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MAR 31 2009
DISTRICT OF COLUMBIA
COURT OF APPEALS

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 08-AA-44

2009 APR -2 A 10:35

LYDIA C. ADAMS, *et al.*, PETITIONERS,

v. 61119-07/107P

DISTRICT OF COLUMBIA ALCOHOLIC BEVERAGE CONTROL BOARD, RESPONDENT,
AND
TONIC AT QUIGLEY'S, LLC, INTERVENOR.

On Petition for Review of an Order
of the District of Columbia Alcoholic Beverage Control Board

(Argued March 17, 2009 Decided March 31, 2009)

Before: WASHINGTON, *Chief Judge*, FISHER, *Associate Judge*, and STEADMAN, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioners live in an area zoned as a residential-use district near George Washington University. They challenge the issuance of a liquor license to Intervenor Tonic at Quigley's, LLC ("Tonic"), a restaurant located within that residential district. We affirm.

Petitioners' principal argument turns on D.C. Code § 25-336 (2007). That section in its subsection (a) bans the issuance of a retailer's license for a business operated in a residential-use district but, among other exceptions, provided at the time of the issuance of this license an exception in its subsection (c) that read as follows:

> Subsection (a) of this section shall not apply if, at the time the application for a new license is submitted to the Board, a license of the same class is operating an establishment within 400 feet of the applicant.

Lisner Auditorium is located within 400 feet of Tonic. It holds a liquor license of the same class as that issued to Tonic although not of the same type; Lisner is a multipurpose facility and Tonic is a restaurant. Thus, prior to 2007, the exception would not have been applicable to Tonic because at that time the exception referred to an existing license of the same "type

and class." However, in 2007, the District of Columbia Council enacted the Retail Class Exemption Clarification Temporary Act of 2007 which deleted the words "type and" from subsection (c). 54 D.C. Reg. 8034, 10702 (2007).

Nonetheless, petitioners argue that, correctly interpreted, subsection (c) operates as a sort of grandfather clause, permitting licenses to be awarded only to those who already hold licenses within the residential-use district, and that no licenses may be awarded to new entities. The argument is based not on any plain reading of the statute, which is termed "ambiguous," but rather on the invocation of legislative history of the original adoption of the section in 2001 "based" upon a prior section dating from 1958.

As we have said many times and in many contexts, "an agency's interpretation of the statute and regulations it administers will be sustained unless shown to be unreasonable or in contravention of the language or legislative history of the statute," and thus "we must accord considerable respect . . . [to] the Board's interpretation of the underlying statutory requirements for obtaining a liquor license . . . ." *Haight v. District of Columbia Alcoholic Beverage Control Bd.,* 439 A.2d 487, 491 (D.C.1981). The Board, of course, disagreed with petitioners' interpretation and, for purposes of this appeal, we do likewise. We are addressing here a provision amended by the District of Columbia Council by emergency and temporary legislation in 2007 accompanied by legislative history that unambiguously made clear that the section as amended operated to permit Tonic, a new licensee, to apply for a license under subsection (c). Indeed, the accompanying resolution mentioned Tonic by name. 54 D.C. Reg. 6620 (2007). The operation of the amended section was prospective, not retroactive as was the case in *West End Tenants Ass'n v. George Washington Univ.*, 640 A.2d 718, 730-32 (D.C. 1994), upon which petitioners rely. There can be no doubt that the amended provision was intended to encompass the circumstances of the Tonic application.[1] The Board's interpretation to this effect was entirely reasonable.

As a statutory fall-back argument, petitioners assert that a restaurant license is not of the same "class" as a multipurpose facility license. They rely on the language of D.C. Code § 25-113 (a)(1). That subsection provides that on-premises retailer's licenses shall be "classified by the type of establishment licensed as follows," listing seven categories, including restaurants and multipurpose facilities. This argument overlooks the use of the very word "type" in subsection (a)(1). It also overlooks the immediately following

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[1] The emergency and temporary legislation amending subsection (c) was allowed to expire without permanent legislation being enacted and thus the subsection has reverted to its former language including the phrase "type and." No issue is raised on appeal about this aspect of the matter.

subsection (a)(2), which provides that "[f]or each *type* of establishment listed in paragraph (1) of this section, there shall be 2 *classes* of on-premises retailer's license." (Emphasis added.) Here, both the Tonic and the Lisner licenses were of class C (although bearing a further letter indicating the type of establishment). The Board here determined, consistent with an earlier analogous ruling, that "class" referred only to the two classes of licenses and not to the subcategories. Again, this interpretation was reasonable and in accord with the legislative history of the amended section, as discussed above. Indeed, it is difficult to determine the purpose of the prior reference to "same type and class" if petitioner's interpretation were correct.

Petitioners make two final arguments. First, they invoke the equal protection clause of the United States Constitution. We shall assume that petitioners are being treated differently[2] from others "similarly situated." *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Nonetheless, a statutory provision of the type here will not be set aside "if any set of facts reasonably may be conceived to justify it." *Tucker v. United States*, 708 A.2d 645, 647 (D.C. 1998) (citation omitted). A challenger must make "a clear showing of arbitrariness and irrationality" and must "negat[e] every conceivable basis which might support [the legislation]." *Id.* The District and Tonic set forth a number of reasons supporting the distinction that the legislature has made here, including, for example, a determination that full protection is not required where a district already contains a liquor licensee. Unwarranted proliferation of liquor licensees in such districts is checked by the requirement that any liquor licensee will have to obtain, as a prerequisite to operation of its business, a special exception to the zoning laws. We cannot discern any equal protection violation here.

Finally, petitioners argue that the Board's approval of alcohol service hours until one and two a.m., instead of eleven p.m. and midnight, was unsupported by substantial evidence and an abuse of discretion. "Unless the Board has committed an error of law, this court will overturn its decision only if it is unsupported by substantial evidence. Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Tiger Wyk Ltd. v. District of Columbia Alcoholic Beverage Control Bd.*, 825 A.2d 303, 307 (D.C. 2003) (citations omitted). Here, the Board had before it a wide

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[2] Petitioners claim that they, and others in residential-use districts which already contain a liquor licensee, are treated differently from those living in a residential-use district which does not contain such a licensee. The District argues, however, that those to whom petitioners should be compared are all other residents in residential-use districts which already contain a liquor license and that, as to them, all are being treated equally by the statutory provision. We need not address this argument.

variety of evidence bearing on the issue of hours of operation and their possible effect on the neighborhood, including twenty-one investigations of the premises, information about the operation of another similar facility owned by Tonic, and a number of restrictions placed on the operation by a voluntary agreement, all of which is set forth in great detail in its findings of fact. We cannot say that a reasonable mind could not have come to the conclusion adopted by the Board.

Accordingly, the order of the Board granting a license to Tonic is affirmed.

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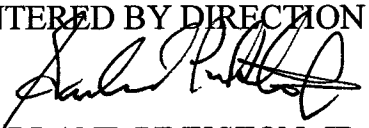

GARLAND PINKSTON, JR.
Clerk of the Court

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