

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

In the Matter of:)
)
)
Don Juan Restaurant, Inc)
t/a Don Juan Restaurant & Carryout)
Application for Renewal, Voluntary)
Agreement Termination, and an) Case No. 21278-07/042P
Entertainment Endorsement at)
1660 Lamont Street, N.W.)
Washington, D.C.)

Before: Peter B. Feather, Chairperson
Judy A. Moy, Member
Mital M. Gandhi, Member

MOTION TO RECONSIDER

ANC1D hereby moves the Alcoholic Beverage Control Board (the “Board”) to reconsider the portions of the “FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER” which denied Applicant Don Juan Restaurant, Inc. (“Don Juan’s”) the ability to have live entertainment, including live music without restricting the type or genre of music, thereby disallowing the business, and their patrons the ability to freely determine appropriate forms of live music. The Board misconstrued the position of ANC1D, and therefore failed to give requisite “great weight” to the actual position of the ANC. In light of the written record of ANC1D Resolutions throughout 2007 and 2008, there can be no doubt that the formally adopted position of ANC1D was complete support of Don Juan’s to terminate the MPNA agreement and to support live entertainment.

I. BACKGROUND AND INTRODUCTION

A. ANC1D RESOLUTIONS OF 2007 AND 2008 CONCERNING THE LIFTING OF THE EXISTING MOUNT PLEASANT NEIGHBORHOOD ALLIANCE (“MPNA”) BAN ON LIVE MUSIC IN MOUNT PLEASANT

The extensive list of Resolutions passed by ANC1D throughout 2007 and 2008 are listed and briefly described below (See Appendix, Exhibits ____). The Board has mischaracterized the totality of evidence of record, and particularly regarding ANC1D resolutions specifically advising the termination of the Mount Pleasant Neighborhood Alliance (MPNA) Voluntary Agreements (VAs). Throughout 2007 and 2008, more than twenty (20) Resolutions were passed by ANC1D, endorsing the return of live entertainment in Mount Pleasant and supporting truly voluntary VA’s. The resolutions

clearly and consistently included lifting the ban on live entertainment at Don Juan Restaurant. Furthermore, Don Juan was not treated any differently by our ANC than Haydee's or Don Jaime's, which recently gained the ability to have live entertainment of their choice in their establishments.

There were never any distinctions made between Don Juan's and the other Applicants for live entertainment, including live music - free of restrictions on the type or genre of music in Mount Pleasant. There were never any contradictions or doubts in our Resolutions about our support of lifting of the MPNA restrictions on live music in Mount Pleasant. The Board's systematic mischaracterization and blatant misconstruing of our Commission's Resolutions were erroneously relied upon in reaching the arbitrary and capricious decision to deny Don Juan's ability to choose the live music as they see fit for their business and for their patrons.

The 2007 ANC1D Resolutions clearly and specifically advise the Board to terminate the existing MPNA restrictions and approve live music applications of applicants. On June 5, 2007, for example, the ANC supported the requests of Haydee's, Don Jaime's and Don Juan's for termination of their MPNA VAs particularly because they banned live music. On July 11, 2007, another resolution to the same effect was passed. On August 7, 2007, ANC1D passed a resolution specifically endorsing the Hear Mount Pleasant VA as a replacement for any prior existing agreements, because "the current ban on live music, live entertainment and dancing must be lifted."

On June 5, 2007, June 19, 2007, and August 7, 2007, Commissioner Edwards introduced the Responsible Hospitality process for refining and improving neighborhood cohesion concerning the Voluntary and Cooperative Agreement processes currently underway.

- February 6, 2007 (advise the Board to approve the application of Don Juan's for an entertainment endorsement to its liquor license);
- April 11, 2007 (advise the Board to approve the application of Don Juan's for an entertainment endorsement to its liquor license);
- May 15, 2007 (protest renewal of liquor licenses for eight Mount Pleasant venues and negotiate new ones);
- June 5, 2007 (consolidate the handling of all licenses);
- June 5, 2007 (approve the requests of three establishments, including Don Juans, for termination of their existing voluntary agreements, pointing to the secretive, exclusionary nature of MPNA, particularly in instituting and maintaining the ban on live music in Mt. Pleasant);
- June 5, 2007 (terminate eight voluntary agreements now in force and implement a democratic neighborhood partnership process, a Responsible Hospitality Process, for establishing and monitoring compliance with new voluntary agreements);
- June 19, 2007 (establish a community partnership structure to increase cultural vitality, diversity and economic viability);
- July 11, 2007 (advise the Board to accept licensee petitions to terminate old voluntary agreements to end restrictions on live music imposed by MPNA);
- August 7, 2007 (work toward a Responsible Hospitality Process);

- August 7, 2007 (endorsement of Hear Mount Pleasant Voluntary Agreement);
- September 4, 2007 (advises that Board consider license renewals and entertainment endorsements of Mount Pleasant liquor licensees simultaneously);
- September 4, 2007 (ANC1D rescinds all Voluntary Agreements entered into by it and its predecessor to clear the way for its currently approved draft voluntary agreement);
- November 20, 2007 (negotiate Voluntary Agreements with licensees that would meet the licensees' concerns);
- November 20, 2007 (licensees be permitted to offer live music and other live entertainment, in direct contrast to existing MPNA bans);
- December 4, 2007 (combine status hearings for Don Juan's, Haydee's and Don Jaime to reduce burden imposed on working people required to appear at the Board hearings);
- December 4, 2007 (the Board acknowledge and give great weight to the resolutions passed by ANC1D).

The 2008 ANC1D Resolutions advise the Board to terminate the existing MPNA restrictions and approve live music applications of Don Juan's and other applicants. On January 22, 2008, the ANC again registered its support for all forms of live entertainment in Mount Pleasant establishments, including Don Juan's, of course, by calling for the termination of all VAs entered into prior to 2007. This included the termination of the MPNA VA in favor of restoring entertainment within the neighborhood. On May 6, 2008, the ANC passed a resolution clarifying that in the case of Don Juan's, its support of the Hear Mount pleasant VA should not be misunderstood to mean that the ANC supported changing or restricting Don Juan's karaoke hours, which had always been up until closing time. The ANC wanted to be clear that the Board understood that it wanted to preserve Don Juan's karaoke on the same terms as previously existed, so that the licensee would not end up with less rights than it previously had with respect to karaoke.

- January 22, 2008 (advised the Board to permit termination of Voluntary Agreements entered into prior to 2007);
- February 5, 2008 (advise to terminate any Voluntary Agreement that fails to permit live music and entertainment; accepts, on a temporary basis, the termination hour limits to live music specified in Hear Mount Pleasant Agreement);
- February 5, 2008 (reinstate ANC1D as protestant to correct situation due to mislaid ANC1D timely submitted fax by ABRA);
- February 5, 2008 (recommend truly voluntary Voluntary Agreement process with choice of similar versions permitting live music, including by Hear Mount Pleasant and All-Ways Mount Pleasant);
- May 6, 2008 (reiterate support for Karaoke without time limitations at Don Juan's and some restrictions on the hours of live music at Don Juan's).

II. STANDARD

The Board's decision is governed by the District of Columbia Administrative Procedure Act, and must not be arbitrary or capricious. See, D.C. Official Code 2-510(a)(3)(A).

The Court of Appeals has held that to determine whether a decision is appropriate, it must apply a three part test: “first, whether the agency has made a finding of fact on each material contested issue of fact; second, whether the agency’s findings are supported by substantial evidence on the record as a whole; and third, whether the conclusions flow rationally from those findings and comport with the applicable law.” *Mills v. District of Columbia Dep’t of Employment Servs.*, 838 A.2d 325, 328 (D.C.2003); citing *Ferriera v. District of Columbia Dep’t of Employment Serv.*, 667 A.2d 310, 312 (D.C.1995).

The Board’s Decision to deny all forms of live music except “roaming Mariachi bands” is arbitrary and capricious, and is deficient with regard to all three factors listed above, as this Board failed to make appropriate findings of fact, failed to cite substantial evidence for its findings, and failed to properly apply the applicable law in grossly mischaracterizing, and failing to properly consider the ANC1D Resolutions of 2007 and 2008 in their entirety.

III. ARGUMENT

A. THE BOARD FAILED TO CONSIDER A MAJORITY OF THE COMMISSION’S RESOLUTIONS CONCERNING DON JUAN’S

The Board’s decision relied only on a few of the many ANC1D’s resolutions, systematically excluding those Resolutions that clearly supported the lifting of the ban on live music at Don Juan’s. The Board systematically sought to exclude over 16 Resolutions, including those that explicitly supported the requests of Don Juan’s and other establishments to terminate the existing MPNA VAs, particularly because the MPNA VAs banned live music. See Testimony Transcript at pages 324-331. The Board of Appeals has determined that remand was proper when relevant ANC Resolutions were not properly considered as evidence. “[I]t is difficult to determine whether the resolution of [the] ANC.. was or was not admitted... Considering our conclusion that ANC issues and concerns are entitled to great weight, as well as **the ANC’s statutory mandate to forward its recommendations to the Board, exclusion would have been error...** [W]e... suggest that the **Board not exclude such evidence at the new hearing.**” *Kopff v DC ABC Board*, 381 A.2d 1372, 1385, 1386 (D.C.1977). (emphases added).

The Board erroneously reported that our Commission had not considered or voted on the establishment of having live music at Don Juan’s. This is clearly in error. Evidence of the ANC’s continued support in lifting the oppressive MPNA ban on live music includes the Resolutions of February 6, 2007, April 11, 2007, May 15, 2007, June 5, 2007, July 11, 2007, August 7, 2007, September 4, 2007, November 20, 2007, December 4, 2007, January 22, 2008, February 5, 2008 and May 6, 2008. The Commission was very clear in its language in each of these Resolutions that the ban on freely choosing the type of live music be lifted, that hours for such live music be restricted to those included in the Hear Mount Pleasant Voluntary Agreement, but time restrictions only be on a temporary basis, and that Karaoke have no time limitations.

It is well settled that an agency “must give ‘great weight’ to ‘issues and concerns’ raised by an Advisory Neighborhood Commission. See D.C.Code §1-261(d) (1999), recodified as amended in D.C.Code §1-309.10(d)(3)(A) (2001). Specifically, the [agency] must: ‘elaborate, with precision, its response to the ANC issues and concerns,’ and ... ‘articulate why the particular ANC itself, given its vantage point, does or does not offer persuasive advice under the circumstances.’ ... failure to address ANC concerns with particularity is grounds for a remand...” *Watergate West, Inc. v. DC BZA*, 815 A.2d 762, 765, 766 (D.C.2003).

Because the Board did not properly recognize, and therefore did not and could not give great weight to the ANC’s avid and unwavering support for all forms of live entertainment at Don Juan’s, the Order is legally flawed. Accordingly, the Order must be reconsidered and amended to allow all forms of live entertainment in light of the great weight be accorded the ANC and its unqualified support for all forms of live entertainment.

B. THE BOARD MISCHARACTERIZED THE SUBSET OF THE COMMISSION’S RESOLUTIONS THAT IT HAD CONSIDERED CONCERNING DON JUANS

The Board’s decision to deny Don Juan’s their choice of live entertainment erroneously relied upon a subset of the Commission’s Resolutions. It is unclear why the Board so methodically contorted the ANC’s Resolutions in their dealings with Don Juan’s. The Board cited our endorsement of lifting the time constraints on Karaoke as a reason to deny Applicant their choice of the type of live entertainment. This illogical extrapolation is not supported by the evidence. What’s more, this gross mischaracterization is directly contradicted by the **more than twenty (20) Resolutions passed by our Commission** in 2007 and 2008.

C. THE BOARD FAILED TO APPLY THE REQUIRED STANDARD OF GREAT WEIGHT WITH REGARD TO THE ANC AND ITS RESOLUTIONS AND IN DENYING DON JUANS THEIR CHOICE OF THE TYPES OF LIVE MUSIC

The Board’s conclusions of law must rely on accurate findings of fact. This standard was clearly articulated by the Court of Appeals: “Without such findings there is no guarantee that ‘cases (will) be decided according to the evidence and the law, rather than arbitrarily or from extra-legal considerations.’” *Kopff v DC ABC Board*, 381 A.2d 1372, 1386, 1387 (D.C.1977). There also “must be demonstration in the findings of a ‘rational connection between facts found and the choice made.’” *Kopff* at 1387; *quoting Brewington v. DC Bd. of Appeals and Review*, 299 A.2d 145, 147 (D.C.1973). The Board has failed to comply with this standard in its reliance on a subset of the Resolutions passed by ANC1D and by the systematic exclusion of over sixteen other relevant ANC Resolutions concerning the restoration of live entertainment to establishments in Mount Pleasant, including Don Juan’s.

The issues raised before an agency by an ANC have been accorded special status, and the agency is “required by the D.C. Code and its own organic regulations to give issues and concerns raised by the ANC ‘great weight,’ and to discuss those issues ‘in the written rationale for the governmental decision taken.’ The ‘great weight’ requirement obliges the agency to ‘elaborate, with precision, its response to the ANC issues and concerns,’ and to ‘articulate why the particular ANC itself, given its vantage point, does or does not offer persuasive advice under the circumstances.’ ...failure to address ANC concerns with particularity is grounds for a remand even if other procedural requirements are met.” *Levy v. DC BZA*, 570 A.2d 739, 746 (D.C.1990) (citations omitted).

The fact is that the Mount Pleasant ANC has always and unequivocally supported all forms of live entertainment in the case of Don Juan’s, just as in the two related cases of Haydee’s and Don Jaime’s. The main point of debate, in fact, has been ANC1D’s reluctance to impose potentially unfair time limitations on any form of live entertainment. The ANC’s vehement support of live entertainment with respect to Don Juan’s could not be clearer. ANC1D has unequivocally and continuously supported Don Juan’s quest for the right to offer all forms of live entertainment.

D. THE BOARD’S DECISION TO DENY DON JUAN’S THEIR CHOICE OF LIVE ENTERTAINMENT IGNORES OBJECTIVE EVIDENCE RESULTING FROM NO VIOLATIONS FOUND AFTER 41 INSPECTIONS AND AFTER SOUND EXPERT ANALYSIS SHOWED THAT DON JUAN’S EMITTED NO SOUNDS ABOVE AMBIENT SOUND LEVELS

The Board’s Order stated that, after at least 19 (nineteen) visits by a single investigator of complaints forwarded by Ms Laurie Collins to ABRA during the spring of 2008, investigators did “not identify any noise coming from the establishment or observe any ABC violations.” (see Findings of Fact, paragraph 8, bridging pages 3-4). In addition, after 41 (forty-one) monitoring visits were made by ABRA this spring to Don Juan’s, “ABRA Investigators did not find any ABC violations.” (Findings of Fact, paragraph 8, page 4).

The Board’s Order also stated that a sound expert performed a sound monitor of Don Juan’s and “indicated that right outside the front door of the establishment at the corner of Mount Pleasant and Lamont Streets he could not get a meter reading that went above the normal baseline ambient sound level that the neighborhood was creating. At other outside areas near the establishment, including the closest residential neighborhoods, Mr. Turner could not even tell that music was playing and could not get a meter reading.” (citations omitted) (Findings of Fact, paragraph 13, page 5).

Based on the failure to properly consider all of the pertinent resolutions provided by the ANC regarding the instant decision denying live entertainment in Don Juan’s, as well as ignoring the overwhelming evidence that Don Juan’s was not found in violation after 41 inspections, as well as the sound engineer’s report concerning the lack of sound being emitted above ambient sounds on the street in front of the establishment, the Board’s decision has clearly failed to abide by the District of Columbia Administrative Procedure

Act. Its decision to deny live entertainment to Don Juan's is arbitrary or capricious. See, D.C. Official Code 2-510(a)(3)(A). The Board has failed to objectively apply the mandatory three part test set forth in *Mills*, specifically because the Board has failed to make a finding of fact on each material contested issue of fact; second, the agency's findings are not supported by substantial evidence on the record as a whole; and third, the conclusions do not flow rationally from those findings and do not comport with the applicable law. See, e.g., *Mills v. District of Columbia Dep't of Employment Servs.*, 838 A.2d 325, 328 (D.C.2003); citing *Ferrera v. District of Columbia Dep't of Employment Serv.*, 667 A.2d 310, 312 (D.C.1995).

IV. CONCLUSION

For all of these foregoing reasons, ANC1D respectfully requests the Board grant our Motion to Reconsider.