THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:		
S&S U Street, LLC t/a Sports & Social	Case No.: License No.:	23-PRO-00010 ABRA-123418
	Order No.:	2023-134
Application for a New Retailer's Class CR License		
at premises 1314 U Street, N.W. Washington, D.C. 20009		

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

ALSO PRESENT: S&S U Street, LLC, t/a Sports & Social, Applicant

Andrew Kline, Counsel, on behalf of the Applicant

Sabel Harris, Chair, 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 a motion to dismiss the protest filed by Advisory Neighborhood Commission (ANC) 1B from S&S U Street, LLC, t/a Sports & Social (Applicant). The Board agrees with the ANC that in accordance with the Board's precedent that an initial protest letter solely restating the relevant appropriateness grounds is sufficient to initiate and maintain a protest where the record shows that the ANC's vote to protest was based on valid appropriateness concerns regarding peace, order, and quiet at a minimum,

and is in accord with the Board's precedent regarding standards for initial protest pleadings.[1] The Board is further unpersuaded that its prior precedent on this matter was incorrectly decided or otherwise requires a change in interpretation through the adjudication process.

The Board notes that this decision does not prejudice the filing a future motion to dismiss; especially if, after the filing of the protest information form (PIF) in this proceeding, the ANC's PIF only contains a bare recitation of the appropriateness grounds without explanation or further and specific elucidation of the basis of the protest.

ARGUMENTS OF THE PARTIES

The Applicant's motion argues for dismissal of the ANC's protest because the ANC solely stated that the protest was based on "peace, order, quiet, and all applicable grounds" without providing factual support. *Applicant's Motion to Dismiss*, at 4 [*Mot.*]. The motion justifies dismissal for the following reasons: (1) the ANC's vote lacked "any factual predicate"; (2) the ANC actually protested solely to negotiate a settlement agreement; and (3) the Applicant argues that the Board's prior precedent of accepting a mere listing of the appropriateness grounds in a protest letter as a sufficient basis for maintaining a protest should be overturned. *Id*. at 2, 5, 7.

In response, the ANC argues that the protest should be maintained for the following reasons (1) the ANC's protest is based on valid appropriateness criteria; (2) the Board cannot review the validity of the ANC's vote; (3) the Board's prior precedent is correct; and (4) the motion to dismiss is not ripe where the ANC has the opportunity to supplement its pleadings through the PIF and the parties can obtain additional time or the right to potentially supplement the record if necessary. *Response to Motion to Dismiss Protest*, at 1-2 [*Response*].

The Applicant further responds to the ANC's argument by noting the following: (1) the ANC did not provided a factual predicate for its protest in its response; (2) the Applicant is not challenging the validity of the ANC's vote, but rather, the sufficiency of the initial protest letter; (3) the Board may revisit and overturn precedent; and (4) the continuance process is not an adequate remedy to any deficiencies in the notice. *Applicant's Reply Brief in Support of Motion to Dismiss the Protest of ANC 1B*, at 2-4 [*Reply*].

After considering the arguments of the parties, the Board agrees with the ANC for the reasons stated below.

I. The Record Shows that the ANC Vote Related to the Protest Was Sincere and Based on Valid Appropriateness Concerns.

1. The Board disagrees with the Applicant that the ANC voted to protest the application without any regard for appropriateness and solely to stall the application or to force a settlement.

[1] The Board notes that it did not consider the unraised argument that partial summary judgement is warranted or that the protest should be limited to the issue of peace, order, and quiet where the phrase "and all applicable grounds" in the initial protest letter may be too vague to satisfy the requirements of D.C. Official Code § 25-602(a) and 23 DCMR § 1602.2.

Mot., at 2. At the time of the vote during the ANC meeting, the minutes show statements saying that the establishment is "going to be pretty big," and seeking an "entertainment endorsement for the inside"; and a "sidewalk café endorsement." *Id*. The ANC also noted that the Applicant operated as a "chain" in "Bethesda" and "Pittsburgh." *Id*. The ANC further noted that the outdoor seating area may have "40 something seats" and the business may have a "sports gambling license." *Id*. The ANC then voted to protest the license on the grounds of "peace, order and quiet and all applicable grounds." Consequently, based on the statements made at the meeting, the ANC, at a minimum, has indicated that it is concerned about the occupancy, selected endorsements, large outdoor seating area, and its record of operations in other jurisdictions. Therefore, the argument that the ANC solely protested to stall the application without basis is not supported by the record. *Id*. at 5-6.

2. Nevertheless, the ANC's meeting minutes were not transmitted with the protest letter, which means that they are not eligible for consideration at this time. As noted in D.C. Official Code § 25-602(a), protestants are obligated to "notify the Board in writing" of their "intention to object and the grounds for the objection within the protest period." D.C. Code § 25-602(a). Consequently, in accordance with § 25-602(a), in considering whether the ANC raised an appropriate protest ground, the Board can only consider the initial protest letter filed with the Board.

II. The ANC's Initial Protest Letter is Adequate to Initiate and Maintain a Protest Under D.C. Official Code § 25-602 and 23 DCMR § 1602.

3. Based on the initial protest letter filed by the ANC, the sole issue is whether the ANC's statement in its letter stating that the protest is "based on peace, order and quiet, and all applicable grounds" is sufficient to initiate and maintain the protest of the application. *Transmittal of Commission Actions to ABRA*, at 1 (Jan 18, 2023). Based on the Board's current precedent, it is.

4. In *Flash*, the applicant in that case argued that the protest petition filed by the ANC "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." *In re Brilliant, LLC, t/a Flash*, Case No. 19-PRO-00126, Board Order No. 2020-098, 2 (D.C.A.B.C.B. Feb. 12, 2020) (emphasis added). In denying the motion, the Board wrote 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." *Id*.

5. As noted in *Flash*, in reviewing a motion to dismiss for failing to state a 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, 16 (D.C.A.B.C.B. Sept. 24, 2014) *citing In re Estate of Cur seen,* 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).

Id. at 3. As noted in *Flash*, the Board presumes that when a protestant lists an appropriateness ground, the protestant means that the application will have a negative impact on the listed appropriateness grounds. *Id*.

6. In justifying the rejection of the motion, the Board in *Flash* wrote that

> 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 . . . .
>
> 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) . . . .

Id. (emphasis added).

7. Addressing the merits of the motion in *Flash*, the Board wrote 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 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, . . . § 25-602(a) only requires the identification of the grounds at issue *and contains no language requiring particularity in order to initiate a protest* . . . .[2] [Second], § 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 . . . . Therefore, for these reasons, the Petition filed by the ANC satisfies § 25-602(a) and 23 DCMR § 1602.2.

Id. at 4-5 (emphasis added). Therefore, based on the reasoning contained in *Flash*, ANC 1B's reference to peace, order, and quiet in its protest letter is sufficient to meet its burden under § 25-602(a) and § 1602.2.

a. Alternatively, the current protest letter, provides sufficient specific information to satisfy the notice requirement based on the regulatory definition of peace, order, and quiet.

8. In addition, even if additional or more specific notice were required, the use of the phrase "peace, order, and quiet" in the ANC's initial protest letter has sufficient meaning to notify the Applicant of the issues based on the meaning of the phrase in the regulations. Specifically, § 400.1(a) defines the phrase "peace, order, and quiet" as requiring at minimum the consideration of "noise, rowdiness, litter, and criminal activity." 23 DCMR § 400.1(a) (West Supp. 2023). Consequently, even at this early juncture, the Applicant has been notified of at least four specific topics to address at the Protest Hearing based on the usage of the phrase "peace, order, and quiet" in the ANC's initial protest letter.

9. In that vein, in preparing to meet its burden, the Applicant already has specific notice that it should address the Applicant's impact on noise, rowdiness, litter, and criminal activity, its efforts to prevent these negative impacts, and other relevant information. The Board notes that such evidence could include evidence of soundproofing and its entertainment plans, the history of rowdiness and criminal activity at the location if a similar business was located at the same address, its general plans to provide security (e.g., security staff and security cameras), and its

[2] The Board cited 23 DCMR § 1801.2(e) in *Flash*, which has been subsequently repealed. The Board notes that it considered the removal of the provision from the regulations but notes that it was only used to bolster the Board's conclusion and was not necessary or determinative to the Board's current interpretation of the statute and regulations at issue. As a result, in recounting *Flash* in this opinion, the Board has not included language related to § 1801.2 because it no longer pertinent to the question at hand. Nevertheless, to the extent it is relevant, it should be noted that regulation describing protest petitions does not require that such petition contain specific information as to why protestants object to an application, and instead merely requires that such petitions "indicate whether the signatories believe, or do not believe, that the establishment is appropriate." 23 DCMR § 1800.2(b) (West Supp. 2023).

history as an operator in other jurisdictions related to these topics. As a result, the Applicant has not demonstrated that it has insufficient information to plan or make its case-in-chief.

III. The Board Affirms its Holding in *Flash*.

10. The Applicant next argues that the Board should overturn its precedent of accepting mere recitations of the relevant appropriateness grounds in an initial protest letter. The Board is not persuaded.

11. First, the Applicant has not provided an appropriate legal citation to support its position that constitutionally minimum notice must be achieved in the initial protest letter or at the outset of litigation. Indeed, while citing *Goldberg*, the Applicant fails to explain why providing seven days advance notice for the parties to provide the PIF related to adjudicating a liquor license protest is constitutionally offensive on its face while providing only seven days notice to strip an individual of welfare benefits is not. *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) ("We are not prepared to say that the seven-day notice currently provided by New York City is constitutionally insufficient per se, although there may be cases where fairness would require that a longer time be given.").

12. The Board also disagrees that the PIF inherently fails to provide adequate notice or the specific reasons for the protest. *Mot.*, at 11, 16-17. As noted in the regulations, "All parties to a protest hearing shall file a Protest Information Form (PIF) and an Exhibit Form." 23 DCMR § 1722.1 (West Supp. 2023). If completed, the PIF provides information related to the protest, including unresolved issues, the witnesses, the exhibits, and the "relief sought." 23 DCMR § 1722.2 (West Supp. 2023). As part of the exhibit form, each party is obligated to "list each of the exhibits the party intends to introduce at the protest hearing, along with copies of the exhibits." 23 DCMR § 1722.4 (West Supp. 2023). The regulations further allow for evidence and witnesses to be excluded if prejudice is found or matters are excluded intentionally. 23 DCMR § 1722.6 (West Supp. 2023). The regulation further requires that the PIF and related documents must be filed seven days before the hearing. 23 DCMR § 1722.8 (West Supp. 2023). Finally, the regulations permit the introduction of information not included in the PIF and the amendment of the document for "good cause." 23 DCMR §§ 1722.7, 1722.9 (West Supp. 2023). As a result, based on the information required to be included, it cannot be reasonably argued that the PIF inherently fails to provide sufficient information.[3]

IV. A Recitation of the Appropriateness Grounds Satisfies 23 DCMR § 1602.

13. The Applicant argues that 23 DCMR § 1602.2 requires more than a conclusory statement. *Mot.*, at 13. The Board disagrees.

[3] For example, in responding to the question regarding unresolved issues the party could list such matters as amplified noise heard in residential homes, excessive violence in and around the establishment, or patrons continually entering the streets and interfering with traffic. Further, a protestant could list any desired conditions such as the imposition of a security plan or mandatory reimbursable detail. Finally, the submission of exhibits such as video footage, police reports, and expert resumes should generally give a sufficient sense of a party's case-in-chief. And if the PIF is not submitted or is lacking in information, the applicant may move to dismiss or for summary judgement on all or some issues.

14. Section 1602.2 provides that

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

23 DCMR § 1602.2 (West Supp. 2023). The Applicant's interprets the phrase "why the matter being objected to" as requiring protestants to provide specific detail in their initial protest letter. *Mot.*, at 12-13. Nevertheless, the Board previously addressed this argument in *Flash*. As noted in *Flash*, (1) a mere recitation of the appropriateness grounds, such as "the application will have negative impact on peace, order, and quiet" is a valid and responsive answer to the "why" question posed by § 1602.2; (2) § 25-602(a) only requires the identification of issues and contains no language requiring particularity or creating a pleading requirement; and (3) a holistic reading of the regulations demonstrates an expectation that the specific issues will be specifically elucidated in the PIF. *In re Brilliant, LLC, t/a Flash*, Board Order No. 2020-098 at 4-5. Beyond the Board's previous reasoning, it should be further noted that Applicant's preferred interpretation creates its own due process issues where the regulations do not advise or provide fair warning to potential protestants that their initial pleadings must meet some unstated specific pleading standard or mirror specific judicial pleadings, such as a Bill of Particulars. Finally, as noted above, the phrase "peace, order, and quiet" is sufficiently defined in § 400.1 to provide specific guidance as to matters at issue. Therefore, the Board is not persuaded that its current interpretation of § 1602.2 requires modification through the adjudication process.[4]

V. The Issue of Whether the ANC Provided Adequate Notice is Not Ripe for Adjudication Until the Submission of the PIFs.

15. Even if the Board agreed with the Applicant that the ANC failed to state a factual predicate for its protest, at this stage in the proceedings, the ANC has not had an opportunity to file its PIF; therefore, the matter of whether the ANC provided adequate and sufficient notice is not yet ripe for adjudication.

16. As noted in *Flash*, where the same issue was discussed, "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." *In re Brilliant, LLC, t/a Flash*, Board Order No. 2020-098, at 5 *citing 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).

17. As noted above, the Board rejects the Applicant's argument that the PIF inherently fails to provide adequate notice. Instead, whether the PIF in this case provides adequate notice is completely dependent on the answers and information provided in the document, which can only be judged once it is received.

[4] The Board notes that the public is still entitled to suggest changes to the nature, specificity, and timing of pleadings rules on their own initiative or through the rulemaking process.

18. The Board further rejects the Applicant's argument that the matter of notice is fully ripe because the Board should only consider the information available at this stage in the proceedings. *Mot*., at 17. This argument (and the motion) ignores § 2-509(a), which provides that

> The notice shall state the . . . issues involved, but if, by reason of the nature of the proceeding, . . . 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) (emphasis added). In light of this specific language in the D.C. Administrative Procedure Act, the Board is unpersuaded that it should depart from its holding in *Flash* that the ANC may further specify and explain its objections "through the auspices of the protest information form so long as" such information "relate[s] to the grounds it raised in the petition." *In re Brilliant, LLC, t/a Flash*, Board Order No. 2020-098, at 8.

18. The Board further rejects the Applicant's argument that it does not hypothetically have enough time to prepare for the hearing, hire appropriate experts, and take other steps related to preparing for the hearing, or that the required timing of a continuance motion is not a sufficient remedy. *Mot.*, at 15; *Reply*, at 4. The Board notes that this argument is conclusory where the parties have not exchanged PIFs, have not requested an opportunity to amend their PIFs in response to the other party's submission, or otherwise attempted to continue the hearing. The Board acknowledges the Applicant's argument that the PIF must be submitted within 7 days of the hearing and the regulation related to continuances requires filing within 6 days, does not mean that the Applicant has no recourse. *Reply*, at 4-5. Indeed, this line of argument ignores the fact that amendments to PIFs are permitted pursuant to 23 DCMR §§ 1722.7 and 1722.9; therefore, the Applicant has not demonstrated that parties have inadequate time to prepare for the hearing. *Id*. at 4-5. The Board further notes that the Applicant has not exhausted the ability to enter new information into record after the close of the record pursuant to 23 DCMR § 1717.1 (West Supp. 2023) (allowing for the post trial submission of information). Consequently, it is not apparent at this time, that the parties have inadequate time to prepare for the hearing or that the specific issue raised by the Applicant is ripe for consideration at this stage of the proceedings.

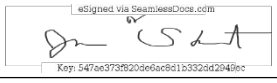
19. The Board further disagrees with the Applicant's contention that 23 DCMR § 1602.2 is "jurisdictional." *Reply*, at § 5. As noted in the regulations, the provisions of Chapter 16 are waivable as discussed in § 1602.2; therefore, § 1602.2 cannot be characterized as jurisdictional.

ORDER

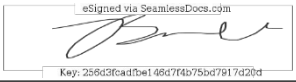
Therefore, the Board, on this 15th day of March 2023, hereby **DENIES** the Applicant's motion to dismiss. The ABRA shall deliver a copy of this order to the Parties.

District of Columbia
Alcoholic Beverage Control Board

Donovan Anderson, Chairperson

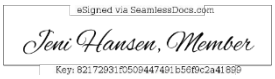


James Short, Member



Bobby Cato, Member

Rafi Crockett, Member



Jeni Hansen, Member

Edward S. Grandis, 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).