THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
La Famosa, LLC t/a La Famosa	Case No.: License No.: Order No.:	20-PRO-00033 ABRA-115848 2020-245
Applicant for a New Retailer's Retailer's Class CR License		
at premises 1300 4th Street, S.E. Washington, D.C. 20003		

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

ALSO PRESENT: La Famosa, LLC, t/a La Famosa, Applicantt

Gail Fast, Chairperson, Advisory Neighborhood Commission (ANC) 6D

Sean T. Morris, Esq., Counsel, on behalf of a Group of Five or More Individuals or Property Owners, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

ORDER DENYING MOTION FOR RECONSIDERATION

INTRODUCTION

The Board affirms the dismissal of the Group of Five or More Residents and Property Owners (Group) under D.C. Official Code § 25-609(b) where La Famosa, LLC, t/a La Famosa, (Applicant) and Advisory Neighborhood Commission (ANC) 6D submitted and obtained approval of a settlement agreement during the protest period but before the Group filed a protest and was formally granted standing. The language of § 25-609(b) states 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 . . ." D.C. Official Code § 25-609(b). The Board interprets § 25-609(b) as creating a dismissal window where all current and future protestant groups are dismissed while the protest process is open, ongoing, and has not reached a final decision. This interpretation comports with the plain language of § 25-609(b) and respects the legislative history and the statutory scheme set up by Title 25 of the D.C. Official Code. The Board further denies the Group's request to convert the Group members into abutting property owners to obtain standing. The Board's reasoning is explained further below.

Background

La Famosa, LLC, t/a La Famosa, (Applicant) filed an Application for a New Retailer's Class CR License at 1300 4th Street, S.E. The public received notice of the application on January 24, 2020, by placard and publication in the D.C. Register. *ABRA License File No. 115848*, Notice of Public Hearing. The placard indicated that protest petitions would be accepted until March 9, 2020. *Id.* The Roll Call Hearing where any protesting parties would be identified was scheduled for March 23, 2020.

In Board Order No. 2020-097, issued on Feb. 12, 2020, the Board approved a request by the Applicant and Advisory Neighborhood Commission (ANC) 6D to extend the protest petition deadline in accordance with 23 DCMR § 1705.5 in order to allow ANC 6D to vote on matters related to the application. Board Order No. 2020-97 extended the protest period to March 23, 2020. The petition date was then further extended due to the COVID 19 crisis.

Subsequently, the ANC never filed a formal protest. Instead, the ANC and the Applicant filed a settlement agreement. The settlement agreement was approved in Board Order No. 2020-200, which was issued on Apr. 29, 2020. On June 1, 2020, the Group filed a protest against the Application. *Mot. for Recon.*, at 1.

In Board Order No. 2020-228, issued on June 3, 2020, the Board dismissed the Group of Residents and Property Owners (Group) in accordance with D.C. Official Code § 25-609(b).

Subsequently, the Group filed a motion for reconsideration requesting reinstatement of their protest. *Mot. for Recon.*, at 1. The Group argues that its dismissal was incorrect because (1) "at the time the ANC submitted the settlement agreement . . . and at the time the Board approved it, the application at issue was not a 'protested license application,' because no protest had . . . [been filed]"; *id.* at 2, (2) the dismissal violated the clear language of the statute, the legislative intent of the law, and does not comport with statutory scheme because § 25-609(b) only requires and intends dismissal "when an application has been protested and then the ANC intervenes, submits a settlement agreement, and the Board approves it"; *id.* at 3, (3) the Board's actions rendered the phrase on a "protested license application" superfluous; *id.* at 3, (4) the Board's interpretation in this case is new, which merits reconsideration; *id.* at 6, (5) the Board violated the due process rights of the Group by failing to recognize their protest; and (6) the Group still retains the right to convert the Group members into individual abutting property owners to obtain standing at the Roll Call Hearing; *id.* at 9.

In Opposition, the Applicant argues that the Board's action in this matter is correct. *Opposition*, at 2. The Applicant asserts that the Board's action complies with the plain meaning of § 2-609(b) which allows for the dismissal of any protest "that was already filed or were to be filed" by any protestant group whether or not the ANC is a party to the case. *Id.* at 2-3. The Applicant further notes that dismissal under § 25-609(b) is not contingent on addressing any matters raised by the Group. *Id.* at 4. Finally, the Applicant argues that the protestants only filed as a group, not abutting property owners. *Id.* at 2. The Group then filed a reply which further elaborated the Group's initial contentions and responded to the arguments made by the Applicant. *Reply*, at 1-3.

DISCUSSION

1. The Board affirms its dismissal of the Group and denies the motion for reconsideration.

I. THE GROUP'S PROTEST WARRANTS DISMISSAL UNDER § 25-609(b) WHERE THE BOARD APPROVED A SETTLEMENT AGREEMENT BETWEEN THE ANC AND APPLICANT WHILE THE PROTEST PROCESS WAS ONGOING.

2. The dismissal of a group's protest is warranted where the Board approved the settlement agreement between the applicant and the ANC during the protest period where the Group seeks to file a protest against the Applicant.

3. The Board interpretation of § 25-609(b) is guided by the *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). Under *Chevron*, the Board must first determine whether a 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 the statute is clear, then the Board should permit the plain language to control. 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.

a. The Board's interpretation comports with the language of § 25-609(b).

4. The Board's interpretation does not contradict the plain language of § 25-609(b) because the use of the word "upon" implies that the dismissal power may be triggered after the submission and approval of the settlement agreement.

5. Under the general canons of statutory construction, 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). This is because "The primary and 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). Nevertheless, "In some instances, the legislature has delegated authority to the agency to fill in gaps or ambiguities." *U.S. Parole Comm'n v. Noble*, 693 A.2d

1084, 1096–97 (D.C. 1997), *adhered to on reh'g en banc,* 711 A.2d 85 (D.C. 1998). Where gaps or ambiguities exist, the agency is granted "leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute" so long as the rules do not contradict "plain statutory language or clear legislative history." *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2134 (2016); *id.* at 1098.

6. Section 25-609(b) reads in full:

> 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 of no fewer than 5 residents or property owners 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. Official Code § 25-609(b).

7. The Group wants the Board to interpret § 25-609(b) as applying only to the situation where "an application has been protested and then the ANC intervenes, submits a settlement agreement, and the Board approves it." *Mot. for Recon.*, at 3. According to the Group, the dismissal trigger set up by § 25-609(b) only works once per case, and if no groups happen to be recognized at the time the parties filed their settlement agreement, no further dismissals are permitted to occur. Thus, the Group takes a "form over substance" approach that mandates a strict order of events; namely, (1) the filing of a protest, (2) the submission of a settlement agreement by the ANC and the Applicant, (3) approval by the Board, and then (4) dismissal.

8. Rather than seeking to punish early filers, a better interpretation of § 25-609(b) is that the statute creates a dismissal window where all current and future protestant groups are dismissed while the protest process is open, ongoing, and has not reached a final decision. Thus, while the strict order of events that the Group seeks to impose qualify for dismissal, other situations, such as when a protest arises after the submission and approval of an ANC settlement agreement, as is the case here, may also trigger the required statutory dismissal.

9. The Board's less restrictive interpretation of § 25-609 is specifically derived from the portion of the statute that states, "the Board, *upon* its approval of the settlement agreement, shall dismiss any protest of a group . . . meeting the requirements of § 25-601(2)." § 25-609(b). As various dictionaries note, "upon" has multiple meanings, including "thereafter"; "immediately" or "very soon after."[1] In light of the various possible meanings of the word "upon," the most reasonable sense of the word here implies that dismissal does not need to occur immediately upon approval of the ANC's settlement agreement, but may occur "thereafter" or "very soon after." Moreover, the reference to a "protested license application" does not preclude

[1] Merriam-Webster, "upon," (last visited Jun. 29, 2020), https://www.merriam-webster.com/dictionary/upon#examples; Dictionary.com, "upon" (last visited Jun. 29, 2020), https://www.dictionary.com/browse/upon?s=t.

recognizing situations where a license application is protested after the submission of the ANC settlement agreement, nor does it preclude triggering the dismissal authority multiple times in a case should it be required. Thus, dismissing groups after the filing and approval of the ANC settlement agreement does not contradict the plain language of § 25-609(b).

b. The Board interpretation of § 25-609(b) respects the intent of the Council.

10. While the Board is confident its interpretation of § 25-609(b) satisfies the plain language test, the Board's interpretation further comports with the legislative intent and the structure of Title 25 as a whole. 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) [*Omnibus 2012*]. In enacting the provision, the Council heard testimony arguing that "residents should have to work through their ANCs" but rejected proposals to fully eliminate the group standing category. *D.C. Council, Report on B19-824, the "Omnibus Alcoholic Beverage Regulaion Amendment Act of 2012,"* Committee on Human Services, 13 (Nov. 8, 2012) (Testimony of Jamie Leeds and others). The Board notes that its interpretation does not contradict any stated legislative intent, as the Board's interpretation results in dismissal while "a license application is pending" and permits groups to participate when no ANC settlement agreement has been approved. *Omnibus 2012*, at 2.

c. The Board interpretation of § 25-609(b) respects the statutory scheme and does not lead to absurd results.

11. It should be further noted that it is reasonable for the Board to apply any ANC settlement agreement filed and approved during the protest period to any current and future group protests filed during the same protest cycle. To rule otherwise would lead to absurd, unfair results that fail to take into account the statutory scheme. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) ("In deciding whether a result is absurd, we consider not only whether that result is contrary to common sense, but also whether it is inconsistent with the clear intentions of the statute's drafters."); *Moore v. Dist. of Columbia Dep't of Employment Services*, 211 A.3d 159, 161 (D.C. 2019) ("The court looks not only to the specific language in question but also to the statute as a whole.").

12. In this case, the ANC settlement agreement that was filed and approved by the Board was submitted during the protest period where the Group sought standing. Under Title 25, the "Protest period" is "a 45-day period during which an objection to the issuance or renewal . . . may be filed." D.C. Official Code § 25-101(41). Under Title 25, there is no material difference between a protest filed on the first or last day of the protest period, or any day in between. Yet under the Group's interpretation an early filed group protest faces more risk of being dismissed than a late filed protest even though there should be no legal difference between protests so long as they are filed timely within the protest period. Moreover, under the Group's rule, every ANC and Applicant would have to hold their settlement agreements until after Roll Call, which will

add further delays to the licensing process.[2] Finally, the Board's interpretation is beneficial for groups because if group organizers know early in the process that an ANC settlement agreement will be filed, they avoid wasting time, effort, and expense in organizing the group and appearing at unnecessary hearings.[3]

13. As a result, the Board's interpretation of § 25-609(b) is the most reasonable, efficient, and fairest interpretation of the statute.

d. The Group has failed demonstrate any inconsistency by the Board.

14. In its motion for reconsideration, the Group appears to argue that the Board has never expressly stated in prior decisions that it would dismiss a protestant group after the submission and approval of a settlement agreement has been completed.[4] *Mot. for Recon.*, at 5-6. An agency may engage in interpretative rulemaking through administrative adjudication. *Andrews v. Dist. of Columbia Police & Firefighters Ret. & Relief Bd.*, 991 A.2d 763, 771 (D.C. 2010). This means that the mere fact that an interpretation is first announced in an adjudication does not render it incorrect. Furthermore, it also demonstrates that there is no evidence of any "unexplained inconsistency" that would render the Board's actions arbitrary and capricious. *Hensley v. Dist. of Columbia Dept. of Employment Services*, 49 A.3d 1195, 1203 (D.C. 2012).

II. THE GROUP HAS NO INHERENT CONSTITUTIONAL RIGHT TO PROTEST THE APPLICATION.

15. In its motion, the Group claims that it has a fundamental due process right to protest the Application. This is incorrect. As noted in *Cork*,

> . . . 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 . . . 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). In examining statutory standing provisions, the Supreme Court of Michigan noted that

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[2] For example, the Group's rule will result in unfair and costly delays in the issuance of a stipulated licenses because when there is a gap between the Roll Call and the end of the protest period the Board would potentially not be able to dismiss all group protests filed during the protest period.

[3] The Group's interpretation is also absurd because approval of a settlement agreement is not always a ministerial act. Certainly, some settlement agreements can be easily approved; especially, if an ANC is using a previously approved settlement agreement as a template. Nevertheless, on other occasions, ABRA staff or the Board request that parties modify or delete various provisions so that the settlement complies with Title 25. Thus, in some cases approval may occur quickly and in others it may take a long time if parties are difficult to reach or need to negotiate further. Thus, the Group would have dismissal under § 25-609(b) be based on an action by the Board that has highly variable timelines.

[4] The Group's motion is unclear where it says "as to deny a group from filing a protest during the protest period . . ." as the Board is not actually blocking the filing of protests, only denying them. Nevertheless, the Board infers that the Group is referring to the interpretation of § 25-609(b) undertaken by the Board in this case.

> 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

> . . . 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.

In re M & A Hospitality, LLC, t/a Cork Wine Bar & Market, Case No. 18-PRO-00006, at ¶¶ 33-34 (D.C.A.B.C.B. Jun. 6, 2018) (footnote removed). As a result, prohibiting the Group from protesting based on the agreement of the ANC and the Applicant is a lawful exercise of the Council's discretion.

III. THE GROUP CANNOT CHANGE TO A NEW STANDING CLASS AFTER THE END OF THE PROTEST PERIOD UNDER § 25-602(a).

16. The Group's motion for reconsideration claims that the group members could claim standing as abutting property owners at the Roll Call Hearing. *Mot. for Recon.*, at 9. The Group further claims that it sufficiently alluded to its qualification as an abutting property owner in its protest letter and communicated this fact to the Board through ABRA staff. *Id.* The Group further argues that there is no law mandating that that protestants establish standing in their protest letter. *Id.* The Group's argument is contrary to law and precedent. Furthermore, the Group's unexplained failure to state explicitly in the protest letter the Group sought standing as abutting property owners is particularly unconvincing when Board issued the approval order a few months before the filing of the protest and the dismissal rule was enshrined in the statute.

17. As noted in *The American*,

> Under § 25-601, only certain categories of "persons" may file a protest against an application. D.C. Official Code § 25-601. Two of those "persons" identified by § 25-601 include "abutting property owners" and groups of at least five residents and property owners. § 25-601(1), (2). According to § 25-602, each person objecting ". . . to the approval of an application" must file an ". . . *objection within the protest period.*" D.C. Official Code § 25-602(a) . . . .

> Under Title 25 of the D.C. Official Code groups and abutting property owners are considered legally separate persons under § 25-601 . . . . . [A]llowing . . . abutting property owners to splinter off from [a] . . . [g]roup would create new protestants with legally separate interests.

In re The Blagden Alley Entertainment, LLC, t/a The American, Case No. 14-PRO-00019, Board Order No. 2014-238, 2 (D.C.A.B.C.B. May 28, 2014) (emphasis added). As a result, the rule in this forum is that parties cannot change or seek a new standing classifications at Roll Call because the Roll Call Hearing occurs after the protest period expires. *Id.* at 3. To do otherwise, would violate § 25-602(a) by allowing individuals to "evade the protest filing requirements" by allowing new legal persons into the protest outside the permitted timeframe. *Id.*

18. In *The American*, the Board further noted that had the "abutting property owners sought standing as both a group . . . and as separate abutting property owners with their initial protest letter," the Board would have permitted them to have standing. *Id.* Nevertheless, as was the case there, the Group failed to identify themselves as abutting property owners in their protest letter. *Id.* at 2-3. A review of the June 1 protest letter filed by the Group indicates that the Group solely stated that "the group of District of Columbia residents listed below hereby protests the . . . license application . . . ." *Group Protest Letter*, at 1 (Jun. 1, 2020). The letter then states that "the group of residents" will be represented by Richard Schwinn and counsel. *Id.* at 2. The letter indicated that the residents resided in the same building. *Id.* At no point, does the letter indicate that the group members sought individual standing as abutting property owners, mention the word "abutting"; or otherwise hint that the group members should be granted standing on an individual basis; instead, the letter solely expresses interest in being recognized as a group.[5] Therefore, the Board cannot reasonably read the letter as requesting both standing as a group and abutting property owners. Consequently, the request to convert the members of the Group into abutting property owners is denied.

IV. THE DISMISSAL REQUIRED BY 25-609(b) LEGALLY ELIMINATED THE NEED TO HOLD A ROLL CALL AND OTHER HEARINGS IN THIS MATTER.

19. The Group argues in its motion that it is entitled to a Roll Call Hearing. *Mot. for Recon.*, at 7. This argument is without merit. Section 25-609(b) statutorily commands 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 of no fewer than 5 residents or property owners meeting the requirements of § 25-601(2). D.C. Code § 25-609(b) (emphasis added). As a result, once triggered, § 25-609(b) eliminates all groups and overrides all other requirements to hold protest proceedings related to the claims raised by the affected groups.

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[5] It should be further noted that the mere fact that persons reside in the same building does not mean that they qualify as abutting property owners under D.C. Official Code § 25-601(a)(1). As noted in *Reverie*, "condominiums and apartments that do not share a wall or ceiling with the licensed establishment cannot constitute abutting properties." *In re Po Boy Jim 2, LLC, t/a Po Boy Jim 2*, Case No. 19-PRO-00064, Board Order No. 2019-544, 2. *In re Spero, LLC, t/a Reverie*, Case No. 17-PRO-00088, Board Order No. 2018-045, 2 (D.C.A.B.C.B. Jan. 31, 2018).

V. THE GROUP'S MOTION MAY BE RENDERED FUTILE BY THE OTHER PARTIES.

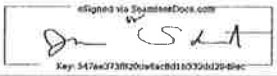
20. On a final note, even if the Board agreed with the Group's interpretation, the other parties still retain the ability to trigger § 25-609(b) and dismiss the Group a second time. D.C. Official Code § 25-609(b). Specifically, the ANC and the Applicant could seek to have the orders approving the settlement agreement withdrawn or vacated and resubmit and seek approval of their agreement after the Roll Call so that the Group's version of § 25-609(b) is satisfied. The Board finds nothing unfair about considering or approving such requests by the ANC and the Applicant where they could not have known that the Group's interpretation controlled and may have taken completely different actions had they known, such as submitting the settlement agreement for approval at a different time. The parties may have been impacted by the unforeseen extensions of the protest deadline in this case, which further supports allowing them to seek relief and modification of the Orders approving their settlement agreement. As a result, even if correct, the Group may still be dismissed in the end if this matter is revived.

ORDER

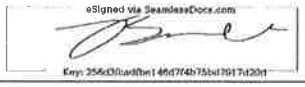
Therefore, the Board, on this 8th day of July 2020, hereby **DENIES** the motion for reconsideration. A copy of this Order shall be provided to the parties.

District of Columbia
Alcoholic Beverage Control Board

Donovan Anderson, Chairperson



James Short, Member



Bobby Cato, Member

Rema Wahabzadah, Member

Rafi Crockett, Member

Jeni Hansen,Member

Edward S. Grandis, Member

Pursuant to D.C. Official Code§ 25-433(d)(l), 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, 2000 14th Street, N.W., Suite 400S, Washington, DC 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 thilty (30) days of the date of service of this Order, with the District of Columbia Coult of Appeals, 430 E StTeet, N.W., Washington, D.C. 20001; (202/879-1010). 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).