THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
M & A Hospitality, LLC t/a Cork Wine Bar & Market	Case No.: License No.:	18-PRO-00006 107308
Application for Substantial Change to a Retailer's Class CR License	Order No.:	2018-372
at premises 1805 14th Street, N.W. Washington, D.C. 20009		

BEFORE: Donovan Anderson, Chairperson
Nick Alberti, Member
Mike Silverstein, Member
James Short, Member
Donald Isaac, Sr., Member
Bobby Cato, Member
Rema Wahabzadah, Member

ALSO PRESENT: M & A Hospitality, LLC, t/a Cork Wine Bar & Market, Applicant

Sidon Yohannes, Esq., Counsel, on behalf of the Applicant

Katie Lane Chaverri, Esq., Counsel, on behalf of A Group of Five or More Residents or Property Owners, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING PROTESTANT'S MOTION FOR RECONSIDERATION

On May 2, 2018, the Alcoholic Beverage Control Board accepted and approved the Settlement Agreement submitted by Advisory Neighborhood Commission (ANC) 1B and M & A Hospitality, LLC, t/a Cork Wine Bar & Market (Cork). *In re M & A Hospitality, LLC, t/a Cork Wine Bar and Market*, Case No. 18-PRO-00006, Board Order No. 2018-256, 2 (D.C.A.B.C.B. May 2, 2018). Based on this action, the Board dismissed the protest of a group of residents and property owners (Protestant) under D.C. Official Code § 25-609(b), which requires the dismissal

of all protests filed by groups when the Board approves a settlement agreement between an applicant and "an affected ANC." *Id.* at 2.

In its motion that makes many claims and provides few citations, the Protestant requests that the Board vacate the Order dismissing its protest, give the Protestant standing, deny the Settlement Agreement, or modify the trash provisions of the Settlement Agreement. *Mot. for Recon.*, at 1, 13.[1] As grounds for reinstatement, the Protestant argues that § 25-609 only applies in situations where the ANC is a protestant, and, in conclusory fashion, argues that the Board's interpretation is unconstitutional under the right to be heard, an aspect of the Due Process Clause. *Id.* at ¶¶ 15, 23. The Protestant also makes various arguments and claims, including (1) that the conclusory opinion of the Director of Community Engagement with the Office of the Attorney General for the District of Columbia (OAG) supports the Protestant's interpretation, *id.* at ¶¶ 24-27; (2) that a "Protest Roadmap" guide published by ABRA does not describe the present situation and that dismissing the protest under § 25-609(b) violates the Protestant's right to notice, *id.* at ¶¶ 28-30; (3) that the Board's interpretation is so fundamentally unfair that the Council of the District of Columbia could not have intended such a result, *id.* at ¶¶ 31-32; and (4) that the Board should not have approved the trash provisions of the Settlement Agreement because they are illegal and ambiguous and Cork has committed violations related to trash and public space based on a citation issued by the Department of Public Works, *id.* at ¶¶ 33-42.

In response, Cork requests that the Board deny the motion. *Cork Response*, at 6. Cork notes that the Board's interpretation of § 25-609(b) follows the Board's administrative precedent and the plain language of the statute. *Id.* at 2. Cork also argues that the statement made by an official with OAG on the matter does not constitute an official opinion of OAG. *Id.* at 3. Moreover, the "Protest Roadmap," cited by the Protestant, is merely informational and irrelevant to the present matter. *Id.* As to the Settlement Agreement, Cork argues that language of the agreement makes it clear that compliance with the provision is contingent on the contemplated action being "allowed by applicable law." *Id.* at 4. On the matter of alleged violations, Cork argues that under *Kopff* the Board lacks jurisdiction to adjudicate the claim. *Id. citing Kopff v. D.C. Alcoholic Beverage Control Bd.*, 413 A.2d 152, 154 (D.C. 1980). Finally, Cork argues that the result in this case is fair because elected ANCs "represent the whole community." *Id.* at 5.

The Board denies the motion for several reasons. First, the plain language and publicly announced, consistent, and longstanding administrative precedent of the Board regarding § 25-609(b) requires dismissal in this case. *Infra* at ¶¶ 8-14. Second, the Board's interpretation does not contradict the legislative purpose expressed by the Council in enacting § 25-609(b) and the subsequent amendment to that statute. *Infra* at ¶¶ 15-14. Third, in accordance with the *Chevron* test, even if § 25-609(b) were deemed ambiguous and subject to conflicting interpretation, the Board would reach the same conclusion. *Infra* at ¶¶ 9, 30. Fourth, the limits on statutory standing provided by the Council cannot be challenged in this forum on constitutional grounds; nevertheless, such a challenge fails because limits on statutory standing are a legitimate exercise of legislative power. *Infra* at ¶¶ 31-34. Fifth, the opinion of the Director of Community Engagement with OAG carries no weight in this matter or otherwise represents the formal

[1] The Board noticed the absence of relevant citations, references to legal authority, or analogous cases at various points in the Protestant's motion to support its legal conclusions and proposed remedies. *Mot. for Recon.* at ¶¶ 23-27, 30-32, 38, 42.

opinion of OAG. *Infra* at ¶¶ 35-37. Sixth, the Protestant cannot claim lack of notice based on the alleged lack of information in an educational guide produced by ABRA; especially, when existing law and precedent provides notice of the possibility of dismissal. *Infra* at ¶ 38. Seventh, the alleged public space and trash violations have no relevance to a determination under § 25-609(b). *Infra* at ¶ 39. Eighth, the Protestant lacks standing to challenge the Settlement Agreement. *Infra* at ¶ 40. Therefore, for these reasons, and as explained below, the Board affirms its prior Order.

FINDINGS OF FACT

The Board's decision relies on the following factual findings:

I. Facts Related to ANC 1B's Protest of Cork.

1. The Protestant, which was granted standing as a group under D.C. Official Code § 25-601(2), and Advisory Neighborhood Commission (ANC) 1B filed protests against the Application for a Substantial Change filed by M & A Hospitality, LLC, t/a Cork Wine Bar & Market (Cork). *In re M & A Hospitality, LLC, t/a Cork Wine Bar & Market*, Case No. 18-PRO-00006, Board Order No. 2018-049, 1 (D.C.A.B.C.B. Feb. 7, 2018). The Board dismissed the protest of ANC 1B because the ANC failed to appear. *Id.* at 2. ANC 1B did not file for reinstatement.

II. Facts Related to the Settlement Agreement.

2. On May 2, 2018, the Board accepted and approved the Settlement Agreement between Advisory Neighborhood Commission (ANC) 1B and M & A Hospitality, LLC, t/a Cork Wine Bar & Market (Cork). *In re M & A Hospitality, LLC, t/a Cork Wine Bar and Market*, Case No. 18-PRO-00006, Board Order No. 2018-256, 2 (D.C.A.B.C.B. May 2, 2018). The agreement itself is signed by Diane L. Gross, on behalf of Cork, and Commissioner Anita Norman and Chair James A. Turner on behalf of ANC 1B. *Id.* at 5.

3. Section 3 of the agreement, titled "Trash on Premises," requires Cork

> to use all commercially reasonable efforts to house all trash and recycling on public space in a locked and covered structure, *if allowed by applicable law*, so as to not be visible and to prevent rodents. [Cork] agrees to have trash and recycling picked up six times a week.

Id. at 4 (See § 3) (unbolded) (emphasis added).

III. Facts Related to the Protestant's Motion for Reconsideration.

4. ANC 1B has not filed a response to the Motion for Reconsideration. Nevertheless, the Protestant's Motion for Reconsideration only indicates that Cork's Counsel was formally served with the motion. *Mot. for Recon.*, at 15 (Certificate of Service).

IV. Facts Related to the Opinion of OAG.

5. On April 3, 2018, Joan Sterling requested an opinion from the Director of Community Engagement, a part of the Office of the Attorney General. *Protestant's Exhibit No. 10.* The email requested that OAG interpret § 25-609 and argued that the statute only triggered the dismissal of a group when an ANC was a protestant. *Id.*

6. In response, on April 13, 2018, the Director stated, in conclusory fashion, that "The office has reviewed your email and agrees with your interpretation." *Id.* Nevertheless, no letter or memorandum under the signature of the Attorney General memorializing and explaining the Attorney General's views has been issued. There is also no indication that ABRA or the Board has sought formal or informal guidance on the interpretation of § 25-609(b) from the Attorney General or any other office under the Attorney General.

CONCLUSIONS OF LAW

7. The Board denies the Protestant's motion for several reasons.

I. The Plain Language of § 25-609(b) Requires Dismissal in this Case.

8. Section § 25-609(b) provides that

> In the event that 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 . . . meeting the requirements of § 25-601(2). The Board shall not dismiss a protest filed by another affected ANC, a citizens association, or an abutting property owner meeting the requirements of § 25-601(3) upon the Board's approval of an ANC's settlement agreement submission.

D.C. Code § 25-609(b).[2]

9. An agency's interpretation of a statute is governed by the two-part *Chevron* test. *Pannell-Pringle v. D.C. Dep't of Employment Servs.*, 806 A.2d 209, 211 (D.C. 2002) *citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The threshold question under *Chevron* is whether the statute is clear. *Id. citing Columbia Realty Venture v. District of Columbia Rental Housing Comm'n,* 590 A.2d 1043, 1046 (D.C.1991). If so, then under *Chevron* the plain language of the statute governs its interpretation. *Id.* If not, the agency must simply provide a "reasonable" or permissible interpretation of the ambiguous statute to have its interpretation upheld. *Id. citing Chevron*, 467 U.S. at 842-43; *infra* at ¶ 30.

10. In interpreting a statute, the "words of [a] statute should be construed according to their ordinary sense and with the meaning commonly attributed to them." *Dist. of Columbia v. Cato Inst.*, 829 A.2d 237, 240 (D.C. 2003) (quotation marks removed). Moreover, "The primary and

[2] Section 25-601(2) gives standing to groups of five or more residents and property owners sharing common grounds to protest various types of liquor license applications. D.C. Code § 25-601(2).

general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he [or she] has used." *Dist. of Columbia v. Reid*, 104 A.3d 859, 867 (D.C. 2014).

11. On its face, § 25-609(b) requires the Board to dismiss the protest of any group if the Board approves a settlement agreement filed by "an affected ANC" and the applicant targeted by the group's protest. § 25-609(b). There is no express language in § 25-609(b) requiring that the affected ANC be a protestant, and no language within § 25-609(b) can be read to infer that the ANC must be protestant. In light of this clear language, the dismissal of the Protestant-group's protest was required when the Board approved ANC 1B and Cork's settlement agreement. *Supra* at ¶¶ 1, 2.

a. The Board's current interpretation represents the publicly announced, consistent, and longstanding interpretation of the Board.

12. The Protestant's proposed interpretation goes against the longstanding practice and interpretation of the Board, and has been argued, considered, and rejected in this forum on at least two occasions.[3]

13. In *Macon*, decided on April 10, 2014, the ANC, not participating as a protestant, and Macon, the applicant, requested the dismissal of a group based on the submission and approval of a settlement agreement with an ANC, which the Board granted. *In re Macon DC, LLC, t/a Macon DC*, Case No. 14-PRO-00017, Board Order No. 2014-124, 2 (D.C.A.B.C.B. Apr. 10, 2014). The group argued that § 25-609(b) only applied when the ANC was a protestant. *Id.* In response, the Board explained that the ANC and Macon had the right to enter into an agreement, even though the ANC was not a protestant. *Id. citing Kingman Park Civic Association v. D.C. Alcoholic Beverage Control Board*, No. 11-AA-831, 4, 6 (D.C. 2012). The Board further rejected the group's argument that the legislative history supported its position because "the motivation of the legislature that enacted it . . . is of no concern" when "the statute is clear . . . ." *Id.* at 4 *citing Burgess v. United States*, 681 A.2d 1090, 1095 (D.C. 1996). Further, the Board did not find the legislative history cited by the group persuasive, because the legislative history only discussed the scenario of an ANC protesting an application and later filing a settlement agreement. *Id.* It did not expressly address a scenario where the ANC was not a protestant or supported the application. *Id.* Consequently, the Board reasoned that the Council simply did not consider a scenario where an ANC supported an application. *Id.* The Board also rejected the group's argument because it would require the Board to rewrite § 25-609(b).[4] Finally, the Board rejected the group's interpretation because the Board believed such an interpretation "would . . . encourage ANCs to file bogus protests against applications they support in order to" obtain dismissal. *Id.* at 4 n. 5.

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[3] *Johnson v. Dist. of Columbia Dept. of Employment Services*, 111 A.3d 9, 11 (D.C. 2015) (saying "[c]onsistent and longstanding agency interpretations . . . merit the most deference").

[4] *In re Macon DC, LLC, t/a Macon DC*, Case No. 14-PRO-00017, Board Order No. 2014-124, 2 (D.C.A.B.C.B. Apr. 10, 2014) ("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)").

14. The Board again reached the same conclusion in *Calico* on January 31, 2018. *In re Alley Cats Hospitality, LLC, t/a Calico*, Case No. 17-PRO-00084, Board Order No. 2018-038, 1-2 (D.C.A.B.C.B. Jan. 31, 2018). In *Calico*, in response to the group's statutory language argument, the Board interpreted the phrase "a protested license application" in § 25-609(b) as referring "to any type of protest without reference to the identity of the filer" and did not signify that the ANC must be a protestant to trigger § 25-609(b). *In re Alley Cats Hospitality, LLC, t/a Calico*, Board Order No. 2018-038, at 2. As a result, the Board's current interpretation has been in effect and consistently relied upon since 2014.

b. The legislative history of § 25-609(b) does not contradict the Board's current interpretation.

15. In considering the Protestant's motion, the Board also reviewed the legislative history surrounding § 25-609(b).

16. Section 25-446(a) states that "the applicant and any protestant may, at any time, negotiate a settlement and enter into a written voluntary agreement." D.C. Code § 25-446. The Board has interpreted § 25-446 "broadly to include potential protestants, now and in the future, and not just protestants protesting the current application." *Kingman Park Civic Association v. D.C. Alcoholic Bev. Control Bd.*, 11-AA-831, 6 (D.C. 2012). In *Kingman Park,* issued in 2012, the court found this interpretation "reasonabl[e]" and affirmed the Board's interpretation. *Id.*

17. In 2013, § 25-609(b) was first added to Title 25 of the D.C. Official Code by the *Omnibus Alcoholic Beverage Regulation Amendment Act of 2012,* which sought, in part, "to clarify the impact of a settlement agreement submitted by an affected ANC when a protest of a license application is pending . . . ." *Omnibus Alcoholic Beverage Regulation Amendment Act of 2012*, D.C. Act 19-678, 2 (effective May 1, 2013).[5] The first version of § 25-609(b) did not include the reference to abutting property owners in the current law. *Id.* (See page 11 of the Enrolled Original).

18. The 2012 Committee Report discussing the act indicated that the new subsection altered the protest process by "requir[ing] that when a protest is filed by a group . . . and an ANC protests the same license, the protest of the group . . . will be dismissed if the ABC Board approves a voluntary agreement between the ANC and the licensee." D.C. Council, *Report on B19-824, the "Omnibus Alcoholic Beverage Regulation Amendment Act of 2012,"* Committee on Human Services, 23 (Nov. 8, 2012).[6] At the time, various ANC members and other witnesses discussed "the provision that dismisses protestant groups when an ANC successfully signs a [settlement agreement.]" *Id.* at 5-6, 8-10, 12-13, 15-17. The report does not indicate that the commentators thought that the provision only triggered when the ANC was a protestant. Furthermore, the report does not expressly address the scenario where the applicant and an affected ANC enter into a settlement agreement, but the ANC has not filed a protest.

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[5] *Also available at* http://lims.dccouncil.us/Download/26580/B19-0824-SignedAct.pdf (last visited May 16, 2018).

[6] *Also available at* http://lims.dccouncil.us/Download/26580/B19-0824-CommitteeReport1.pdf (last visited May 16, 2018).

19. In 2014, after the enactment of § 25-609(b), in *Macon*, the Board clearly and publicly announced its interpretation of § 25-609(b) that the statute is still triggered when the ANC submits a settlement agreement but does not participate as a protestant. *Supra* at ¶ 13.

20. In 2015, § 25-609(b) was amended by the *Omnibus Alcoholic Beverage Regulation Amendment Act of 2014*, which created the current version of the law. *Omnibus Alcoholic Beverage Regulation Amendment Act of 2014*, D.C. Act 20-609, § 2 (effective May 2, 2015) (See page 5 of the Enrolled Original).[7] The 2014 Act was introduced on July 9, 2014, and enacted on January 26, 2015.[8]

21. According to the 2014 Committee Report, the purpose of the amendment is allow "an abutting property owner" to "maintain" his or her "standing in a protest hearing even after an [affected] advisory neighborhood commission . . . settlement agreement is approved . . ." by the Board. D.C. Council, *Report on B20-902, the "Omnibus Alcoholic Beverage Regulation Amendment Act of 2014,"* Committee on Business, Consumer, and Regulatory Affairs, 1, 12 (Nov. 17, 2014). The report does not indicate that the statute only triggers when the ANC is a protestant or indicate that the Council disapproved of the Board's interpretation announced in *Macon*.

22. In light of this legislative history, two canons of construction lend support to Board's current interpretation. First, as the Supreme Court noted in *Barr*, when the legislature "has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators." *Barr v. United States*, 324 U.S. 83, 90 (1945). Second, under the ratification cannon, the legislature "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

23. As noted in *Macon*, the legislative history related to § 25-609(b) shows that the Council never expressly addressed or considered the scenario where an ANC reached an agreement with an applicant, but was not a protestant. *In re Macon DC, LLC, t/a Macon DC*, Board Order No. 2014-124 at 4.[9] Under these circumstances, the Board must apply the law as written, which, under its plain language, fairly includes situations where an affected ANC submits a settlement agreement with the applicant, but the ANC is not a protestant.

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[7] *Also available at* http://lims.dccouncil.us/Download/32303/B20-0902-SignedAct.pdf (May 16, 2018).

[8] Council of the District of Columbia, *B20-0902 Omnibus Alcoholic Beverage Regulation Amendment Act of 2014*, Bill History, Legislative Information Management System, *http://lims.dccouncil.us/Legislation/B20-0902?FromSearchResults=true* (last visited May 17, 2018).

[9] In searching prior Board's Orders for similar situations, the Board found only *Macon* and *Calico* where § 25-609(b) was triggered by a non-protestant. The Board notes that other cases may exist, but they are difficult to find because the fact that ANC was or was not a protestant would not likely have been mentioned or deemed relevant unless the matter was specifically raised by a party, as in *Macon* and *Calico*.

24. Moreover, in light of *Kingman Park* and the underlying administrative case that lead to the appeal, it must be presumed that the Council knew that the Board was accepting settlement agreements from non-protestants when it enacted § 25-609(b). Furthermore, it must also be presumed that the Council was aware of the Board's decision in *Macon* when it amended § 25-609(b) in 2015 without expressing disapproval of the Board's decision, or otherwise amending the portion of the law causing the dismissal of the Protestant in this case.[10] In light of these considerations, the legislative history of § 25-609(b) further encourages the Board to maintain its current interpretation of the statute.

II. The Protestant Fails to Provide a Compelling Reason to Depart From the Plain Language of § 25-609(b) and Current Precedent.

25. As noted above, the Protestant asks the Board not to apply § 25-609(b) in cases where the ANC is not a protestant but submits a settlement agreement. The Protestant argues that this interpretation is compelled because the phrase "Whether the ANC participates as a protestant" appears in § 25-609(a), but not § 25-609(b). *Mot. for Recon.* at ¶ 23. Nevertheless, this strained and unnatural interpretation of the statute is not persuasive.

26. Section 25-609(a) states

> The affected ANC shall notify the Board in writing of its recommendations, if any, and serve a copy upon the applicant or licensee, not less than 7 calendar days before the date of the hearing. Whether the ANC participates as a protestant, the Board shall give great weight to the ANC recommendations as required by subchapter V of Chapter 3 of Title 1 . . . .

D.C. Code § 25-609(a).

27. The Protestant's proposed interpretation is strained, unnatural, and improper for several reasons. First, § 25-609(a) discusses the application of the great weight requirement, while § 25-609(b) discusses dismissal of protest groups; as a result, the two subsections are not discussing the same topic. Under these circumstances, there is no reason to use language from one to interpret the other. Second, the phrase highlighted by the Protestant merely ensures that there is no conflict or confusion with "subchapter V of Chapter 3 of Title 1," which governs agency relations with ANCs and serves no other purpose. Third, nothing in the phrases "an affected ANC" or "a protested license application" found in § 25-609(b) suggests to the reader that the ANC has to be a protestant.[11] Fourth, the Protestant fails to provide or cite any legislative

[10] *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 381 (1969) (saying administrative "construction of a statute . . . should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction").

[11] In *Ratzlaf*, the Court indicated that "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). For example, in Title 25, the term "affected ANC" does not, in and of itself, refer to an ANC engaged in a protest. In § 25-447(a), "an affected ANC" is authorized to submit a complaint to the Board requesting an enforcement action. D.C. Code § 25-447. Nothing in § 25-447(a) expressly or implicitly indicates that the ANC must file a protest or be a protestant to utilize the provision. In light of the Court's reasoning in *Ratzlaf*, it would be odd for the phrase "an affected ANC" to mean one thing in § 25-447, but another in § 25-609.

history that shows the Council intended to adopt its proposed interpretation of § 25-609(b). Consequently, the Protestant has not presented the Board with any compelling reasoning to depart from the plain language of § 25-609 or the Board's precedent. *Dist. of Columbia v. Cato Inst.*, 829 A.2d 237, 240 (D.C. 2003) (saying that one should only depart from the plain language when there are "persuasive reasons" for doing so).

a. The Board's interpretation represents good public policy.

28. As to the matter of fairness raised by the Protestant, the Board notes that its decision in this case represents good public policy. First and foremost, as an administrative agency, the Board has a responsibility to generally "adhere to its precedents in adjudicating cases before it." *Jicarilla Apache Nation v. U.S. Dept. of Interior*, 613 F.3d 1112, 1119–20 (D.C. Cir. 2010). Failing to adhere to long standing precedent risks subjecting litigants to arbitrary and capricious rules, and such actions will likely not receive deference if reviewed by a court. *Mallof v. Dist. of Columbia Alcoholic Beverage Control Bd.*, 43 A.3d 916, 923 (D.C. 2012). Indeed, reversing the interpretation would prejudice ANCs and licensees across the District that have reasonably relied on the Board's decision in *Macon* and *Calico*, and call into question the validity of prior settlement agreements based on their mistaken understanding of the law.

29. Additionally, the Board's current interpretation is beneficial in other respects. For example, the present interpretation encourages the settlement of disputes before the formal filing of a protest, which reduces the burden on litigants to file documents and make appearances. It also dissuades ANCs from misrepresenting their concerns regarding appropriateness or filing bogus protests just to obtain standing for the sole purpose of dismissing a group.[12] Moreover, requiring ANCs to file and maintain a protest to trigger § 25-609(b) creates unnecessary ministerial requirements that have no publicly beneficial purpose. Finally, it would be unfair and discriminatory to interpret the law in a manner that favors ANCs that oppose an application over those ANCs that support an application. Consequently, the Board finds no persuasive reason to depart from the current interpretation of § 25-609(b).

III. Even if Deemed Ambiguous, the Board's Current Interpretation of § 25-609(b) is Permissible.

30. Above, the Board found the plain language of § 25-609(b) definitive. Nevertheless, even if the statute were deemed ambiguous, the Board would reach the same conclusion. In *Defenders of Wildlife*, the Court indicated that if the statutory language at issue "is silent or ambiguous . . . the question . . . . is whether the agency's [interpretation] is based on a permissible construction of the statute." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 646 (2007). As previously noted, the Board's current interpretation complies with the express language of the statute and does not contradict any express purpose stated in the

[12] An ANC cannot file a protest for the sole purpose of negotiating a settlement agreement; therefore, it would have to concoct reason to protest in order to remain a protestant if the ANC supported the application. *In re Giant of Maryland, LLC, t/a Giant #2379, Case No. 14-PRO-00060, Board Order No. 2014-349,* § 11 (D.C.A.B.C.B. Sept. 24, 2014) (dismissing ANC because solely protesting to achieve a settlement agreement does not sufficiently state a claim).

legislative history. Therefore, even if the statute were deemed ambiguous, the Board has the right to maintain its present interpretation.

IV. The Limits on Statutory Standing in § 25-609(b) are Constitutional.

31. Besides raising an issue of statutory interpretation, the Protestant's motion asks the Board to ignore the plain language of § 25-609(b) because the statute allegedly violates the Due Process Clause. *Mot. for Recon.*, at ¶ 23. Even if the Protestant had provided any citation to authority for this interpretation of the Due Process Clause, the argument is unavailing.

32. Simply put, as an administrative agency, the Board cannot overturn a duly enacted statute on constitutional grounds. *See Motor & Equip. Mfrs. Ass'n, Inc. v. E.P.A.*, 627 F.2d 1095, 1115 (D.C. Cir. 1979) ("It is generally considered that the constitutionality of Congressional enactments is beyond the jurisdiction of administrative agencies"). Nevertheless, the Board is confident that § 25-609(b) passes constitutional muster.

33. As § 25-601 makes clear, the right to protest is not available to everyone. § 25-601. As a statutory standing provision, § 25-601 determines whether this or any protestant may maintain a protest under Title 25 of the D.C Official Code. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n. 2 (1998).[13] In examining statutory standing provisions, the Supreme Court of Michigan noted that

> Although the Legislature cannot *expand* beyond constitutional limits the class of persons who possess standing, the Legislature may permissibly *limit* the class of persons who may challenge a statutory violation. That is, a party that has constitutional standing may be precluded from enforcing a statutory provision, if the Legislature so provides.

Miller v. Allstate Ins. Co., 481 Mich. 601, 607 (M.I. 2008). Consequently, if a party lacks statutory standing, the party "cannot bring *any* action in reaction to the alleged legal violation." *Id.* at 609.

34. In light of this legislative discretion, the Council could have provided no one with the right to protest an application, eliminated the group standing provision entirely, or provided every individual with standing to protest. The Council also could have required groups of ten, groups of one hundred, or whatever number the Council deemed appropriate. Further, in creating the right the protest, as long as the conditions are not otherwise unlawful, the Council is entitled to create whatever preconditions for protesting it deems appropriate. In light of this inherent authority, § 25-609(b) represents a legitimate exercise of the Council of the District of Columbia's power to limit the authority to protest an application.

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[13] It should be noted that Title 25 provides an administrative forum to resolve disputes between certain classes of persons and licensed establishments. Even if the administrative forum provided by Title 25 is unavailable, nothing in Title 25 appears to prevent anyone from seeking redress from the courts in the form of a civil lawsuit to resolve nuisance, trespass, or other claims arising from the operation of a licensed establishment. *See, e.g.*, D.C. Code § 25-805(a).

V. The Individual Opinion of a OAG Employee Has No Impact on the Present Case.

35. The Protestant further argues that the Board should defer to the conclusory opinion of the Director of Community Engagement with OAG. Nevertheless, the opinion of the Director is not binding or persuasive on the matter at issue in this case, nor has the Protestant presented any authority for deferring to that opinion.

36. In the District of Columbia, "The Attorney General shall have the power to control litigation and appeals, as well as the power to intervene in legal proceedings on behalf of this public interest." D.C. Code § 1-301.81(a)(1). The Attorney General is further empowered to "furnish opinions in writing to the Mayor and the Council whenever requested to do so." D.C. Code § 1-301.81(a)(2). Unless the OAG has radically altered its policies, the formal opinion of the OAG should be contained in a formal letter, properly titled, signed by the Attorney General, and "addressed to the government official requesting . . . guidance." *U.S. Parole Comm'n v. Noble*, 693 A.2d 1084, 1099 (D.C. 1997), *adhered to on reh'g en banc,* 711 A.2d 85 (D.C. 1998).[14] Indeed, in *Noble*, the court found it doubtful that a letter "not requested by or directed to a District of Columbia officer or employee," lacking the proper title, and unsigned could constitute a formal opinion. *Id.* Moreover, the court cautioned in *Noble*, that in "a matter of pure law" the opinions of the Attorney General "are not valid legal authority," and cannot ignore the plain language of a statute." *Id.* at 1100, 1102.

37. In this case, the alleged opinion does not have any of the features of a formal opinion identified in *Noble*. The opinion does not explain the reasoning or show consideration or knowledge of the plain language, administrative precedent, legislative history, and other factors relevant to interpreting § 25-609(b). Furthermore, the opinion was not requested by ABRA or the Board, OAG has not sought to intervene in this case, and OAG did not voluntarily or independently submit the letter to the Board. As a result, the Director's email provided by the Protestant is not binding or persuasive, and carries no weight in this matter

VI. The Protestant Cannot Claim Lack of Notice of the Law Based on an Informal Guide Produced by ABRA.

38. The Protestant's claim that it suffered a constitutional violation for lack of notice based on an educational guide's failure to describe the possibility of dismissal under § 25-609(b) is without merit. The enactment of § 25-609(b), and the Board's decisions in *Macon* and *Calico* provide adequate notice and fair warning to the public of current law and the risk of dismissal. Moreover, educational documents are not statements of the law and do not create legal rights. Therefore, any claim of lack of notice, estoppel, or reasonable reliance is not supported by the record.

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[14] The "Office of the Corporation Counsel" was "re-designated as the Office of the Attorney General for the District of Columbia and the "Corporation Counsel of the District of Columbia" was changed to the "Attorney General for the District of Columbia." *2004-92, Re-Designation of the Office of the Corporation Counsel as the Office of the Attorney General*, Mayor's Order 2004-92, 51 D.C.Reg. 6052, §1 (June 11, 2004). As a result, prior rulings related to the Office of the Corporation Counsel generally apply to the current Office of the Attorney General.

VII. The Alleged Trash and Public Space Violations Are Not Relevant.

39. The Protestant raises the issue of alleged trash and public space violations committed by Cork. The Board notes that none of these alleged violations relate to the Board's determination under § 25-609(b); therefore, these claims are irrelevant and have no bearing on the Protestant's standing.

VIII. The Protestant Lacks Standing to Object to the Settlement Agreement.

40. In this forum, it is a longstanding rule that non-parties to a settlement agreement lack standing to challenge the Board's approval of an agreement. *In re Macon DC, LLC, t/a Macon*, Board Order No. 2014-124, 5 n. 6 *citing Kingman Park Civic Association v. Alcoholic Bev. Control Bd.*, No. 11-AA-831 at 7.

a. Section 3 of the Settlement Agreement is Not Illegal or Ambiguous.

41. Even if the agreement were subject to challenge, the Protestant's argument that § 3 of the Settlement Agreement is illegal and ambiguous is not persuasive or well-reasoned. According to § 3, the provision regarding public space and trash is conditioned on being "allowed by applicable law." *Supra* at ¶ 3. As a result, even if the provision did require an illegal action, the language indicates that the parties contemplated this possibility in drafting the provision and provided Cork with an adequate workaround. Moreover, even if it could be considered a viable legal argument, the Protestant cannot argue that the first sentence of § 3 is ambiguous based on the heading, as it is obvious that the heading "Trash on Premises" refers generally to the topic of trash generated by the business. *Mot. for Recon.*, at 12; *see also RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 121 (T.X. 2015) ("titles and headings are not determinative, and when they are inconsistent with the plain meaning of the provision's operative language, we afford greater weight to the operative language"). It should also be noted that even if the first sentence of § 3 were deemed wholly illegal or unenforceable, § 3's mandate to provide trash and recycling pick up six times per week would remain in effect. Consequently, the Board finds no reason to disturb the Settlement Agreement.

b. The forced modification or nullification of the Settlement Agreement requested by the Protestant would violate the Contract Clause of the U.S. Constitution.

42. In this case, the Protestant also requests that the Board forcibly modify the Settlement Agreement without the permission of the parties. *Mot. for Recon.*, at 13. The Protestant points to no authority in Title 25 of the D.C. Official Code or Title 23 of the D.C. Municipal Regulations that allows this type of action.

43. According to § 1-203.02, "the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and . . . subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States." D.C. Code § 1-203.02. Under, the Contract Clause of the United States Constitution, "[n]o State shall ... pass any ... Law impairing

the Obligation of Contracts . . . ." U.S. CONST. ART. I, § 10, cl. 1. In a 2008 memorandum, the Attorney General noted that the Board "has always viewed [settlement agreements] . . . as contractual in nature." *Legal Opinion on Inaugural Celebration Extension of Hours and Voluntary Agreements*, 3-4 (AL-08-868 A) (MID 244473) (Dec. 18, 2008). The Attorney General further indicated in an opinion requested by ABRA that settlement agreements are protected by the Contract Clause. *Id.* at 4.

44. In *Kansas Power and Light Co.*, the Supreme Court indicated that a state law may violate the Contract Clause when state law operates "as a substantial impairment of a contractual relationship." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). According to the Court, "If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation." *Id.* at 412. In *Blaisdell*, the Court further explained that "The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 431(1934). Finally, the law impairing a contract cannot be "for the mere advantage of particular individuals." *Donohue v. Paterson*, 715 F. Supp. 2d 306, 320 (N.D.N.Y. May 28, 2010) *citing id.* at 445.

45. In this case, even if the Board were inclined to modify or vacate the agreement, such action would be barred by the Contract Clause. Specifically, from the perspective of either ANC 1B or Cork, the Protestant's requested action would substantially impair the Settlement Agreement by extinguishing or modifying the agreement. Furthermore, modifying or vacating the agreement would not be in the interest of the public at large, but at the request and to the advantage of this particular Protestant as part of an individual contested case. Under these circumstances, granting the Protestant's request would result in a gross violation of the Contract Clause, and must be denied for this, and the above mentioned reasons.[15]

IX. Even Under the Protestant's Interpretation, the Result Would Not Change Based on ANC 1B's Initial Filing of a Protest.

46. As noted above, ANC 1B actually filed a protest in this matter but was dismissed for failing to appear. *Supra* at ¶ 1. In light of this fact, even under the Protestant's interpretation of § 25-609(b), its protest merits dismissal because the ANC filed a protest and entered into a settlement agreement. While the Protestant may argue that the ANC's dismissal negates the effect of § 25-609(b), nothing in the phrase "protested license application" or anything else in the subsection indicates that it forbids application to ANC protests dismissed on procedural grounds. As a result, even if the Board adopted the Protestant's interpretation, its protest would still be subject to dismissal.

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[15] The Board notes that this reasoning does not apply to the settlement agreement amendment and termination provision found at § 25-446(d), which was in existence at the time the parties entered into the agreement and applies to all settlement agreements generally, rather than an individual settlement agreement. D.C. Code § 25-446(d); *W. End Tenants Ass'n v. George Washington Univ.*, 640 A.2d 718, 733 (D.C. 1994) (saying Contract Clause not a complete bar to legislative alterations); *Legal Opinion on Inaugural Celebration Extension of Hours and Voluntary Agreements*, 4 (AL-08-868 A) (MID 244473 (Dec. 18, 2008) (saying the Council "may not use the Bill to change the requirements" of an "existing Agreement," but not discussing future agreements).

ORDER

Therefore, the Board, on this 6th day of June 2018, **DENIES** the Motion for Reconsideration. The ABRA shall deliver copies of this Order to the parties.

District of Columbia
Alcoholic Beverage Control Board

Donovan Anderson, Chairperson

Nick Alberti, Member

Mike Silverstein, Member

James Short, Member

Donald Isaac, Sr., Member

Bobby Cato, Member

Rema Wahabzadah, Member

Pursuant to D.C. Official Code § 25-433(d)(1), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, Reeves Center, 2000 14th Street, NW, 400S, Washington, D.C. 20009.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 430 E Street, N.W., Washington, D.C. 20001; (202-879-1010). However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. *See* D.C. App. Rule 15(b) (2004).