THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
Brilliant, LLC t/a Flash	Case No.: License No.:	19-PRO-00126 ABRA-096176
Application to Renew a Retailer's Class CT License	Order No.:	2020-098
at premises 645 Florida Avenue, N.W. Washington, D.C. 20001		

BEFORE: Donovan Anderson, Chairperson
James Short, Member
Bobby Cato, Member
Rema Wahabzadah, Member
Rafi Aliya Crockett, Member
Jeni Hansen, Member

ALSO PRESENT: Brilliant, LLC, t/a Flash, Applicant

Sidon Yohannes, Counsel, on behalf of the Applicant

James A. Turner, Commissioner, on behalf of Advisory Neighborhood Commission (ANC) 1B, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING APPLICANT'S MOTION TO DISMISS

The Alcoholic Beverage Control Board (Board) received an Application to Renew the Retailer's Class CT License (Application) held by Brilliant, LLC, t/a Flash (hereinafter, "Applicant" or "Flash"). The Application was timely protested by Advisory Neighborhood Commission (ANC) 1B through the submission of a protest petition (Petition). The Petition indicates that the ANC's objection is "based on the effect on real property values; the effect on peace, order, and quiet, including the noise and litter provisions; and the effect upon residential parking needs and vehicular and pedestrian safety[.]" *Letter from James A. Turner, Chair, ANC*

1B, to the Alcoholic Beverage Regulation Administration (Nov. 7, 2019). No other basis for the protest is provided in the letter. *Id.*

On February 3, 2020, Flash filed a motion arguing that ANC 1B's Petition fails to provide specific and sufficient notice of the basis of the protest under 23 DCMR § 1602.2 because it merely recites appropriateness standards found in the law at D.C. Official Code § 25-313 and 23 DCMR § 400. *Mot. to Dismiss*, at 3. Flash avers that no other basis for the protest has been provided through other means, such as through complaints sent to the ownership or at the Roll Call proceeding on December 9, 2019. *Id.* at 2.[1] Flash further argues, based on the alleged lack of notice, that continuing the protest violates its constitutional right to due process and notice under the District of Columbia Administrative Procedure Act. *Id.* at 4-5. Finally, Flash argues that ANC 1B should not be permitted to amend or supplement their protest in accordance with Board precedent. *Id.* at 6-7.

The ANC opposes the motion in a letter dated February 6, 2020. *Letter from James Turner, Chair, Advisory Neighborhood Commission (ANC) 1B, to the Alcoholic Beverage Control Board*, 1 (Feb. 6, 2020) [*ANC Response*]. As part of its motion, the ANC submitted various emails complaining about "excessive noise" related to the club that show email complaints regarding "excessive noise" being sent to the Applicant. *Id.* at 5 (Patroski emails sent 1/1/19). The ANC further indicates that guidance on ABRA's website states that protestants should indicate that the protest is based on at least one appropriateness standard and does not state that further explanation is required. *Id.* at 2. Finally, the ANC argues that the Applicant is attempting to shift discovery to the initial protest filing. *Id.*

The Board notes that the Board's current and long standing administrative practice is to accept protest petitions that merely recite one of the appropriateness grounds without requiring any detailed or specific reasons for raising the selected grounds. If the Board adopted Flash's position, it would likely result in the dismissal of a number of petitions if amendments are not permitted.

Nevertheless, Flash's argument is unpersuasive; therefore, the motion is denied. First, the Petition filed by ANC 1B meets the minimum standards provided by D.C. Official Code § 25-602(a) and 23 DCMR § 1602.2. Second, the claim that ANC 1B failed to provide notice of its issues and concerns is not ripe for consideration, as this can only be determined after the submission of the protest information form and protest report. Third, the Board's regulations and precedent do not prohibit the submission of additional information and explanation further specifying an appropriateness ground provided in that party's protest petition. As a result, dismissing the ANC is unwarranted at this time.[2]

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[1] The response filed by the ANC appears to put the accuracy and credibility of the affidavit into doubt. Specifically, section 4 of the affidavit executed by Afshin Mottaghi states "During the last three and half years, and since the license was last renewed, we have received no complaints either from ANC 1B or anyone else concerning the operation of the business. *Affidavit of Afshin Mottaghi in Support of Motion to Dismiss*, 1 (undated). Nevertheless, in the ANC response, the ANC submits emails from 2017 and 2019 sent to an account that appears to be controlled by Flash that complains about excessive noise from Flash. *ANC Response*, at 10, 13 (Email from Patroski Lawson sent 6/25/17 and 1/1/19).

I. Standard of Review

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 Giant of Maryland, LLC, t/a Giant #2379*, Case No. 14-PRO-00060, Board Order No. 2014-349, ¶ 6 (D.C.A.B.C.B. Sept. 24, 2014) *citing In re Estate of Curseen,* 890 A.2d 191, 193 (D.C. 2006). Thus, the Board "must construe the [Petition] in the light most favorable to the [protestant]." *Id. citing Haymon* v. *Wilkerson,* 535 A.2d 880, 882 (D.C.1987). In that vein, when the Petition refers to the "effect" on various appropriateness factors the Board infers that the ANC means a negative effect; especially, in light of the complaints included with its opposition to the motion.

II. The ANC's Petition is Sufficient Under D.C. Official Code § 25-602(a) and 23 DCMR § 1602.2.

The Petition filed by ANC 1B meets the minimum standards provided by D.C. Official Code § 25-602(a) and 23 DCMR § 1602.2 as a matter of law, interpretation, and agency practice. Section 25-601 provides specific parties, including advisory neighborhood commissions, with the right to protest various types of liquor license applications. D.C. Code § 25-601. Section 25-602(a) provides that "Any person objecting, under § 25-601, to the approval of an application shall notify the Board in writing of his or her intention to object and the grounds for the objection within the protest period." § 25-602(a). Section 1602.2 further provides that "All protests . . . 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 § 1602.2 (West Supp. 2020).

The ANC's Petition raised the impact of the Application on peace, order, and quiet and real property values. Under Title 25 of the D.C. Official Code, the grounds of peace, order, and quiet are described in § 25-313(b) as "all relevant evidence of record, including: . . . "The effect of the establishment on peace, order, and quiet, including the noise and litter provisions set forth in §§ 25-725 and 25-726[.]" D.C. Code § 25-313(b)(2). Section 400.1 further explains this factor by stating that in "establishing the appropriateness of the establishment . . . the applicant shall present to the Board such evidence and argument as would lead a reasonable person to conclude the following: . . . The establishment will not interfere with the peace, order, and quiet of the relevant area, considering such elements as noise, rowdiness, loitering, litter, and criminal activity[.]" 23 DCMR § 400.1(a) (West Supp. 2020). In describing the real property factor, § 400.1(d) states that the Board will consider the establishment's "adverse impact on real property values in the locality, section, or portion of the District of Columbia" where the establishment is located. 23 DCMR § 400.1(d).

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[2] The parties have not addressed whether the Board could waive 23 DCMR § 1602.2 in accordance with 23 DCMR § 1600.2 (West Supp. 2020). Nevertheless, the Board does not address this issue at this time based on its denial of the motion.

In describing the filing requirements to initiate a protest, § 1800.1 provides that "Protest Petitions filed pursuant to D.C. Official Code § 25-601 may be received by the Board regarding objections to licenses." 23 DCMR § 1800.1 (West Supp. 2020).[3] Section 1800.2(b) indicates that the petition may be filed to indicate whether the signatories believe, or do not believe, that the establishment is appropriate under the provisions of D.C. Official Code §§ 25-313 and 25-314, and § 400 of this title." 23 DCMR § 1800.2(b) (West Supp. 2020). Finally, § 1801.2(e) mandates that the protest petition should include "A brief summary of the reasons for support of or opposition to the granting of the license; *provided, that participation in Board proceedings shall not be limited by this summary.*" 23 DCMR § 1801.2(e) (emphasis added).

The Board is not aware of a prior Board decision indicating whether it is sufficient to merely state the appropriateness ground at issue in a manner similar or the same as provided in § 25-313 or § 400.1 without additional explanation of the reasons for selecting those grounds or detailed explanation of the negative impact of the application. Related decisions by the Board indicate that the Board will dismiss protest petitions that fail to list any appropriateness grounds whatsoever. *In re Communal Restaurant, LLC, t/a Communal Restaurant*, Case No. 18-PRO-00059, Board Order No. 2018-529, 1 (D.C.A.B.C.B. Sept. 12, 2018). Nevertheless, a protestant that fails to state a specific appropriateness ground "but . . . merely alleges 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" may be found to have adequately satisfied § 26-602(a). *In re Giant of Maryland, LLC, t/a Giant #2379*, Board Order No. 2014-349 at ¶ 8. The Board has also stated that protestants have an obligation to notify the applicant "of all of the grounds on which they intend to protest the license," and that the failure to do so may prohibit the presentation of evidence on unlistes issued and lead the Board to deeming the matter uncontested. *In re Trump Old Post Office, LLC, t/a Trump International Hotel Washington DC*, Case No. 19-PRO-00036, Board Order No. 2019-467, ¶ 6 (D.C.A.B.C.B. Jun. 12, 2019) *citing In re Watergate Hotel Lessee, LLC, t/a Watergate Hotel*, Case No. 13-PRO-00005, Board Order No. 2013-293, 17 (D.C.A.B.C.B. Jul 24, 2019) *and Craig v. Dist. of Columbia Alcoholic Beverage Control Bd.*, 721 A.2d 584, 590 (D.C. 1998).

In turning to the question at issue, the Board is persuaded that § 25-602(a) and § 1602.2 are satisfied if a protestant generally indicates an impact on one of the appropriateness grounds found in Title 25 without specificity. As a matter of statutory interpretation, merely listing an appropriateness ground is sufficient because such a statement identifies the "grounds" for the objection, which satisfies § 25-602(a). A petition containing only a conclusory statement that the application is inappropriate without details or explanation is also legally sufficient to satisfy the requirement under § 1602.2 that the petition state "why the matter being objected to is inappropriate" under one of the appropriateness standards. While it would not win an award for specifics, merely stating that the application will have an "effect" or "negative effect"—as the

[3] Title 23 of the D.C. Municipal Regulations does not explain the difference between a "protest" when referring to the filing that initiates a protest; "protest letter"; and "protest petition." *See e.g.*, 23 DCMR § 1612.1 (West Supp. 2020) ("Whenever any objection is filed to any of the licensing actions set out in § 1602.1, whether by protest or by submission of Protest Petitions . . . ."). The Board considers the term "protest"; "protest letters"; and "protest petitions" to mean and refer to the same thing in Title 23 of the D.C. Municipal Regulations and subject to the same requirements. *Compare* 23 DCMR § 1612.1 (West Supp. 2020) (referring to the initial filing as "by protest"); 23 DCMR §§ 1602.4, 1606.4 (referring to protest letters) *with* 23 DCMR §§ 1605.3, 1612.1, 1705.5, 1800, 1801 (West Supp. 2020) (referring to protest petitions).

ANC has done in its Petition—is a responsive answer to the "why" question or statement posed by § 1602.2. As a result, accepting the Petition does not violate the terms set by the language used in § 25-602(a) and § 1602.2.

Moreover, "[s]tatutory interpretation is a holistic endeavor, and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *Dist. of Columbia v. Reid*, 104 A.3d 859, 868 (D.C. 2014) *citing Baltimore v. District of Columbia,* 10 A.3d 1141, 1146 (D.C. 2011). A holistic interpretation, if done properly, requires a review of the "statute as a whole" in order to ascertain whether other parts of the law "inform" the interpretation of the statute or regulation at issue. *Id.*

When looking at Title 25 as a whole, the law presumes that the issues and evidence related to a specific appropriateness ground will be further described at a later point in the protest process. First, as noted above, § 25-602(a) only requires the identification of the grounds at issue and contains no language requiring particularity in order to initiate a protest. Second, § 1801.2(e) states plainly that protest petitions are not limited by the summary of their issues.[4] Third, § 1722 mandates the disclosure of all remaining issues and evidence before the hearing. In light of these provisions, the Board does not interpret § 1602.2 as requiring more specificity or particularity in a protest petition than providing as a basis for the protest a negative impact on the appropriateness factors referenced in Title 25. Therefore, for these reasons, the Petition filed by the ANC satisfies § 25-602(a) and 23 DCMR § 1602.2.

Finally, it should be noted that Flash's claim that the ANC merely repeats the legal appropriateness standard in the law is dubious. Based on the ANC's filing, at a minimum, it can be reasonably inferred that the ANC intends to argue that Flash does not operate in compliance with the District's noise and trash laws. As a result, even if more specific notice is legally required, the ANC appears to have met that standard.

III. Flash's Claim of Lack of Notice is Not Ripe.

The Board also withholds judgment on the issue of lack of notice at this time. The legal doctrine of ripeness permits an adjudicatory body to withhold judgement regarding a claim "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Local 36 Int'l Ass'n of Firefighters v. Rubin*, 999 A.2d 891, 897 (D.C. 2010) *citing Atl. States Legal Found. v. E.P.A.*, 325 F.3d 281, 284 (D.C. Cir. 2003).

It is not disputed that as a matter of constitutional law Flash has a right to "due process of law" and that "due process" requires "adequate notice" of the matters at issue. U.S. Const. amend. V; *Chiapella v. Dist. of Columbia Bd. of Zoning Adjustment*, 954 A.2d 996, 1004 (D.C. 2008) *citing Pub. Serv. Comm'n of Kentucky v. F.E.R.C.*, 397 F.3d 1004, 1012 (D.C. Cir. 2005).

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[4] The Board notes that dismissing a party because they failed to cite any appropriateness standard, as in *Communal Restaurant*, is appropriate because the party failed to meet the minimum "brief summary" required by § 1801.2(e). *In re Communal Restaurant, LLC, t/a Communal Restaurant*, Case No. 18-PRO-00059, Board Order No. 2018-529, 1 (D.C.A.B.C.B. Sept. 12, 2018). If the issue were raised, the Board would find that merely stating that the application will have an "effect" or "negative effect" satisfies the "brief summary" requirement found at § 1801.2(e).

While "adequate notice" is a constitutional right, there is no requirement that it be provided immediately or in a specific form; instead, notice may take many forms including both written notice and oral notice. *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (saying notice by "letter" and "personal conference" sufficient).

It is also not disputed as a matter of statutory law that § 2-509(a) of the District of Columbia Administrative Procedure Act (DCAPA) requires

> In any contested case, all parties . . . shall be given reasonable notice of the afforded hearing . . . . The notice shall state the . . . issues involved, but if, by reason of the nature of the proceeding, the Mayor or the agency determines that the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto. D.C. Code § 2-509(a).

In this case, as in all protest cases, the parties will have an opportunity for specific notice of the other party's case-in-chief upon receipt of the protest report and protest information form before the protest hearing, which satisfies the notice requirement contained in § 2-509(a) and all relevant constitutional requirements regarding notice.

As noted in § 1612.4, the Board has the power to call its own witnesses. 23 DCMR § 1612.4 (West Supp. 2020). In practice, the Board assigns an investigator to provide basic information about the application and obtain statements about the case from the parties if possible. While not required, as a matter of practice, this investigation leads to the issuance of a standard report, called a protest report, related to the application and the protest. As a result, the report, which is provided to the parties before the hearing, may give the parties notice of the other side's issues and concerns if reported by the Board's investigator.

Furthermore, § 1722 requires parties to serve a protest information form on all other parties at least seven days prior to the protest hearing. 23 DCMR § 1722.7 (West Supp. 2020); *see also Goldberg v. Kelly*, 397 U.S. at 268 (1970) (refrained from holding that a seven day notice period was insufficient as a matter of constitutional law). The form requires disclosure of "[u]nresolved issues that remain the subject of the protest hearing"; "[w]itnesses"; evidentiary exhibits and copies of the exhibits themselves; and a statement of the "relief sought." 23 DCMR § 1722.2 (West. Supp. 2020). It should be further noted that after the service deadline the Board has the discretion to allow additional documents, exhibits, and witnesses for "good cause." 23 DCMR §§ 1722.5, 1722.6 (West Supp. 2020). Finally, if the parties require more time to prepare, obtain evidence, hire an expert witness, or schedule an expert, they have the opportunity to request a continuance. D.C. Code § 25-441; 23 DCMR §§ 1705 (West Supp. 2020).[5] As a result, the protest information form will potentially provide complete notice of one party's issues and concerns to the other side so long as completed properly. And even if there is something

[5] The Board notes that the plain language of § 25-441(a) allows for oral motions to continue a proceeding on the day of the proceeding but § 1705 requires the filing of a written motion for continuance six days before the hearing. D.C. Code § 25-441(a). Nevertheless, the requirement for a written motion to continue could be waived by the Board under § 1700.2 for "good cause" and in the "interest of justice." 23 DCMR § 1700.2 (West Supp. 2020).

surprising or unpredictable in one party's protest information form or the protest report, there are remedies in the statute and regulations that allow for additional time to add evidence and case preparation if warranted.

As a result, even if the Petition in this case provides inadequate notice, ANC 1B still has further opportunity to provide more specific notice through the auspices of the protest information form and other documents provided before the hearing.[6] Therefore, issuing a decision on the issue of adequate notice would be premature, which renders the issue not ripe for consideration at this time.

IV. While Parties May Not Submit New Protest Grounds After the Protest Deadline, the Provision of Additional Information or Explanation of Properly Raised Protest Grounds is Permitted Under 23 DCMR § 1722.

In support for denying the ANC an opportunity to further specify its protest, the Applicant cites the Board's decision in *Communal Restaurant* and *Rito Loco*. In *Communal Restaurant*, the Board dismissed the protestant in that case where they failed to state any specific appropriateness ground. *In re Communal Restaurant, LLC, t/a Communal Restaurant*, Case No. 18-PRO-00059, Board Order No. 2018-529, 1 (D.C.A.B.C.B. Sept. 12, 2018). Similarly, Flash refers to *Rito Loco*, where the Board dismissed the protest where the protestant failed to include required signatures, as support for its position. *In re Rito Loco, LLC, t/a Rito Loco*, Case No. 17-PRO-00025, Board Order No. 2017-331 (D.C.A.B.C.B. Jun. 7, 2017).

Nevertheless, these cases are not applicable as they do not address the fact pattern in this case where ANC 1B listed a specific appropriateness ground in its initial Petition. *Id.* As noted in § 1801.2(e) the regulation provides that the protest petition should include "A brief summary of the reasons for support of or opposition to the granting of the license; *provided, that participation in Board proceedings shall not be limited by this summary.*" 23 DCMR § 1801.2(e) (emphasis added). Furthermore, § 1722 requires service of the protest information form on all parties, which provides disclosure of "[u]nresolved issues that remain the subject of the protest hearing"; "[w]itnesses"; evidentiary exhibits and copies of the exhibits themselves; and a statement of the "relief sought." 23 DCMR §§ 1722.7, 1722.2. Moreover, there is an opportunity to continue the hearing and supplement the record if so warranted. § 25-441; 23 DCMR §§ 1705. Finally, the District's alcohol laws should be read in harmony with § 2-509(a) of the DCAPA, which allows parties to provide notice of the issues "as soon as practicable"—and contains no requirement that a full statement of the issues be provided upon the filing of an administrative lawsuit. § 2-509(a). As a result, allowing a party to state specific issues related to the appropriateness grounds selected in their Petition in the protest information form, and accepting evidence related to that ground, are permitted under the District's alcohol laws.

[6] The Board emphasizes that parties relying on the production of a protest report or having the protest report contain certain statement do so at their own risk because its contents are subject to the discretion of the assigned investigator and there is no obligation to produce or use the report as part of the protest. As a result, relying on the protest report to provide notice to the other side is ill-advised.

Therefore, while the ANC cannot add new appropriateness grounds after the protest deadline under § 25-602(a), the ANC is not prevented from further specifying its issues and concerns through the auspices of the protest information form so long as they relate to the grounds it raised in its Petition.[7]

ORDER

Therefore, the Board, on this 12th day of February 2020, hereby **DENIES** the motion.

IT IS FURTHER ORDERED that motion is **DENIED WITHOUT PREJUDICE** on the specific issue as to whether the ANC properly provided notice of its objections in this proceeding where additional documents providing notice may be filed, including the protest information form. The Board has not determined whether when looking at all of these documents as a whole (e.g., the protest information form), on the eve of the Protest Hearing, that a mere restatement of the appropriateness grounds, as provided in the District's alcohol laws is sufficient to constitute adequate notice. Therefore, the Board warns the ANC that the failure to state its issues and concerns with particularity or specificity in its future filings in this matter may result in its protest being dismissed if an appropriate objection is raised by the Applicant after the deadline for serving the protest information form has passed.

The ABRA shall deliver a copy of this order to the Parties.

[7] For example, if a party only stated in their protest petition that their objection was based on the impact on real property values with no further explanation, that party should be later permitted to specifically indicate in their protest information form that the party has concerns and evidence related to blight from the applicant's alleged dilapidated facilities. Nevertheless, if impact on real property values were the sole issue, the Board would not likely accept evidence and argument related to traffic safety in the area.

District of Columbia
Alcoholic Beverage Control Board

Donovan Anderson, Chairperson

James Short, Member

Bobby Cato, Member

Rema Wahabzadah, Member

Rafi Aliya Crockett, Member

Jeni Hansen, 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. 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. 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).