

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

In the Matter of:)	
)	
Giant of Maryland, LLC)	License No.: 095376
t/a Giant #2379)	Case No.: 14-PRO-00060
)	Order No.: 2014-349
Application for a New)	
Retailer's Class DR License)	
at premises)	
3336 Wisconsin Avenue, N.W.)	
Washington, D.C. 20016)	

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

ALSO PRESENT: Giant of Maryland, LLC, t/a Giant #2379, Applicant

Stephen J. O'Brien, of the firm Mallios & O'Brien, on behalf of the Applicant

Carl A. Roller, on behalf of Advisory Neighborhood Commission (ANC) 3C, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DISMISSING ANC 3C AND CONSENT ORDER LIMITING APPLICANT'S HOURS

INTRODUCTION¹

This matter comes before the Alcoholic Beverage Control Board (Board) on the Application for a New Retailer's Class DR License (Application) filed by Giant of Maryland, LLC, t/a Giant #2379 (hereinafter "Applicant" or "Giant"). Notice of the Application was published in the District of Columbia (D.C.) Register on June 13, 2014. *ABRA Protest File No. 14-PRO-00021*, Notice of Public Hearing.

During the protest period, Advisory Neighborhood Commission (ANC) 3C voted to protest the Application and submitted a letter to ABRA designating ANC 3C Chair Carl Roller as the commission's designated representative. *ABRA Protest File No. 14-PRO-00060*, Protest of ABRA Application 095376 (Jul 23, 2014) [*ANC Letter*]. The Chair submitted a revised letter to the agency on July 28, 2014. *ABRA Protest File No. 14-PRO-00060*, Protest of ABRA Application 095376 (Revised) (Jul 23, 2014) [*Revised ANC Letter*].

The Board's Agent convened a Roll Call Hearing on August 11, 2014. During the hearing, ANC 3C was granted standing to protest the Application.

FINDINGS OF FACT

The Board makes the following findings:

- A. ANC 3C voted 5-3 to protest the Application for a Retailer's Class DR License at 3336 Wisconsin Avenue, N.W., on July 21, 2014. *ANC Letter*, 1. The minutes and resolution regarding this action were not available or published at the time the motion to dismiss was filed with the Board or as of the Protest Status Hearing, which occurred on September 10, 2014. *Motion to Dismiss Protest of Advisory Neighborhood Commission (ANC) 3C*, 1 n. 1 [*Mot.*].²
- B. ANC 3C Chair Carl Roller submitted a protest letter on July 23, 2014 and a revised letter on July 28, 2014. *ANC Letter*, 1; *Revised ANC Letter*, 1. The revised protest letter added concerns regarding intoxicated persons leaving the store or driving, as well as peppering the letter with references to the statutory language regarding appropriateness. *Compare ANC Letter*, 1-2 with *Revised ANC Letter*, 1-2.
- C. The parties do not dispute that the original protest letter accurately reflects the public deliberations, discussion, and vote held at the July 21, 2014 meeting. *Opposition to Applicant's Motion to Dismiss Protest of ANC3C*, 2 [*Opposition*]; *Reply to Opposition to Motion to Dismiss Protest of Advisory Neighborhood Commission (ANC) 3C*, 2. [*Reply*].

¹ The transcript of the September 10, 2014 hearing was not available at the time this Order was written.

² ANC 3C has not published its public meeting minutes or issued a resolution related to the Application at the time this Order was signed. ANC 3C, ANC 3C Monthly Meeting Minutes, *available at* <http://anc3c.org/documents/meeting-minutes/> (last visited Sept. 22, 2014); ANC 3C, ANC 3C Resolution and Letters, *available at* <http://anc3c.org/documents/resolutions-letters/> (last visited Sept. 22, 2014).

MOTION TO DISMISS

Subsequently, Giant file motion to dismiss on the grounds that ANC 3C failed to state a proper objection to the license. *Motion to Dismiss Protest of Advisory Neighborhood Commission (ANC) 3C [Mot.]*. The Board convened a motions hearing on September 10, 2014.

Giant argues that ANC 3C failed to properly state an issue under the appropriateness test found in D.C. Official Code § 25-313. *Mot.*, at 2. Although ANC 3C submitted a revised letter, the new letter exceeded the authorization to protest the Application voted upon at the ANC meeting on July 21, 2014. *Id.*; *Reply*, 2. Giant argues that the July 28, 2014, letter filed by the Chair of the ANC failed to comply with obligations to conduct official actions at a public meeting; therefore, Giant requests that the Board dismiss the protest. *Mot.*, at 2

ANC 3C responds that the revised letter should be considered in accordance with the Chair's authority as a designated representative. *Opposition to Applicant's Motion to Dismiss Protest of ANC3C*, 1 [*Opposition*]. The Chair admits that the July 28, 2014, letter was written from "... his memory of the deliberations of the public meeting ...". *Id.* at 2.

CONCLUSIONS OF LAW

1. The Board dismisses the protest of ANC 3C, because the Board does not accept the amended protest letter and its letter of July 23, 2014 fails raise a proper objection under D.C. Official Code §§ 25-313, 25-315, and 23 DCMR § 400.1.

I. THE FAILURE OF ANC 3C TO ISSUE MINUTES AND A RESOLUTION PERMIT THE BOARD TO MAKE A NEGATIVE INFERENCE THAT THE REVISED LETTER DOES NOT REFLECT THE OFFICIAL POSITION OF THE ANC.

2. ANCs are entitled to protest applications in accordance with Title 25 of the D.C. Official Code. D.C. Official Code §§ 1-309.10(c)(2)(B).³ Under § 1-309.10(d)(1), "[t]he recommendations of the Commission, if any, shall be in writing and articulate the basis for its decision." D.C. Official Code § 1-309.10(d)(1). Section 1-207.42(a) requires that all resolutions and other official action be made at a public meeting. D.C. Official Code §§ 1-207.42(a); 1-309.11(g). Further, "[a] written transcript or a transcription shall be kept for all such meetings and shall be made available to the public during normal business hours of the District government." D.C. Official Code § 1-207.42(b).

3. The failure of a government body to follow its statutes, regulations, and procedures may permit the finder of fact to draw a negative inference. *Wheeler v. United States*, 930 A.2d 232, 239 (D.C. 2007). Further, it has also been said that "[p]roof of the absence of records that would ordinarily exist if a particular event had occurred gives rise to a legitimate negative inference that the event did not occur." 29A Am. Jur. 2d Evidence § 1370.

³ This section refers to D.C. Official Code §§ 25-115, which has been recodified in a different portion of Title 25 of the D.C. Official Code.

4. As of the date of this Order, ANC 3C has not issued or submitted minutes or a resolution related to the meeting, decision to protest the Application that occurred on July 21, 2014. *Supra*, at ¶ A. Under the ANC governing statute, ANCs may only take official actions, such as authorizing protests, during a public meeting. Further, the ANC, to date, has not presented the Board with a resolution voted upon by a majority of the ANC at a publicly noticed meeting that authorized the Chair to exceed the scope of the initial protest authorization. Because the motion to dismiss effectively places the subject matter of the resolution and the minutes in dispute, any minutes or resolution produced by the ANC after the filing of the motion to dismiss would be created in “anticipation of litigation,” which would raise serious doubts regarding their potential credibility. *Evans-Reid v. D.C.*, 930 A.2d 930, 944 n. 21 (D.C. 2007). Therefore, based on the lack of the minutes and resolution—documents that an ANC are required to produce as a matter of law—the Board makes a negative inference that the revised protest letter submitted on July 28, 2014, does not reflect the views of the ANC expressed at the public meeting and must be excluded.

5. Therefore, the only protest letter before the Board is the July 23, 2014 letter, which both parties agree represents the views of the ANC. *Supra*, at C.

II. ANC 3C’S PROTEST LETTER FAILS TO RAISE A VALID OBJECTION UNDER § 25-313.

6. In determining whether a protestant stated a proper claim, the Board “. . . 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).

7. Under D.C. Official Code § 25-313, an applicant bears the burden of demonstrating the establishment will not have a negative impact on a neighborhood’s “peace, order, and quiet”; “real property values”; “residential parking needs”; and “vehicular and pedestrian safety.” D.C. Official Code § 25-313(a)-(b).

8. Under § 1605.2,

All protests shall be in writing, shall be received by the Board prior to the end of the protest period, and shall state, as grounds for the protest, why the matter being objected to is inappropriate under one (1) or more of the appropriateness standards set out in D.C. Official Code §§ 25-313 and 25-314 and § 400 of this title.

23 DCMR § 1605.2. The Board’s interpretation of § 1605.2 is that a protestant does not have to specifically state any of the statutory factors found in § 25-313, but rather, merely allege negative impacts or harms that fall or may reasonably be interpreted to fall under a specific factor listed in D.C. Official Code §§ 25-313 and 25-314 or 23 DCMR § 400. In this case, ANC 3C did not specifically cite any of the statutory factors or allege an impact that falls under the criteria.

9. First, in paragraph 2 of its letter, ANC 3C objects to the Application, because serving alcohol at a supermarket and permitting consumption all over the premises is not a practice allegedly occurring within Ward 2 and Ward 3. *ANC Letter*, 1. Furthermore, ANC 3C states that it did not have sufficient “. . . time to inform residents nor evaluate the full impact of the proposal.” *Id.* Even if true, these facts do not relate to “peace, order, and quiet”; “real property values”; “residential parking needs”; and “vehicular and pedestrian safety.” § 25-313(a)-(b); *see generally* 23 DCMR § 400.1. Therefore, ANC 3C fails to raise a proper objection under the appropriateness test in paragraph 2 of its letter.

10. Second, in paragraph 3, ANC 3C states that it objects to “. . . supermarket shoppers walking the aisles of the store while drinking an alcoholic beverage next to families accompanied by minors or next to recovering alcoholics.” *ANC Letter*, 1. In *All Souls*, the Board previously rejected the assertion that the mere sight of alcohol is harmful to children. *In re All Souls, LLC, t/a All Souls*, Case No. 11-PRO-00090, Board Order No. 2012-278, ¶ 36 (D.C.A.B.C.B. Jun. 20, 2012). In light of *All Souls*, the Board finds that a harm based on children or other individuals seeing alcohol does not constitute a harmful impact; therefore, the Board finds that, even if true, these facts do not relate to “peace, order, and quiet”; “real property values”; “residential parking needs”; and “vehicular and pedestrian safety.” § 25-313(a)-(b). Thus, ANC 3C fails to raise a proper objection under the appropriateness test in paragraph 3 of its letter.

11. Third, in paragraph 3, ANC 3C further argued that the Applicant could be selling up to two glasses of wine or beer per consumer and that all employees may not be trained. *ANC Letter*, 1. ANC 3C then stated that Giant refused to accept its proposed resolutions to these concerns. *Id.* at 2. The Board holds that an applicant’s failure to agree to a proposed settlement is not sufficient grounds under the appropriateness test when it is not connected to an effect on the neighborhood. Therefore, ANC 3C fails to raise a proper objection under the appropriateness test in paragraph 3 of its letter.

12. Fourth, in paragraph 5, ANC 3C states that it objects to the establishment’s proposed hours of operation; specifically, beginning the sale, service, and consumption of alcoholic beverages before 11:00 a.m. and after 10:00 p.m. *ANC Letter*, at 2. Here, Applicant agreed to begin service no later than 11:00 a.m.; therefore, Giant’s morning hours are no longer in controversy based on the information provided by the ANC. *Mot.*, at 3. In regard to the request for later hours, ANC 3C fails to articulate any harm or effect on the neighborhood should the request be granted. Consequently, because paragraph 5 is a bare request for limited hours without connection to an effect on the neighborhood, the Board cannot find that the ANC raised a proper issue under the appropriateness test.

13. The Board further notes that the ANC did not allege any claims under § 25-314 (e.g., proximity to schools and similar facilities and their clientele, undue attraction of children, overconcentration, etc.). D.C. Official Code § 25-314(a)(1)-(4).

14. Under § 25-602(a), a party seeking standing as a protestant must inform the Board of the grounds of the protest and file within the protest period. D.C. Official Code § 25-602(a).

Because ANC 3C failed to file a letter containing valid objections to the Application, the Board dismisses the protest for failing to file a proper protest.

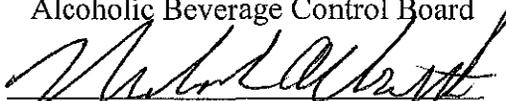
ORDER

Therefore, based on the foregoing, the Board, on this 24th day of September 2014, **GRANTS** the Applicant's motion to dismiss ANC 3C.

IS FURTHER ORDERED that Giant has consented to limit its hours of sale, service, and consumption of alcoholic beverages in footnote 3 of its Motion to Dismiss Protest of Advisory Neighborhood Commission 3C. The establishment's hours of sale, service, and consumption of alcoholic beverages shall not begin until 11:00 a.m., seven days per week, as a condition of licensure under D.C. Official Code §§ 25-104(e) and 25-724.

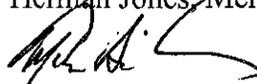
ABRA shall deliver copies of this Order to the Applicant and ANC 3C.

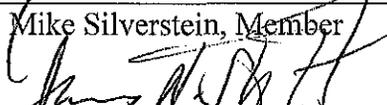
District of Columbia
Alcoholic Beverage Control Board


Nick Alberti, Member


Donald Brooks, Member

Herman Jones, Member


Mike Silverstein, Member


James Short, Member

We concur with the Majority's position set forth in Part I of the Order and dissent in part from the Majority's position set forth in Part II of the Order.

We concur with the Majority that a protestant need not cite the "magic words" set forth in the statute to bring a protest, but that the protestant state adverse impacts that may reasonably be interpreted to fall under D.C. Official Code § 25-313(a)-(b).

Our regulations require at § 1605.2 that

All protests shall be in writing, shall be received by the Board prior to the end of the protest period, and shall state, as grounds for the protest, why the matter being objected to is inappropriate under one (1) or more of the appropriateness standards set out in D.C. Official Code §§ 25-313 and 25-314 and § 400 of this title.

As the Majority states, [i]n determining whether a protestant stated a proper claim, the Board ". . . 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). Accordingly, in the protest letter, the protestant is not required to present a full case, but to articulate a harm, even an inferred one, under one of the grounds set forth in D.C. Official Code §§ 25-313 and 25-314 and § 400 of this title.

The concerns of ANC 3C, admittedly, are not as clear or specifically articulated in the July 23, 2014, letter as might be desired. However, based on the statements set forth therein as well as the representations made at the motions hearing, it appears that the ANC has concerns regarding the impact of shoppers drinking alcohol in the aisles upon families, minors, and recovering alcoholics. In our view these concerns do go to peace, order and quiet.

This case is one of first impression before this Board. This would be the first case to protest the impact of a fairly new phenomenon in a few supermarkets in this city of drinking in supermarket aisles. We find this case distinguishable from *All Souls*, relied on by the majority. That case involved the mere sight of individuals drinking in a tavern, which children and other passersby had no need to enter or use for any unrelated business.

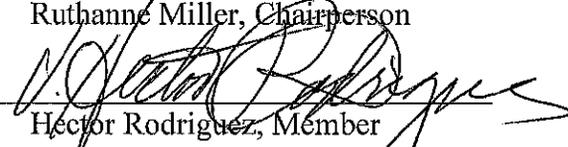
In this case, the Giant supermarket is located in a family neighborhood that will most likely will be frequented by families. Unlike in *All Souls*., families and children will have a distinct purpose to frequent the establishment separate from drinking. We also find this different from a restaurant where serving and drinking alcohol is a normal occurrence.

The ANC apparently seeks, among other measures, a restriction on hours in which such drinking will occur to carve out some period of time when families and others may supermarket without such drinking in the aisles. While the ANC's case is not fully flushed out, we are of the view that they have articulated concerns of adverse impact on peace, order and quiet, not only in the supermarket, such as exposure to minors, but also beyond, such as driving accidents mentioned at the hearing.

Accordingly, in construing the letter in the light most favorable to the protestant pursuant to the case law mentioned above, we would deny the motion to dismiss and allow the Protest to go forward.



Ruthanne Miller, Chairperson



Hector Rodriguez, Member

Pursuant to 23 DCMR § 1719.1 (April 2004), 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 (April 2004) 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).