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Minutes of the August 12, 2008 special meeting of Advisory Neighborhood Commission 1-D

These minutes accepted at the September 2, 2008 meeting.

Call to order

[7:13 pm] Vice Chair Gregg Edwards called the meeting to order at 7:13 pm. Present were ANC1D commissioners Edwards, Bosserman, Zara, and Tunda, constituting a quorum. Two topics were named as grounds for the special meeting, namely delaying the closing of the Mount Pleasant Library, and reconsideration of the ABC Board's decision concerning the entertainment endorsement for Don Juan's Restaurant.

Public discussion

[7:14 pm] The meeting was opened to public discussion. Claudia Schlosberg spoke.

Delay closing Mt Pleasant Branch Library until funds are available for a local temporary facility

[7:16 pm] Gregg introduced this resolution:

ANC1D resolves to advise the DC Public Library (DCPL) to delay closing the Mt Pleasant Branch Library until there are funds available for a temporary facility within three or four blocks of the current facility. ANC1D requests the assistance of the Mayor, Deputy Mayor, and DC council to become actively engaged in fulfilling this advice, requests the Councilmember for Ward One and the chair and members of the Council committee on Libraries to assist, and requests Councilmember Jim Graham to withdraw his letter asking DCPL to proceed without delay and instead send a letter supporting this resolution.

Why:

Again, the concern of ANC1D is not just the impact of loss of local library service on Mt Pleasant, but on library users in most of Ward One. The MtPL is close to the four corners of all four ANC areas in Ward One, and serves almost equally all four areas.

Since ANC1D's last resolution requesting a local facility, it has become apparent that the current financial condition of the DC government would make fulfillment of our earlier request inconvenient if not politically impractical. Indeed, we hear informally that the current plan would be to close both the Petworth and Mount Pleasant (MtPL) branch

libraries at the same time, and open a temporary facility near the Petworth metro station, which is a walk of one mile from the MtPL.

Incorporating, to avoid repeating, the arguments in our previous resolutions asking for delay and for a local temp facility, ANC1D notes that the likely Petworth facility would substantially disrupt the library usage for most of the over fifty educational programs located within six or seven blocks of the current facility, and all serving Ward One.

The delays we suggest need not be major: A rehab project could start soon if designed with flex-space and with provision for later add-ons that could facilitate at least the above mentioned opportunities for leveraging this facility to better serve our neighbors.

Approved, 4 to 0.

ANC1D advises DCPL to delay closing the MtP Branch Library until it follows the law on engagement.

[7:19 pm] Gregg introduced this resolution:

ANC1D resolves to advise the DC Public Library (DCPL) to delay closing the Mount Pleasant Branch Library until it follows the ANC law on communication with ANC1D, and until there is a chance for substantial consideration of alternative approaches. ANC1D asks the Mayor, Deputy Major, and DC Council for their assistance in this matter, specifically the Ward One Councilmember and the chair and members of the committee on Libraries.

Why:

DCPL has not complied with the ANC laws, nor has it acknowledged nor substantially answered previous ANC1D resolutions on the Mount Pleasant branch library. Similarly, it has neither acknowledged nor answered resolutions from civic associations whose members are users of the library. It has not answered critiques of the "community meetings" and does not welcome substantial "input" or "participation", nor reveal much about the situation. These meetings do not replace the legal requirements for substantial communication required by law. In fact, the very function of the meetings is questionable given Director Cooper's revelation that almost all of the design decisions have been made. Yet, the recent certified letter suggests there will be more design meetings. This notice is incomplete in many ways.

The laws are clear in requiring relevant agencies to acknowledge and address affected ANC's concerns: § 309.10(d)(3)A states that "The issues and concerns raised in the recommendations of the Commission shall be given great weight during the deliberations by the government entity. Great weight requires acknowledgement of the Commission as the source of the recommendations and explicit reference to each of the Commission's issues and concerns."

Furthermore, D.C. Code § 309.10(h)(1) states that "Each Commission may initiate its own proposal for District government action. The District government entity to which the proposal is made shall acknowledge the proposal in writing to the initiating Commission within 10 days of receipt of the proposal and shall issue a status report to the initiating Commission within 60 days of receipt." And, according to the text of § 309.10(i)(1) "Each commission shall have access to District government officials and to all District government official documents and public data pursuant to § 2-531 et seq. that are material to the exercise of its development of recommendations to the District government."

DCPL is advised to abide by the requirements set forth in the Real Property Disposition Economic Analysis Amendment Act, and the Amended Act of 2006, D.C. Code § 10-801, which requires the Mayor to describe the manner in which economic factors are weighted

and evaluated, including estimates of the monetary benefits and costs to the District for contemplated changes to the library structures or associated public property.

§ 10-801(f) requires: “The Mayor shall take any steps necessary to ensure continuous community input in the disposition of any real property. Changing services in public facilities including a public library is undoubtedly a change in disposition, and so invokes the requirements of continuous community input, transparency and economic accountability under § 10-801 et seq.

The Mount Pleasant Branch Library sits close to the four corners of the four ANCs in Ward One; this is one of, if not the principal branch library serving Ward One. The failure to give legally required notices and to sincerely work with ANCs 1A (across the street), 1B and 1C (both two blocks away) constitutes a serious failure in DCPL handling its legal duties, a failure that by itself requires a remediating delay and re-engagement. Much harm can be inflicted on the residents of Mount Pleasant and Ward One by a rushed design and construction.

ANC1D and other civic groups have expressed concerns that the essentially 19th century design theories will greatly constrain the usable potential of the rushed construction for a half century or more. Director Cooper announced at the 10 June 2008 meeting that she has decided against flex space that allows adaptation and learning in the use of the building. Flex space has been the best practice for building adaptable structures for over forty years, reinforced by scientific studies that show that less than 10% of the life-cycle value is delivered by the initial structure, and less if that structure requires expensive alterations to adjust the space to changing needs. The delays implicit in Director Cooper's announced decision translate into large future losses of services to users, and a large net present value loss arising from designing a public building without benefit of genuine public discourse. In this way, failure to delay and mitigate would contribute to substantial harm

Director Cooper, again in the 10 June 2008 meeting, announced her decision to keep a design based around large public rooms with a sense of grandeur. Interviews with library staff suggest that such aesthetics the already present aggregation of public space into a few large rooms are already in place and seriously constrains current use to perhaps 20% of current demand for established programs, and perhaps much more for potential programs.

A rushed design and construction precludes the possibility of seeking synergies and many additional public benefits that likely will arise out of the current Comprehensive Plan, and the strong possibility of a Special Planning Area focused in a one block wide strip with the branch library almost in the middle. To rush this plan evades the benefits possible from a synergy in working with the Department of Parks and Recreation, whose headquarters is just across the street, and whose programs offer many points of contact if not overlap. It evades the synergies possible with working with the over fifty education programs within six blocks, including the more than \$50 million newly opened Columbia Heights Educational Campus across the street. For a third of a century, a "silo" approach -- to designing public services agency by agency without regard for synergies -- has been depreciated as simplistic. It is well accepted that having a single agency, like DCPL, design a building and program in isolation loses the possibilities of greatly extended public benefits, and loses one of the few means for increasing public sector productivity. The stagnation of public sector productivity seems to be one of the major sources of slowed economic growth over the last third century, and has been blamed for impoverishing the country by 40% compared to the trend-line of the previous century. In this way, failure to delay and mitigate would contribute to substantial harm.

DCPL's failure to follow public policy and the ANC law evades the synergies of a potential public-private partnership involving a planned unit development where representatives of almost a dozen neighboring buildings have expressed interest; the prospect for such a PUD has included the mutual benefits of a cultural force centered in the library and operating with an endowment deriving from air-rights at the rear (not messing with the historical façade) of the library. It evades the awesome potential leverage of anchoring several hundred alley-oriented low-cost live-above store fronts in the two large blocks of and across the street of the branch library; an entrepreneurship center with a library to support an outcrop of the knowledge economy is already proven to be part of some cities stoking ten times the growth of good jobs than others. DCPL current design approach contributes to great harm.

Yes, the loss is important of potential outreach to underserved but yearning to learn neighbors that live nearby in the DC region's largest concentration of low-cost housing and immigrants. Perhaps the worst impact of DCPL's apparent approach, if not delayed and changed, is the loss of a sense of neighborhood civic effectiveness. This factor – which has emerged out of statistic studies on what makes neighborhoods work in the sense of more effective schools, lower crime rates, higher health status and longevity, lower recidivism, . . . – is directly linked to experience of fate control, and thus with the behavior of city agencies. When DCPL does not follow the ANC law, rudely and systematically ignores civic association resolutions for decades, and puts on "community meetings" that are not open, fair, balanced, and welcoming, then a sense of neighborhood effectiveness withers, along with many other component of Quality of Life measures.

Approved, 4 to 0.

ANC1D Requests a Motion to Reconsider the ABC Board Ruling on Don Juan's Liquor License/Endorsement

[7:23 pm] Jane moved the following resolution:

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.

(The text supporting this resolution is added at the end of these minutes, due to its length.)

Approved, 4 to 0.

ANC1D supports clarification of legal issues around ABC rulings on Don Juan's.

[7:25 pm] Gregg moved the following resolution:

ANC1D appropriates \$5000 for research and legal advice to clarify the issues around ABC rulings on Don Juan's, including issues on legal notice and response. The funds will be administered under the direction of ANC1D's executive director.

Approved, 4 to 0.

Adjournment

[7:33 pm] Vice Chair Edwards adjourned the meeting, by unanimous vote of the commissioners, at 7:33 pm.

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

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In the Matter of:)

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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 attached, listed and briefly described below. 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 (advise 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 *Ferriera v. District of Columbia Dep't of Employment Serv.*, 667 A.2d 310, 312 (D.C.1995).

E. THE BOARD FAILED TO APPLY THE REQUIRED STANDARD OF GREAT WEIGHT WITH REGARD TO THE ANC AND ITS RESOLUTIONS TO PERMIT DON JUANS THEIR CHOICE OF VOLUNTARY OR COOPERATIVE AGREEMENT

The Board did not refer to or incorporate ANC1D's resolution to allow all licensee's, obviously including Don Juan's, to choose between the two versions of ANC1D proposed Cooperative Agreement, the ones based on recommendations of Hear Mt Pleasant (Version A) and of All-Ways Mt Pleasant (Version B, including participation in a Responsible Hospitality process). The ANC1D versions explicitly include a continuing freedom of choice between these two, and not a version based on that maintained by Mt Pleasant Neighborhood Alliance. Without this option of choice, the term Voluntary Agreement actually is not voluntary. Since there is no reference anywhere in the Board's ruling of this fundamental issue of voluntary choice, nor of the strong and continuing series of ANC1D resolutions supporting an immediate implementation of a Responsible Hospitality process, it appears that Board has chosen to ignore this whole initiative. In ignoring the opportunity to introduce a well-proven best practice, the Board causes substantial harm to the Mt Pleasant area by denying the benefits of the aspect of progress.

IV. CONCLUSION

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

August 12, 2008

Respectfully submitted,

ANC1D