mr. Broeksmit criticized the Hear Mount Pleasant Voluntary Agreement. He stated that the MPNA was not concerned with making space for local artists at the restaurant. *Tr.*, 11/11/10 at 338. He added that employing a second night manager and providing their phone number is not a concern of the MPNA as well. *Tr.*, 11/11/10 at 338. He also stated that there was no guarantee that Hear Mount Pleasant would continue to support its Voluntary Agreement. *Tr.*, 11/11/10 at 338.

30. Mr. Broeksmit presented the Board with a number of arguments for ruling against the Petitioner. First, Mr. Broeksmit argued that the Board is entitled to limit the Petitioner’s entertainment to karaoke because the Petitioner only requested karaoke in its application for an entertainment endorsement. *Tr.*, 11/11/10 at 343. Second, Mr. Broeksmit argued that the Board should not give much credence to the Hear Mount Pleasant Voluntary Agreement because it was not “backed by a 501(c)(3) community civic organization.” *Tr.*, 11/11/10 at 367. Third, Mr. Broeksmit argued that the Board should abide by its appropriateness determination in 2008. *Tr.*, 11/11/10 at 346. He stated that there were problems in the past regarding loud noise disturbing residents and rowdy

patrons. *Tr.*, 11/11/10 at 348. Mr. Broeksmit argued that there have been no changes to the neighborhood that warrant loosening the restrictions previously enacted by the Board in 2008. *Tr.*, 11/11/10 at 349.

31. Mr. Broeksmit requested that Board consider the “residential character” of Mount Pleasant. *Tr.*, 11/11/10 at 365. He noted that there are many single family lots and six and eight story apartments within 1200 feet of the establishment. *Tr.*, 11/11/10 at 408. Mr. Broeksmit also asked the Board to consider the large number of residents near the establishment. *Tr.*, 11/11/10 at 365. Mr. Broeksmit further asked the Board to consider the demographics of Mount Pleasant. *Tr.*, 11/11/10 at 365. He also asked the Board to consider the traffic and parking problems currently experienced by Mount Pleasant. *Tr.*, 11/11/10 at 365-66. According to Mr. Broeksmit, the MPNA does not support having live entertainment in Mount Pleasant that runs until 2:00 a.m. or 3:00 a.m. *Tr.*, 11/11/10 at 411.

32. Mr. Broeksmit stated that the MPNA supports the entertainment hours indicated in the Hear Mount Pleasant Voluntary Agreement. *Tr.*, 11/11/10 at 368. Mr. Broeksmit stated that he believes that it is appropriate to have entertainment until midnight during the week and 1:00 a.m. on the weekends in Mount Pleasant. *Tr.*, 11/11/10 at 412. Furthermore, he stated that the MPNA supports the inclusion of a “reasonable happy hour provision” and allowing the petitioner to utilize pitchers. *Tr.*, 11/11/10 at 368. Mr. Broeksmit stated that the MPNA supports allowing the Petitioner to utilize entertainment “beyond karaoke.” *Tr.*, 11/11/10 at 369, 421. Furthermore, Mr. Broeksmit stated that the MPNA supports eliminating or modifying provisions in the MPNA Voluntary Agreement in order to resolve enforcement questions. *Tr.*, 11/11/10 at 369.

33. As altered by Board Order No. 2008-233 and the 2001 Addendum, the MPNA Voluntary Agreement places a number of requirements on the Petitioner. The Board will also note the provisions in the Hear Mount Pleasant Voluntary Agreement that correspond with the MPNA Voluntary Agreement where appropriate.

34. Item A of the MPNA Voluntary Agreement requires the Petitioner to comply with the laws of the District of Columbia. *ABRA Protest File No. 10-PRO-00114, MPNA Voluntary Agreement, A.*

35. Item B of the MPNA Voluntary Agreement requires the Petitioner to cooperate with appropriate enforcement agencies, the MPNA, and the ANC to address any violations of the law. *ABRA Protest File No. 10-PRO-00114, MPNA Voluntary Agreement, B.*

36. Item G of the MPNA Voluntary Agreement requires the Petitioner to use “reasonable means to discourage loitering in front of the establishment.” *ABRA Protest File No. 10-PRO-00114, MPNA Voluntary Agreement, G.*

37. Item H of the MPNA Voluntary Agreement requires the Petitioner to post signs in English and Spanish about respecting the community, parking, and alcohol awareness. *ABRA Protest File No. 10-PRO-00114, MPNA Voluntary Agreement, H.* In the alternative, the Hear Mount Pleasant Voluntary Agreement states in Item 14 that:

Licensee shall post signs in English and in Spanish, in not less than 1 inch type, in the public restrooms and in a position prominently visible to patrons exiting, with the following text: "Please be considerate of our neighbors. Keep noise to a minimum when you leave. And please help keep our neighborhood clean and safe." *ABRA Protest File No. 10-PRO-00114, Hear Mount Pleasant Voluntary Agreement, Item 14.*

38. Item I of the MPNA Voluntary Agreement requires the Petitioner to continue the following:

- (a) retaining a new trash hauling service
- (b) changing the hours of trash service, recycling and bottle dumping
- (c) constructing a double door entry foyer to baffle any noise or music from reaching the street
- (d) removed excess signage from the windows
- (e) cleaned the windows
- (f) planted trees to shield the trash area and beautify the corner
- (g) hired MPD officers to control loitering and improve community safety
- (h) established regular cleaning of the public space adjoining the restaurant
- (i) participated in community meetings about improving the neighborhood . . .
ABRA Protest File No. 10-PRO-00114, MPNA Voluntary Agreement, 1, I.

39. Item J of the MPNA Voluntary Agreement the Petitioner agrees to "work cooperatively with the MPNA." *ABRA Protest File No. 10-PRO-00114, MPNA Voluntary Agreement, Item J.* The Petitioner also agrees not to sell liquor to minors, not provide go-cups, have all its staff participate in "training of the type offered by TIPS," and not serve pitchers to individual customers. *ABRA Protest File No. 10-PRO-00114, MPNA Voluntary Agreement, 2-3.*

40. In turn, Item 17 in the Hear Mount Pleasant Voluntary Agreement states that:

Licensee will assure that any persons serving in capacity as "night manager" and all alcoholic beverage serving staff receive appropriate training regarding the terms of this Agreement and in the sale, service and handling of alcoholic beverages as required by law and regulation. *ABRA Protest File No. 10-PRO-00114, Hear Mount Pleasant Voluntary Agreement, Item 17.*

41. Item B of the 2001 Addendum requires the Petitioner to not serve alcoholic beverages after its licensed hours and requires the licensee to keep its kitchen open until at least 1:00 a.m. *ABRA Protest File No. 10-PRO-00114, 2001 Addendum, Item B.*

42. Item C of the 2001 Addendum states that the Petitioner will:

undertake a leadership role in the Mount Pleasant business community in an effort to enlist wider business support for clean-up, responsible alcohol service, support of alcohol abuse assistance organizations, and law enforcement activities, including leading efforts to hire private trash services to keep Mount Pleasant Street clean on a daily basis. This role includes, but is not limited to, active participation by principles of licensee

in Police Service Areas (“PSA”) meetings, and consultation with MPNA and the ANC when reasonably requested by such organizations. *ABRA Protest File No. 10-PRO-00114, 2001 Addendum, Item C.*

43. The MPNA Voluntary Agreement has a number of provisions related to trash. Item F of the MPNA Voluntary Agreement requires the Petitioner to “keep the public space in front of the restaurant free of debris and trash and keep its trash area clean and use its “best efforts to control the noise of trash dumping and pickup.” *ABRA Protest File No. 10-PRO-00114, MPNA Voluntary Agreement, F.* Item E of the 2001 Addendum requires the Petitioner to “keep . . . the public space[, defined as the space between the property line and 18 inches from the curb] in front and rear of the establishment[,] free of debris and trash.” *ABRA Protest File No. 10-PRO-00114, 2001 Addendum, Item E.* Item F of the 2001 Addendum requires the Petitioner to power wash the sidewalk as needed. *ABRA Protest File No. 10-PRO-00114, 2001 Addendum, Item F, amended by Board Order No. 2008-233, 22.* Item G of the 2001 Addendum requires the Petitioner to “maintain trash, garbage and recycle material storage facilities in which all containers have lids which are kept securely closed at all times, which containers shall be sufficient to contain all trash, garbage and recycle materials generated by the establishment.” *ABRA Protest File No. 10-PRO-00114, 2001 Addendum, Item G.* Item H of the 2001 Addendum requires the Petitioner to only dump waste between 8:00 a.m. and 10:00 p.m. *ABRA Protest File No. 10-PRO-00114, 2001 Addendum, Item H.* Finally, Item I of the 2001 Addendum requires the Petitioner to schedule trash pickups at least three times per week and only between the hours of 8:00 a.m. and 8:00 p.m. *ABRA Protest File No. 10-PRO-00114, 2001 Addendum, Item I.*

44. The Board notes that the Hear Mount Pleasant Voluntary Agreement states in Item 18 that the “Licensee will keep the sidewalk in front of the establishment free of debris, trash and litter and shall provide appropriate receptacles for the deposit of cigarette butts.” *ABRA Protest File No. 10-PRO-00114, Hear Mount Pleasant Voluntary Agreement, Item 18.* Alternatively, the Hear Mount Pleasant Voluntary Agreement states in Item 19 that:

Licensee will keep the alley behind the establishment free of debris, trash and litter. Licensee will store garbage and recyclable materials in containers with secure lids. Licensee will arrange to have garbage and recyclables picked up at least two times per week during the hours between 9:00 a.m. and 8:00 p.m. *ABRA Protest File No. 10-PRO-00114, Hear Mount Pleasant Voluntary Agreement, Item 19.*

45. The MPNA Voluntary Agreement also regulates the Petitioner’s ability to sell alcoholic beverages. Item J of the 2001 Addendum forbids the Petitioner from serving intoxicated persons or people with “intemperate habits.” *ABRA Protest File No. 10-PRO-00114, 2001 Addendum, Item J.* Item J also requires that the Petitioner “cooperate” with the Metropolitan Police Department and health authorities in identifying such individuals. *ABRA Protest File No. 10-PRO-00114, 2001 Addendum, Item J.* Additionally, Item K of the 2001 Addendum requires the Petitioner to “not sell or deliver alcoholic beverages to anyone accompanying a person who has been denied service if there is an apparent attempt to deliver the alcoholic beverage to the person who has been denied service.” *ABRA Protest File No. 10-PRO-00115, MPNA Voluntary Agreement, Item J.* Finally, Item K forbids the Petitioner from serving alcohol to patrons at tables if no customers sitting at the

table purchase food. *ABRA Protest File No. 10-PRO-00114, MPNA Voluntary Agreement, Item J.*

46. The Hear Mount Pleasant Voluntary Agreement also regulates the Petitioner's ability to sell alcohol. Item 16 states that the "Licensee will not sell or deliver alcoholic beverages to anyone who is intoxicated and shall not sell or deliver alcoholic beverages to anyone accompanying a person who has been denied service if there is an apparent attempt to deliver alcoholic beverages to the person who has been denied service." *ABRA Protest File No. 10-PRO-00114, Hear Mount Pleasant Voluntary Agreement, Item 16.*

47. Item L of the 2001 Addendum prohibits the Applicant from obscuring its windows or hanging banners outside its premises. *ABRA Protest File No. 10-PRO-00114, MPNA Voluntary Agreement, Item L.*

48. Item N of the 2001 Addendum requires the Petitioner to "meet" with representatives of the MPNA to discuss issues and solutions to "problems concerning the operation of the establishment . . . if . . . requested by [the] MPNA." *ABRA Protest File No. 10-PRO-00114, MPNA Voluntary Agreement, Item N.*

49. Board Order No. 2008-233 allows the Petitioner to have karaoke and dancing until 1:40 a.m., Sunday through Thursday, and until 2:40 a.m., Friday and Saturday. *Board Order No. 2008-233, 22.* Furthermore, the Board allowed the Petitioner to have roaming mariachi bands until 11:00 p.m., Sunday through Wednesday, until 12:00 a.m. on Thursday, and until 1:00 a.m. on Friday and Saturday. *Board Order No. 2008-233, 22.*

CONCLUSIONS OF LAW

50. Pursuant to D.C. Official Code §§ 25-313(a) (2001), 23 DCMR § 400.1(a) (2008), and 25-446(d)(4)(C) (Supp. 2010), a Petitioner must demonstrate to the Board's satisfaction that the establishment for which a Petition to Terminate a Voluntary Agreement and Application for an Entertainment Endorsement are appropriate for the neighborhood in which the establishment is located. The Protestant challenged the Petition under §§ 25-602(a) and 25-446, arguing that the Petition would adversely impact the peace, order, quiet, residential parking, and pedestrian safety of the neighborhood. In this matter, the Board is also tasked with resolving the issues identified by the Court of Appeals in respect to Board Order No. 2008-233. Further, the Board must determine the appropriateness of the 2010 Petition submitted by the Petitioner and decide whether under § 25-104(e) the conditions imposed by the Board are still in the "best interest" of the neighborhood. D.C. Code § 25-104(e) (2001).

51. In Don Juan Restaurant, Inc., the court ordered the Board to "consider the ANC's written resolutions supporting live music entertainment at Don Juan Restaurant, and to conduct further hearings to fully explore whether there would be an adverse impact on the Mount Pleasant neighborhood if the MPNA agreement is terminated and replaced with the new agreement Don Juan Restaurant reached with the Hear Mount Pleasant organization." Don Juan Restaurant, Inc. v. District of Columbia Alcoholic Beverage Control Board, Nos. 09-AA-29, 09-AA-30, 09-AA-31, 1-2 (D.C. 2010).

52. After considering the recommendations of ANC 1D and whether terminating the MPNA Voluntary Agreement would have an adverse impact on Mount Pleasant, the Board finds that its previous findings in Board Order No. 2008-233 regarding termination of the Mount Pleasant Voluntary Agreement and restricting entertainment at the establishment are incorrect. The Board vacates the Conclusions of Law and Order contained in Board Order No. 2008-233 and grants the 2008 Petition. As such, the MPNA Voluntary Agreement is terminated and the conditions placed on the Petitioner's license are removed. The Board notes that this renders the 2010 Petition moot because the MPNA Voluntary Agreement is now terminated. The Board discusses its reasoning below.

53. As a preliminary matter, the Board recognizes that pursuant to D.C. Official Code § 1-309.10(d) (Supp. 2010) and D.C. Official Code § 25-609 (2001), an ANC's properly adopted written recommendations are entitled to great weight from the Board. *See Foggy Bottom Ass'n v. District of Columbia ABC Bd.*, 445 A.2d 643 (D.C. 1982). Accordingly, the Board "must elaborate, with precision, its response to the ANC issues and concerns." *Foggy Bottom Ass'n*, 445 A.2d at 646. The Board thanks Commissioner Edwards for compiling all 39 of the ANC's resolutions related to this matter in a comprehensive document for the Board's review. *See ABRA Protest File No. 10-PRO-00114, ANC 1D resolutions, 39 with 562 points linked to Don Juan case.*

54. ANC 1D stated that it has made 562 points that require a response from the Board. *See Board Order No. 2008-233, para. 51.* Nevertheless, the Board notes that many of the points raised by ANC 1D are not pertinent to the issues raised by the petitions. Indeed, many of ANC 1D's recommendations relate to policy, do not relate to appropriate protest issues, or are beyond the scope of the ABC laws. The Board will take ANC 1D's comments under advisement but for the purposes of this protest, the Board's response to any resolution or point not addressed in its Conclusions of Law is that the points raised are irrelevant to the issues presented to the Board and cannot factor into the Board's determination in this matter.

55. The Board notes that ANC 1D has submitted a number of resolutions and makes a number of points that relate to the protest issues placed before the Board. As such, the Board provides a response to ANC 1D's issues and concerns, which are related to the issues at hand, below:

56. On April 4, 2006, ANC 1D asked the Board to approve the Petitioner's request for karaoke. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution April 4, 2006.* ANC 1D also voted to support music and dancing in Mount Pleasant. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution April 4, 2006.* ANC 1D justified its position by arguing that the owner has a record of responding quickly to complaints and that any potential noise problems could be resolved under the District of Columbia's current noise regulations. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution April 4, 2006.* In response, the Board agrees with ANC 1D and notes that it has factored this information into its determination to grant the 2008 Petition.

57. On July 10, 2006, ANC 1D stated that many businesses in Mount Pleasant were losing revenue. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution July 10, 2006.* ANC 1D further argued that increasing the number of patrons would improve public safety in Mount Pleasant. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution July 10,*

2006. In response, the Board agrees with ANC 1D and notes that it has factored this information into its determination to grant the 2008 Petition.

58. On August 8, 2006, ANC 1D stated that it supported allowing the Petitioner to have its hours of operation to go until 2:00 a.m., Sunday through Thursday, and until 3:00 a.m., on Friday and Saturday. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution August 8, 2006.* In response, the Board notes that it considered ANC 1D's support of extended hours for the Petitioner in reaching its decision; however, the Petitioner must still abide by the terms of the Hear Mount Pleasant Voluntary Agreement.

59. On December 5, 2006, ANC 1D requested that the Board approve the Petitioner's request for an entertainment endorsement. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution December 5, 2006.* In response, the Board agrees with ANC 1D and notes that it has factored this information into its determination to grant the 2008 Petition.

60. On May 15, 2007, ANC 1D voted to protest an application submitted by the Petitioner. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution May 15, 2007.* In supporting its position, ANC 1D stated that property values had increased in Mount Pleasant. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution May 15, 2007.* Further, ANC 1D noted that more police were patrolling the neighborhood. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution May 15, 2007.* Also, contradicting its recommendation to approve the petitions and applications, ANC 1D complained that there were a number of nuisances effecting the neighborhood, including trash, noise, traffic, and vermin. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution May 15, 2007.* In response, the Board has factored this information into its determination but notes that ANC 1D does not provide evidence that the negative impacts cited in the ANC's resolutions are being caused by the Petitioner.

61. On June 5, 2007, ANC 1D recommended terminating the MPNA Voluntary Agreement. Furthermore, contradicting its recommendation to approve the petitions and applications, the ANC stated that it felt that the neighborhood was unsafe because of gangs. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution May 15, 2007.* ANC 1D also suggested that the lack of street activity in Mount Pleasant endangered the public. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution May 15, 2007.* In response, the Board notes that it agrees with ANC 1D's recommendation to terminate the MPNA Voluntary Agreement. The Board further agrees with ANC 1D that creating more activity in the streets will improve public safety. Finally, the Board notes that there is no evidence in the record that the gang activity mentioned by ANC 1D is attributable to the Petitioner and as such, is not a relevant consideration in this matter.

62. In the resolution passed on June 5, 2007, ANC 1D also challenged the MPNA's standing as a citizens association under D.C. Code § 25-601. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution June 5, 2007.* In response to ANC 1D's June 5 resolution, the Board recognizes that both the Petitioner and ANC 1D have repeatedly questioned the MPNA's standing as a citizens association. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution June 5, 2007.* However, the Board finds that the record does not provide sufficient evidence demonstrating that the MPNA is not a citizens association open to all residents. As such, the Board affirms its decision to grant the MPNA standing in this matter.

63. On July 11, 2007, ANC 1D passed a resolution requesting that the Board allow licensees with Retailer Class CR Licenses to terminate their old voluntary agreements. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution July 11, 2007.* ANC 1D stated that the neighborhood's property values were threatened by economic decline, the absence of people on the street could lead to violence and crime, and that the ANC is concerned about gang violence. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution July 11, 2007.* The Board notes that it has already addressed this concern in prior paragraphs.

64. On August 7, 2007, ANC 1D stated that it endorsed the Hear Mount Pleasant Voluntary Agreement. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution August 7, 2007.* The Board notes that it has factored the Hear Mount Pleasant Voluntary Agreement in its decision to approve the 2008 Petition.

65. On January 22, 2008, ANC 1D noted that property values in the neighborhood had tripled. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution January 22, 2008.* Furthermore, ANC 1D noted that the homeless population in Mount Pleasant had decreased because various homeless services had moved to Columbia Heights. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution January 22, 2008.* Finally, ANC 1D noted that more middle income residents had been moving into Mount Pleasant. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution January 22, 2008.* ANC 1D also noted that alcohol abuse issues in Mount Pleasant had decreased. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution January 22, 2008.* Finally, ANC 1D stated that there had been a 50 percent decrease in calls for service related to disorderly conduct in Mount Pleasant from 2000 to 2004. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution January 22, 2008.* The Board notes that it has factored this information into its decision to approve the 2008 Petition.

66. On February 5, 2008, ANC 1D stated that it supported the Hear Mount Pleasant Voluntary Agreement but believed that limitations on the Petitioner's license should expire after 1 year. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution February 5, 2008.* ANC 1D also supported allowing all forms of entertainment at the Petitioner's establishment. *ABRA Protest File No. 10-PRO-00114, ANC 1D Resolution February 5, 2008.* The Board notes that it factored this information into its decision to approve the 2008 Petition; however, the Board notes that the issue of terminating the Hear Mount Pleasant Voluntary Agreement was not presented to the Board by the Petitioner.

67. The Board further notes that after conducting additional hearings, the Board finds that the Board's prior decision in Board Order No. 2008-233 is flawed because it does not compare the impact on the neighborhood with the MPNA Voluntary Agreement versus the impact on the neighborhood with solely the Hear Mount Pleasant Voluntary Agreement in effect.

68. D.C. Code § 25-446(d)(4) states that:

The Board may approve a request by fewer than all parties to amend or terminate a voluntary agreement for good cause shown if it makes each of the following findings based upon sworn evidence:

- (A) (i) The applicant seeking the amendment has made a diligent effort to locate all other parties to the voluntary agreement; or
- (ii) If non-applicant parties are located, the applicant has made a good-faith attempt to negotiate a mutually acceptable amendment to the voluntary agreement;
- (B) The need for an amendment is either caused by circumstances beyond the control of the applicant or is due to a change in the neighborhood where the applicant's establishment is located; and
- (C) The amendment or termination will not have an adverse impact on the neighborhood where the establishment is located as determined under § 25-313 or § 25-314, if applicable. D.C. Code § 25-446(d)(4)(A)-(C) (Supp. 2011).

69. The Board is aware that it previously applied §§ 25-446(d)(4)(A)(i)-(ii) and 25-446(d)(4)(B) to petitions to terminate voluntary agreements. *See, e.g., Board Order Nos. 2008-189, 2008-190.* However, as a matter of statutory interpretation and public policy, the Board has decided to reverse its previous interpretation of § 25-446(d). As noted by the Court of Appeals, "stare decisis has traditionally been thought to be a principle of palpably less rigorous applicability in the field of administrative law" Springer v. District of Columbia Dept of Empl. Servs., 743 A.2d 1213, 1221 (D.C. 1999) *citing* FTC v. Crowther, 139 U.S. App. D.C. 137, 140, 430 F.2d 510, 513 (1970). Agencies have "the right to modify or even overrule an established precedent or approach, for an administrative agency concerned with the furtherance of the public interest is not bound to rigid adherence to its prior rulings." *Id. citing* Columbia Broadcasting System, Inc. v. FCC, 147 U.S. App. D.C. 175, 183, 454 F.2d 1018, 1026 (1971) (footnote omitted). However, the agency "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Id. citing* Watergate East, Inc. v. Public Service Comm'n, 665 A.2d 943, 947 (D.C. 1995) (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (1970), *cert. denied*, 402 U.S. 1007 (1971)). Consequently, an agency is entitled to alter its interpretation of its statutes and regulations so long as it provides "a reasoned analysis, so that the agency's path may reasonably be discerned." Watergate East, Inc., 665 A.2d at 947 *citing* Greater Boston Television Corp., 444 F.2d at 851; *see also* District of Columbia v. Am. Univ., 2 A.3d 175, 187 (D.C. 2010) *citing* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009).

70. In *Hank's Oyster Bar*, the Board determined that a petition to terminate a voluntary agreement only requires the petitioner to prove that removal of their voluntary agreement will not result in an adverse impact on their neighborhood under § 25-446(d)(4)(C). *Leeds the Way, LLC, t/a Hank's Oyster Bar, Board Order No. 2010-533, para. 49* (Nov. 3, 2008). The Board clearly explained, in writing, that it was relying on the plain language of § 25-446(d)(4) to conclude that petitioners, as a matter of law, do not have to satisfy §§ 25-446(d)(4)(A)(i)-(ii) and 25-446(d)(4)(B) to terminate their voluntary agreements. *See Board Order No. 2010-533.* Specifically, in *Hank's Oyster Bar*, the Board explained that § 25-446(d)(4) distinguished between petitioners who applied to amend their voluntary agreements versus those who applied to terminate their voluntary agreements. *Board Order No. 2010-533, para. 49.* The Board noted that neither §§ 25-446(d)(4)(A)(i)-(ii) and 25-446(d)(4)(B) mentions applicants who sought termination. *Board Order No. 2010-533, para. 49.* As a result, the Board provided a sound and reasoned basis for its decision. Indeed, based on the Board's reasoning in *Hank's Oyster Bar*, such a change was required

as a matter of law and public policy because the Board has a duty to apply the law as written by the D.C. Council. Accordingly, a petition to terminate a voluntary agreement does not require proof of good faith negotiations or a change in circumstances in the neighborhood under §§ 25-446(d)(4)(A) and 25-446(d)(4)(B) respectively. *Board Order No. 2010-533, para. 49.*

71. In Board Order No. 2008-233, the Board should only have considered whether terminating the MPNA Voluntary Agreement and replacing it with the Hear Mount Pleasant Voluntary Agreement would “have an adverse impact on the neighborhood where the establishment is located,” and consider the impact of the 2008 Petition on peace, order, and quiet, residential parking, and pedestrian safety. § 25-446(d)(4)(C); *see also* D.C. Code § 25-313 (Supp. 2011). However, Board Order No. 2008-233 does not discuss the specific terms of the MPNA Voluntary Agreement nor compare them to the terms of the Hear Mount Pleasant Voluntary Agreement. As a result, the Board improperly denied the 2008 Petition because it did not properly analyze whether the MPNA Voluntary Agreement actually prevents any adverse effects from the operation of the Petitioner’s establishment from impacting Mount Pleasant.

72. The Board finds that given the imposition of the Hear Mount Pleasant Voluntary Agreement, the termination of the MPNA Voluntary Agreement will not have an adverse impact on Mount Pleasant.

73. First, many of the provisions of the MPNA Voluntary Agreement merely repeat the current law. The Board notes that Item A, Item B, and parts of Item J in the MPNA Voluntary Agreement and Item B, Item E, Item F, Item G, parts of Item J, and Item L in the 2001 Addendum contain prohibitions that are already addressed in the ABC laws. *See* D.C. Code §§ 25-823 (punishes violations and mandates cooperation with ABRA investigators and MPD); 25-781 (prohibiting the sale of alcoholic beverages to minors, intoxicated persons, or individuals with intemperate habits); 25-765 (restricts the posting of signs to 25 percent of establishment’s available window space); and 25-741 (2001) (prohibits the sale of go-cups). Provisions in voluntary agreements that merely repeat the law provide no benefit to a neighborhood because they provide no additional protection.

74. Second, many provisions in the MPNA Voluntary Agreement are covered by the Hear Mount Pleasant Voluntary Agreement. The Board notes that Item F in the MPNA Voluntary Agreement and Items E, F, G, and H of the 2001 Addendum, which discuss trash and cleanliness at the Petitioner’s establishment do not differ significantly from Item 19 in the Hear Mount Pleasant Voluntary Agreement. The Board also notes that the provision in Item J, which requires the Petitioner to provide training to its staff, does not differ significantly from Item 17 in the Hear Mount Pleasant Voluntary Agreement. Further, Item 14 in the Hear Mount Pleasant Voluntary Agreement is much more specific and easier to enforce than Item H in the MPNA Voluntary Agreement, which does not indicate where or what types of signs the Petitioner should post in his establishment. Finally, the Board notes that Item K in the MPNA Voluntary Agreement does not differ in any significant fashion from Item 16 in the Hear Mount Pleasant Voluntary Agreement. Simply put, there will be no adverse impact to Mount Pleasant if the Board terminates provisions in the MPNA Voluntary Agreement that do not differ significantly from provisions in the Hear Mount Pleasant Voluntary Agreement, because such restrictions will still be attached to the Petitioner’s license.

75. Third, many of the provisions in the MPNA Voluntary Agreement appear vague and provide the Board with no enforcement guidelines. Provisions in voluntary agreements that are vague may not be enforced by the Board because they violate the Due Process Clause of the United States Constitution. *See* D.C. Code § 25-446 (2001); LCP, Inc. v. District of Columbia Alcoholic Beverage Control Bd., 499 A.2d 897, 901 (D.C. 1985). Before the Board can enforce a term in a voluntary agreement against a licensee the provision must provide a “person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Id.* (citation omitted).

76. Here, a number of provisions in the MPNA Voluntary Agreement are vague. The Board notes that Item G, which requires the Petitioner to use “reasonable means” to combat loitering, does not provide the Petitioner any guidelines on what behavior is and is not reasonable. Further, Item I, which requires the Petitioner to “continue” actions taken prior to executing the MPNA Voluntary Agreement, is ineffectual because the provision provides no guidance to the Petitioner as to what actions the establishment must take to “continue” the one-time actions referred to. The Board also finds that the phrase “work cooperatively” in Item J of the MPNA Voluntary Agreement provides no guidance to the Petitioner on how to comply with Item J as well.

77. Lastly, the Board finds that a number of provisions in the MPNA Voluntary Agreement are ineffectual and provide no protection against adverse impacts. For example, Item J of the MPNA Voluntary Agreement serve no purpose because there is no evidence that serving pitchers of alcoholic beverages has or will have a negative impact on Mount Pleasant. Consequently, the Board finds that any benefits to Mount Pleasant provided by the MPNA Voluntary Agreement are negligible.

78. The Board further finds that there is no evidence that problems in Mount Pleasant with public drunkenness, public urination, fighting, noise, and parking are attributable to the Petitioner. The Board’s determination of appropriateness must be based on “[t]he effect of the establishment” on the community. *See* § 25-313(b)(1)-(3) (2001) (emphasis added). The Board recognizes that some testimony indicated that there were problems in Mount Pleasant; however, the Board does not find such problems attributable to the Petitioner.

79. Indeed, the Board is not persuaded by the testimony of Ms. Caroline Lucas and Ms. Monica Rubio. Both Ms. Lucas and Ms. Rubio testified that they had witnessed intoxicated patrons emerge from the establishment, fighting, public urination, and drunkenness. *Tr.*, April 30, 2008 at para. 34-36. Nevertheless, the Board notes that Ms. Lucas admitted that she could not see the establishment from her home and only observes the establishment for a brief period of time when she walks home from the bus. *Board Order No. 2008-233, para. 34-36, 61-62.* The Board also finds that the testimony of the ABRA investigators who, in total visited the establishment over 43 times, contradicts the testimony of Ms. Lucas and Ms. Rubio because they did not observe any of the behavior that the MPNA’s witnesses complained of. *Board Order No. 2008-233, para. 3, 8.* Furthermore, based on the testimony of ANC Commissioner McKay, it is more likely that any problems experienced by Ms. Lucas and Ms. Rubio were the result of indigent individuals using nearby Lamont Park as a place to drink alcohol in public, which is not the fault of the Petitioner.

80. Furthermore, Ms. Lucas and Ms. Rubio's complaints regarding noise appear to be misplaced. Ms. Lucas and Ms. Rubio's testimony regarding noise is contradicted by the testimony of Mr. Turner, a sound expert, who concluded that any "booming base" sounds are not coming from the Petitioner's establishment. *Board Order No. 2008-233, para. 14*. Furthermore, the Board notes that the testimony of Mr. Goldstein and Ms. Treibitz that they are not disturbed by noise from the establishment contradicts the MPNA's evidence that the Petitioner is creating noise as well. *Tr.*, 11/11/10 at 56, 134. The Board also notes that the Petitioner has taken commercially reasonable steps to prevent noise leakage by installing thick windows, double doors, and changing its jukebox.

81. The Board also finds that the establishment is not having an adverse impact on residential parking and pedestrian safety. The evidence presented to the Board indicates that the majority of the Petitioner's customers walk, bike, or utilize public transportation. *Board Order No. 2008-233, para. 4; Tr.*, 11/11/10 at 252. As a result, the Board finds no evidence that the Petitioner's establishment is having an adverse impact on Mount Pleasant or will have an adverse impact if the MPNA Voluntary Agreement is terminated.

82. For the same reasons the Board terminated the MPNA Voluntary Agreement, the Board finds that it is in the best interest of the neighborhood to remove the restrictions imposed by the Board under § 25-104(e) and approve the 2008 Application. The Board finds that granting the Petition will not have an adverse impact on peace, order, quiet, residential parking, and pedestrian safety in the neighborhood. First, even though Mount Pleasant is a residential area, § 25-725, which prohibits licensees from generating noise that can be heard inside residentially zoned buildings, provides sufficient protection. D.C. Code § 25-725 (2001). Second, the community can still rely on the Hear Mount Pleasant Voluntary Agreement, which is still in effect even though the MPNA Voluntary Agreement and other restrictions will no longer be in force. Third, other ABC establishments in Mount Pleasant offer many types of entertainment late into the night and have not had an adverse effect on the community; making it unlikely that the Petitioner, if it follows the ABC laws, will have a negative impact on the community. Fourth, it is hard to imagine the Petitioner having an adverse impact on residential parking and traffic safety in the neighborhood when the Petitioner has already been open for business for many years and is maintaining its current hours of operation and the hours in which it sells, serves, or permits the consumption of alcoholic beverages on its premises. Thus, the Board finds that granting the 2008 Application is not a significant change and so long as the Petitioner follows the law, the Board anticipates no disturbance to the neighborhood.

83. Finally, the Board finds that restricting the Petitioner to only karaoke and roaming mariachis provides no additional protection to Mount Pleasant. Content restrictions on the types of entertainment an establishment may provide serve no purpose. Only time, place, and manner restrictions on entertainment have the potential to impact a neighborhood. Consequently, limiting the Petitioner to karaoke and roaming mariachi served no purpose and such restrictions should be removed. As indicated above, so long as the Petitioner follows the ABC laws, the Board anticipates no disturbance to the neighborhood.

84. Therefore, the Board grants the 2008 Petition.

85. Lastly, the Board also will briefly address a number of erroneous arguments made by the MPNA during the protest proceedings.

86. First, the MPNA appeared to argue that the Petitioner is limited to karaoke because its original application for entertainment only listed karaoke. This is incorrect. Under the regulations,

The licensee under a license, class C/R, D/R, C/H, D/H, C/T, or D/T, may file a written request with the Board to amend its entertainment endorsement subject to the procedures set forth in § 1001.3. *An amendment to an entertainment endorsement shall not be required for changes to an establishment's entertainment or dancing format if: (a) the licensee's entertainment endorsement is approved for entertainment or dancing; and (b) the change is not restricted by Board order or cooperative/voluntary agreement.* 23 DCMR § 1001.6 (2008) (emphasis added).

As a result, so long as the Petitioner acts in accordance with § 1001.6, the terms of the Hear Mount Pleasant Voluntary Agreement, and any applicable Board Order, the establishment is free to change the type and content of its entertainment at will.

87. Second, the Board rejects the MPNA's arguments that it should not give much credence to Hear Mount Pleasant because it is not a proper citizens association, like the MPNA. This argument simply has no basis in the law. The ABC laws treat groups of five or more individuals and community organizations differently for the purposes of standing. There is no other legal difference under the ABC laws. The Board will not discriminate against such groups, their evidence, or their voluntary agreements so long as they are properly before the Board. As a result, there is no reason for the Board to doubt the credibility of Hear Mount Pleasant or treat the Hear Mount Pleasant Voluntary Agreement any differently than the MPNA Voluntary Agreement.

88. Therefore, pursuant to §§ 25-313(a), 25-446(d)(4)(C), and 23 DCMR § 400.1(a), the Board grants the 2008 Petition and 2008 Application. The Board further removes the conditions on the establishment's entertainment endorsement as requested by the Petitioner.

89. Finally, the Board notes that the parties stipulated in 2008 to the renewal of the Petitioner's license. The Board did not receive any testimony opposing the Petitioner's license in 2008 or during the hearings conducted in 2010. As such, the Board has no reason to disturb its conclusion in 2008 that the Petitioner's license merited renewal.

ORDER

Therefore, it is hereby **ORDERED** on this 23rd day of March 2011, that the 2008 Petition to Terminate a Voluntary Agreement and Application for an Entertainment Endorsement filed by Don Juan Restaurant, Inc., t/a Don Juan Restaurant & Carryout (Petitioner), at premises 1660 Lamont Street, N.W., Washington, D.C., is hereby **GRANTED**. The Board **DISMISSES** the 2010 Petition to Terminate a Voluntary Agreement because it is rendered moot by the approval of the 2008 Petition. The Board also **APPROVES** the Petitioner's Application to Renew its Retailer's Class CR License.

The Board **VACATES** the Conclusions of Law and Order contained in Board Order No. 2008-233.

The Board **FURTHER ORDERS** that:

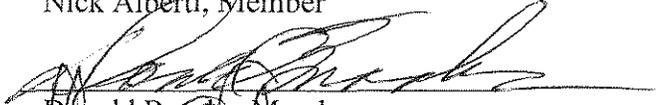
- (1) The Petitioner shall be permitted to offer all forms of entertainment in accordance with the law;
- (2) The Petitioner is permitted to impose a cover charge;
- (3) The Hear Mount Pleasant Voluntary Agreement shall be attached to the Petitioner's license; and
- (4) Copies of this Order shall be sent to the Petitioner, ANC 1D, and the Mount Pleasant Neighborhood Alliance.

District of Columbia
Alcoholic Beverage Control Board

Charles Brodsky, Chairperson



Nick Alberti, Member



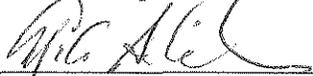
Donald Brooks, Member



Herman Jones, Member



Calvin Nophlin, Member



Mike Silverstein, Member

Pursuant to 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, 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, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 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).