

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CORPORATION COUNSEL

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February 15, 2002

Thurndia S. Brown
Advisory Neighborhood Commission 4A
7820 14th Street, N.W.
Washington, D.C. 20012

Re: Whether recommendations of an affected ANC are given great weight by the ABC Board

Dear Ms. Brown,

This responds to your letter of December 21, 2001 to Annette Elseth, Assistant Corporation Counsel, Legal Counsel Division. You state that an establishment seeking an Alcoholic Beverage Control (ABC) license is located just outside of, but bordering, Advisory Neighborhood Commission (ANC) 4A on the east side of Georgia Avenue. The establishment is located within the boundaries of ANC 4B. You assert that ANC 4A is an affected ANC because the establishment borders the ANC and will have an effect on persons residing or working in ANC 4A. The ABC Board sent both ANC 4A and 4B notice of the application for a license. Both ANCs appeared at the roll call hearing and identified themselves and the ABC Board instructed them to try to negotiate voluntary agreements with the applicant. You further stated in a follow up phone call that the General Counsel for the ABC Board stated to you that recommendations of affected ANCs are not given great weight by the ABC Board. Although ANC 4A has worked out a voluntary agreement with the establishment involved in this case, you seek advice with regard to the larger issue of whether recommendations of an affected ANC are entitled to be given great weight by the ABC Board.

Since great weight is triggered by the notice requirement, if the ABC Board is not required to give notice to an affected ANC, then it is not required to give great weight to the recommendations of an affected ANC. *See Office of the People's Counsel v. PSC*, 630 A.2d 692, 698 (D.C. 1993). Section 738 of the Home Rule Act, approved December 24, 1973, 87 Stat. 824, D.C. Official Code § 1-207.38 provides the functions of the ANC as envisioned by Congress, as follows:

(c) Each Advisory Neighborhood Commission:

(1) May advise the District government on matters of public policy including decisions regarding planning, streets, recreation, social services

programs, health, safety, and sanitation in that neighborhood commission area;

* * *

(3) Shall have such other powers and duties as may be provided by act of the Council.

(d) In the manner provided by act of the Council, in addition to any other notice required by law, timely notice shall be given to each Advisory Neighborhood Commission of requested or proposed zoning changes, variances, public improvements, licenses, or permits of significance to neighborhood planning and development within its neighborhood commission area for its review, comment, and recommendation.

(Emphasis added.) The Home Rule Act requires notice to ANCs of actions to be taken within the boundaries of each ANC. In implementing this provision of the Home Rule Act, the Council chose to require more notice than required by the Home Rule Act. Sections 13(b) and 13(c)(1) of the Advisory Neighborhood Councils Act of 1975 (1975 Act), effective October 10, 1975, D.C. Law 1-21, D.C. Official Code § 1-309.10, as amended, require notice to all affected ANCs for a list of proposed actions by District Government agencies. However, notice by the ABC Board is governed by section 13(c)(2).¹ The question, therefore, is whether subsection (c)(2) requires notice to affected ANCs. In order to answer the question posed, we must consider the District laws governing both ANCs and the ABC Board.

ANCLaw

Notice to ANCs by the ABC Board is governed by section 13(c)(2) of the 1975 Act. The original language requiring the ABC Board to give notice to ANCs was found in section 2(b) of the Advisory Neighborhood Commission Additional Notice Act of 1977, effective October 26, 1977, D.C. Law 2-30, as follows:

The Alcoholic Beverage Control Board shall provide each affected Advisory Neighborhood Commission by mail with a notice of pending original applications for previously unissued liquor licenses, including transfers, for Retailer's License, Class A, or Retailer's License, Class C, within the boundaries of each affected Advisory Neighborhood Commission at least thirty days prior to any hearing at which any such application may be scheduled for consideration. The Alcoholic Beverage Control Board shall publish annually in the District of Columbia Register, on or near the first day of November, or after that date with good cause published with such notice, a list of those licensees with a Retailer's

¹ Although subsection 13(b) appears to apply to all of subsection (c), I conclude that it does not apply to (c)(2) because it provides primarily for the timing and manner of providing notice. Since (c)(2) includes timing and manner provisions of its own as it applies to the ABC Board, there is no need to refer to the generally applicable provisions of subsection (b).

License, Class A, or a Retailer's License, Class C, liquor license which will expire on the 31st of January of the next year.

(Emphasis added.) At the time this language ("original language") was enacted, the term affected had no legal meaning, only its ordinary meaning. Later interpretations concluded that affected ANC's differed from ANC's wherein an establishment was located. *See* Kopffv. District of Columbia ABC Board, 381 A.2d 1372 (D.C. 1977)(Two ANC's claimed to be affected in the case, the respondent did not dispute the claim); September 16, 1987 Opinion of the Corporation Counsel (More than one ANC may be affected under the statute). These later interpretations made the use of the term affected in the original language contradictory with the language that the notice be of licenses "within the boundaries" of the ANC.

Subsequently an amendment to section 13(c)(2) of the 1975 Act was made in section 3(b) of the Alcoholic Beverage Control Amendment Act of 1992 (1992 Act), effective October 3, 1992, D.C. Law 9-174, D.C. Code § 1-261(c)(2)(1981 ed.). that amendment provided:

The Alcoholic Beverage Control Board shall give notice to Advisory Neighborhood Commissions at least 45 calendar days prior to a hearing on applications for issuance or renewal of retailer's licenses, class A, B, C/R, *CIT*, *CIN*, *CIH*, *C/X*, *DIR*, *DIT*, *DIN*, *DIH*, *DIX*, and consumption licenses for clubs, or for transfer of a license of any of these classes to a different location. The notice shall be given to the Advisory Neighborhood Commission representing the area in which the applicant's establishment is located. The Board shall give notice by first-class mail, posted not less than 5 calendar days prior to the first day of the 45-calendar-day notice period, and addressed to the Commission office, with sufficient copies of the notice for distribution to each Commission member, the Chairperson of the Commission at his or her home address of record, and the Commission member in whose single-member district the establishment is located at his or her home address of record. In addition, the Board shall provide to each Commission office, on a quarterly basis, a printed list of all ABC licenses due to expire in the ensuing 6 months. An Advisory Neighborhood Commission may object to the application in the manner set forth in § 25-115(c) and (e).

(Emphasis added.) It is not clear from a review of the legislative history for the 1992 Act that the term affected was removed specifically to remedy the inconsistency identified above. In fact, the Committee Report for the 1992 Act itself uses the term affected while discussing the changes to this section:

[T]o establish detailed requirements for the Alcoholic Beverage Control Board to follow in notifying Advisory Neighborhood Commissions of pending ABC license applications for establishments located within the

area they represent. The intent is to assure that affected ANCs receive notice in ample time to exercise their rights to object.

(Emphasis added). *Report of Committee on Consumer and Regulatory Affairs*, March 12, 1992, page 2. The specific Committee Report language regarding section 3 stated:

This section makes a conforming amendment to section 13(c) of the Advisory Neighborhood Councils Act (D.C. Code, sec. 1-261(c)) by rewriting paragraph (2) to reflect the proposed new requirements regarding ANC notification and also to bring outdated language into conformity with the current ABC Act.

Id at p. 12. Most of the discussion in the Committee report was about the time limit for notifying ANCs and to whom notices would be sent. There was no discussion about affected versus located ANCs. It is not clear what "outdated" language was updated in the new language, or whether that refers to the word affected, which was removed. Nonetheless, the word affected was clearly removed, and the revised language contained no internal inconsistencies. The revised language clearly required notice to an ANC where the establishment was located only, not to affected ANCs.²

Subsequently, in 2000 the ANC law underwent a comprehensive reform in the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, effective June 27, 2000, D.C. Law 13-135, D.C. Official Code § 1-309.10(c)(2). The new language of section 13(c)(2) states:

(A) The Alcoholic Beverage Control Board ("ABC Board") or its designee shall give notice to Advisory Neighborhood Commissions, the Office of Advisory Neighborhood Commissions, the Commission representing the area in which the applicant's establishment is located, and the Commissioner representing an affected single-member district at least 45 calendar days prior to a hearing on applications for issuance or renewal of retailer's licenses, class A, B, CIR, *CRR*, *CIN*, *CIH*, *CIX*, DIR, *Drr*, *DIN*, *DIH*, *DIX*, and consumption licenses for clubs, or for transfer of a license of any of these classes to a different location. The ABC Board or its designee party shall give notice by first-class mail, posted not less than 5 calendar days prior to the first day of the 45-calendar-day notice period, and addressed to:

- (i) The Commission office, with sufficient copies of the notice for distribution to each Commissioner;
- (ii) The Chairperson of the Commission at his or her home address of record; and

² Subsequent to the 1992 Act, the court in Neighbors United for a Safer Community v. District of Columbia BZA, 647 A.2d 793 (D.C. 1994) for the first time interpreted the term affected to include an ANC other than the one within which the proposed action was to take place when it held that a property directly across the street from an ANC clearly affects the ANC.

(iii) The Commissioner in whose single-member district the establishment is located at his or her home address of record.

(B) In addition, the ABC Board shall provide to each Commission office, on a quarterly basis, a printed list of all Alcohol Beverage Control licenses due to expire in the ensuing 6 months. An Advisory Neighborhood Commission may object to the application in the manner set forth in § 25-115(c) and (e).

(Emphasis added.) The new language tracks the old language to a certain extent but adds notice to the Office of ANCs and to the affected Single-Member District (SMD) Commissioner. The reintroduction of the term affected raises the question as to whether the ABC Board notice requirement to the ANCs has changed. The language is internally inconsistent with regard to the SMD Commissioner because the first reference refers to an affected SMD Commissioner, but the second reference refers to the SMD where the establishment is located. A review of the legislative history reveals no indication that this section was intended to change the prior law requiring notice only to the ANC and the SMD Commissioner where the establishment is located.³ In my reading of the entire provision, the second reference to the SMD Commissioner appears to specifically explain how notice is given as required by the first reference. Since the second reference specifies that notice goes to the SMD Commissioner where the establishment is located, it appears that although the term affected is used, the intent of the provision, when read as a whole, is that the term is used without its legal meaning. Thus, the ABC Board would not have to give notice to an affected SMD Commissioner other than the one where the establishment is located. It is important to note also that the term affected in the new language is not used in conjunction with the ANC as a body, but is instead used in conjunction with the SMD Commissioner. The language regarding the ANC specifies that notice be given to the ANC where the establishment is located. Thus, even if the provision is read to require notice to all affected SMD Commissioners, an affected ANC is not entitled to notice under this provision.

ABC Law

Like the ANC law, the ABC law recently underwent a comprehensive reform. The language prior to the reform read as follows:

(c)(1) Prior to acting on applications for issuance or renewal of retailer's licenses, class A, B, C/R, *crr*, *CIN*, *CIH*, *CIX*, *DIR*, *Drr*, *DIN*, *DIH*, *DIX*, and consumption licenses for clubs, or for transfer of a license of any of these classes to a different location, the Board, at least 45 calendar days

³ The only language that appears in the Committee Report to explain the change is, "D.C. Code § 1-261(c)(2) is amended by requiring the Alcoholic Beverage Control (ABC) Board to give notice also to the OANC. This change seeks to bolster the OANCs ability to support ANCs." *Report of Committee on Local and Regional Affairs*, January 11, 20001, page 5.

prior to a hearing, shall give notice of an application to... the Advisory Neighborhood Commission representing the area in which the establishment is located....

(1A) In the case of an Advisory Neighborhood Commission ("Commission"), the Board shall give notice by first-class mail, posted not less than 5 calendar days prior to the first day of the 45-calendar day notice period, and addressed to the Commission office, with sufficient copies of the notice for distribution to each Commission member, the Chairperson of the Commission at his or her home address of record, and the Commission member in whose single-member district the establishment is located at his or her home address of record. In addition, the Board shall provide to each Commission office, on a quarterly basis, a printed list of all ABC licenses due to expire in the ensuing 6 months.

(Emphasis added.) Section 14 of an Act to control the manufacture, transportation, possession, and sale of alcoholic beverages in the District of Columbia, approved January 24, 1934, 48 Stat. 324, D.C. Code § 25-115(c)(1)(1981 ed.), as amended by the 1992 Act. Like the old ANC law, the old ABC law referred only to the area in which the establishment is located, both as to the ANC and the SMD Commissioner. Thus affected ANCs were not provided notice under the old ABC law.

The new ABC law retains the notice requirement for ANCs where the establishment is located, as follows:

(a)...the Board shall give notice of the application to the following parties:

* * *

(4) The ANC representing the area in which the establishment is or will be located.

* * *

(e) The Board shall give notice to the ANC by first-class mail, postmarked not more than 7 days after the date of submission, and addressed to the following persons:

- (1) The ANC office, with a copy for each ANC member;
- (2) The ANC chairperson, at his or her home address of record;

and

(3) The ANC member in whose single-member district the establishment is or will be located, at his or her home address of record.

(f) The Board shall publish the notices required under this section the District of Columbia Register.

(Emphasis added.) D.C. Official Code § 25-421. This language is clear and does not require notice to affected ANCs. The only inconsistency arises from a new provision of the ABC law found at D.C. Official Code § 25-609. This provision states:

The affected ANC shall notify the Board in writing of its recommendations, if any, not less than 7 calendar days before the date of the hearing. Whether or not the ANC participates as a protestant, the Board shall give great weight to the ANC recommendations as required by subchapter V of Chapter 3 of Title 1. The applicant shall have the opportunity to respond to the ANC recommendations in a manner to be prescribed in the rules adopted by the Board.

The use of the term affected here raises the issue of whether affected ANCs are to be given notice and/or whether they are entitled to great weight. Again, there is an internal inconsistency in the statute because the term affected is used, but there is also a reference back to the requirements of "subchapter V of Chapter 3 of Title I", which is the ANC law quoted above. Since the ANC law predicates the granting of great weight on the requirement to give notice and since nothing in the ANC or ABC law requires the ABC Board to give notice to affected ANCs, the use of the term affected here is inconsistent. I am forced to conclude that the term affected is again used without its legal meaning. It is unfortunate that the Council was not more attentive to this language.⁴ If the Council intended that the ABC Board give affected ANCs notice, this language would only provide a roundabout, not a direct, requirement that the ABC Board do so. Given the specificity of the existing notice provisions, I am not convinced that this inartful and inconsistent use of the term affected would require the ABC Board to give notice to affected ANCs.

Conclusion

As to the factual issue of the ABC Board giving notice to ANC 4A, the ABC Board indicates that it sends notices to every ANC for the convenience of the Board, not because it is required. Giving notice that is not required does not impose on the ABC Board the requirement that any recommendation that results be given great weight.

I conclude that on balance the ABC Board's interpretation of the ANC and ABC law is a reasonable one that is likely to be upheld by a court of law. Superior Beverages, Inc. v. District of Columbia ABC Board, 567 A.2d 1319, 1325 (D.C. 1989). While the statutes are not paragons of clarity, I conclude that affected ANEs are not entitled to notice under either the ANC law or the ABC law. Since affected ANCs are not entitled to notice from the ABC Board, their recommendations are not entitled to great weight.⁵

⁴ This provision was not in the Title 25, D.C. Code Enactment and Related Amendments Act of 2001 as it was reported out of Committee, but was an amendment added from the dais prior to the first vote. See *Report of Committee on Consumer and Regulatory Affairs*, dated November 20, 2000, thus no legislative history is available as to its intent.

⁵ Although affected ANCs' recommendations are not entitled to great weight, affected ANCs may protest a license under D.C. Official Code § 25-601. The Committee Report of the Title 25, D.C. Code Enactment and Related Amendments Act of 2001 indicates that the original bill only gave standing to protest to ANCs representing the area in which the applicant requested a license. This language was specifically amended by the Committee to include all affected ANCs. See *Report of Committee on Consumer and Regulatory Affairs*, dated November 20, 2000.

If you have any further questions with regard to this issue, please contact Annette Elseth, Assistant Corporation Counsel, Legal Counsel Division, at 724-5537, or me at 724-5493.

Sincerely,

ROBERT R. RIGSBY
Corporation Counsel

A handwritten signature in cursive script that reads "Darryl Gorman". The signature is written in black ink and is positioned above a horizontal line.

By: DARRYL G. GORMAN
Senior Deputy Corporation Counsel
for Government Operations
Legal Counsel Division

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