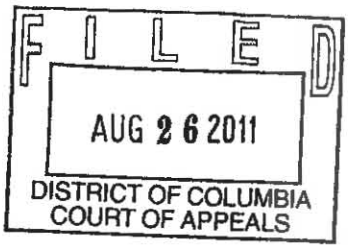
DISTRICT OF COLUMBIA COURT OF APPEALS



No. 10-AA-793

DON PADOU AND ABIGAIL PADOU, *et al.*, PETITIONERS,

v.

DISTRICT OF COLUMBIA ALCOHOLIC BEVERAGE CONTROL BOARD, RESPONDENT.

Petition for Review of a Decision of the District of Columbia
Alcoholic Beverage Control Board
(09-081P)

(Argued June 23, 2011 Decided August 26, 2011)

Before BLACKBURNE-RIGSBY and THOMPSON, *Associate Judges*, and REID,* *Associate Judge, Retired.*

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioners are twenty-four residents of the Brookland neighborhood, located in the Northeast quadrant of the District. They petition for review of a decision by the District of Columbia Alcoholic Beverage Control Board ("the Board") granting the New Brookland Café, LLC ("the Café") a Class CR restaurant license. We conclude that substantial evidence supports the Board's rulings that the license applicant is the true owner of the Café, and that the 400 foot restriction, set forth in D.C. Code § 25-314 (b) (2001), is not applicable to the Café. Hence, we affirm those rulings; however, the Board did not make findings and conclusions on other issues it was statutorily required to consider before determining whether to grant a license. Consequently, we reverse the Board's decision granting the Café a CR restaurant license and we remand this case so that the Board may make required findings and conclusions pertaining to the clean hands and good character issues, the successive application issue, and the door issue.

* Judge Reid's status changed to Associate Judge, Retired, on April 7, 2011.

FACTUAL SUMMARY

The record reflects that in April 2009, D'Maz[1] Lumukanda, applied for a Class CT tavern license[2] for the Café. The Café is located at 1232 12th Street in the Northeast quadrant of the District. The Board granted the Café a stipulated license, which allowed it to operate while its application was pending. On July 29, 2009, the Board revoked the stipulated license and dismissed the application because the Café was located less than 400 feet from a school.[3] The Board concluded, however, that the dismissal was "purely technical or procedural" and that Mr. Lumukanda could apply for a Class CR restaurant license for the Café because restaurants are exempt from the 400 foot prohibition. The Board stayed its decision to revoke the stipulated license and allowed the Café to continue to operate while Mr. Lumukanda completed the application process for the Class CR license.

On October 2, 2009, Mr. Lumukanda applied for a Class CR restaurant license for the Café. Petitioners filed a protest against the application and moved for dismissal, arguing in part that regulations did not permit the Board to grant the Café a CR license, and that under 23 DCMR § 302.8 (a), the 400 foot prohibition still applied to the Café because it did not meet the § 302.8 exemption requirements. On June 23, 2010, following two separate hearings, the Board granted a Class CR license to the Café.

ANALYSIS

Petitioners allege, first, that the Board failed to make three requisite statutory findings before granting the Class CR license to the Café: (1) "[t]he owner did not owe more than $100 to the District (i.e., Clean Hands certification)"; (2) "the owner is of good character and fit for licensure"; and (3) "[t]he purported owner of the Café is the true and actual owner [of the Café] based on substantial evidence in the record as a whole." The Board concedes that it failed to make the requisite statutory findings and requests that we remand the case so that it can determine the issues. It argues that there is substantial evidence in the record to support an affirmative finding on all three issues.

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[1] Mr. Lumukanda's first name also appears in the record as "D'Mazana" and "Dmazana."

[2] A tavern differs from a restaurant in that it does not have to meet a minimum food sales requirement in order to operate. D.C. Code §§ 25-101 (43)(B)(vi), 25-113 (b)(3)(B)(i)(I) (Supp. 2008).

[3] D.C. Code § 25-314 (b)(1) prohibits a tavern from operating within 400 feet of a school.

"We are deferential to an agency's findings of fact unless they are not supported by substantial evidence in the record." *800 Water Street, Inc. v. District of Columbia Alcoholic Beverage Control Bd.*, 922 A.2d 1272, 1274 (D.C. 2010). However, where an agency "fails to make a finding on a material, contested issue of fact," we must "remand the case for findings on that issue." *Morris v. United States Envtl. Prot. Agency*, 975 A.2d 176, 181 (D.C. 2009).

District of Columbia law requires the Board to make several factual determinations before it may properly grant a liquor license to an applicant. D.C. Code § 22-301 (a) 25-301 (a) (Supp. 2010) requires the Board to determine that an applicant "is of good character and generally fit for the responsibilities of licensure." Section 25-301 (b), the "clean hands requirement," prohibits the Board from issuing a restaurant license to any person who "owes more than $100 of outstanding debt to the District" for, among other things, failing to pay penalties resulting from Litter Control Administrative Act violations. *Id.*; *Id.* § 47-2862 (Supp. 2009).

As clean hands and good character are statutory prerequisites to receiving a license, we must remand the case for further findings on these issues. We do so, however, with specific instructions to the Board that it consider three outstanding Litter Control Administration Act liens issued to Mr. Lumukanda against property located at "Square 0302 suffix: Lot: 0841," each in excess of $100. Petitioners attempted to offer evidence of the liens as proof that Mr. Lumukanda did not satisfy the clean hands requirement, but the Board denied its proffer and excluded the evidence. We are not persuaded by the Board's argument that the liens "fail to substantiate any current outstanding debt as the liens were issued in February and June 2008, long before the issuance of the clean hands certifications . . . and the April 30, 2009 compliance report on which [the Board] reasonably relied," since the liens apparently were still outstanding as of the date the Board issued the license.[4] As a result, the

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[4] Mr. Lumukanda submitted three Clean Hands Certifications, on which he swore that he did not owe the District more than $100 for various statutory violations, including the Litter Control Administrative Act. The Office of Tax and Revenue approved the certifications as true and accurate copies of Mr. Lumukanda's assertions, but did not verify the accuracy of the statements on the certifications. The certifications expressly warned that false assertions would result in license revocation and a $1,000 fine:

> PLEASE READ CAREFULLY AND COMPLETELY BEFORE SIGNING. A FALSE STATEMENT ON THIS CERTIFICATION REQUIRES THAT THE

(continued...)

Board's decision to exclude the evidence appears to have been an abuse of discretion. *See, e.g., Kopff v. District of Columbia Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1385 (D.C. 1977) (holding Board abused its discretion in excluding ANC resolution where it was entitled to great weight in the Board's decision to grant a liquor license). The evidence of the outstanding liens is relevant to Mr. Lumukanda's clean hands certifications and D.C. Code § 25-301 (b).

As to the question whether Mr. Lumukanda is "the true and actual owner" of the Café, we agree with the District that there is substantial record evidence supporting the Board's ownership finding. The Board devoted a hearing to the question of the financial interest in the Café, and Babindranauth Ransom's role. That evidence includes the Café's Articles of Organization, a federal application for an identification number, and Mr. Lumukanda's testimony. As we have said previously: "we must uphold the Board's decision so long as it is supported by substantial evidence even though there may also be substantial evidence to support a contrary decision, as there is in this case." *Upper Georgia Ave. Planning Comm. v. District of Columbia Alcoholic Beverage Control Bd.*, 500 A.2d 987, 992 (D.C. 1985) (citations omitted).

Second, petitioners contend that the Board violated certain statutory and regulatory provisions in issuing a Class C Restaurant license to the Café. They claim that the Board erred by considering successive applications, in violation of D.C. Code § 25-338 which provides:

> (a) A second and each subsequent application for the same class of license for the same person or persons shall not be considered within 5 years of a denial.
>
> (b) If an application is withdrawn for good cause, as determined by the Board, before the timely filing of a protest, or if the first application was denied for purely technical or procedural reasons, as determined by the Board, another application by the same applicant for a license of the same class at the same premises may be made at any time.

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[4](...continued)

ADMINISTRATION PROCEED IMMEDIATELY TO REVOKE THE LICENSE OR PERMIT FOR WHICH YOU ARE NOW APPLYING, AND FINE YOU $1,000.

Our review of the Board's decision reveals no analysis of Mr. Lumukanda's 2007 splash restaurant applications and the statutory prohibitions embodied in D.C. Code § 25-338. The District attempts to fashion arguments showing that the Board properly considered Mr. Lumukanda's subsequent applications for a Class C Restaurant license, even though they applied to an establishment at a different location. However, we believe that the proper course is to instruct the Board to make findings and conclusions on this issue upon remand. That is, the Board must explain why it considered Mr. Lumukanda's October 2009 application in light of § 25-338 and his prior applications in July and October 2007, and April 2009.

Third, petitioners argue that the Café is still subject to the 400 foot prohibition under 23 DCMR § 302.8 (a) (Supp. 2008). Under D.C. Code § 25-314 (b)(1) "[n]o license shall be issued for any establishment within 400 feet of a primary, elementary, or high school . . . or recreation area operated by the District of Columbia Department of Parks and Recreation." 23 DCMR § 302.8 (a), which was originally promulgated in April 2004, sets out a list of excepted circumstances under which a restaurant that was located within 400 feet of a prohibited property could obtain a license. However, on March 14, 2007, the Council of the District of Columbia adopted D.C. Code § 25-314 (b)(2), which amended § 25-314 (b)(1) and created an exemption for "a restaurant, hotel, club, caterer's or temporary license" from the 400 foot restriction. Section 25-314 (b)(1) also effectively overrode 23 DCMR § 302.8 (a), as the exceptions listed therein were no longer necessary. In December 2008, 23 DCMR was republished in its entirety, and included § 302.8 (a) as it originally appeared in April 2004. Petitioners argue that the republication of 23 DCMR § 302.8 (a) served to bring restaurants back within the D.C. Code § 25-314 (b)(1) 400 foot restriction. The District argues, that the republication does not trump the § 25-314 (b)(2) exemption for restaurants, as the rule does not carry the force of law.

We agree with the District that the Board did not intend to re-impose the 400 foot restriction on restaurants when it re-published 23 DCMR § 302.8 (a) as part of a package of regulations, and that the Board's interpretation of 23 DCMR § 302.8 (a) as effectively void is correct. "[W]hen an agency supplements a statute, such as by adopting new requirements or limits or imposing new obligations, the rule is invalid unless it had been adopted through notice-and-comment rulemaking and published in compliance with the [the District of Columbia Administrative Procedure Act ("the DCAPA")]." *Andrews v. District of Columbia Police & Firefighters Ret. & Relief Bd.*, 991 A.2d 763, 771 (D.C. 2010) (citation omitted). Under the DCAPA, notice and comment rulemaking requires the agency to publish a copy of the proposed rule in the D.C. Register and to allow at least thirty days for interested members of the public to express their views or to submit data relative to the rule. D.C. Code § 2-505 (a) (2001).

Here, 23 DCMR § 302.8 (a) was republished after D.C. Code § 25-314 (b)(2) amended § 25-314 (b)(1) to wholly exclude restaurants from the 400 foot restriction. Thus, the re-published 23 DCMR § 302.8 (a) imposed new obligations and requirements on restaurants that would be otherwise exempt from § 25-314 (b)(1), and therefore, the proposed new requirements were subject to the rulemaking procedures in the DCAPA. The District concedes that a proper rulemaking did not occur prior to the re-publication of 23 DCMR and asserts that 23 DCMR § 302.8 (a) does not carry the force of law. We agree and conclude that the obligations listed in the regulation are not binding on a Class C restaurant license applicant and thus, the 400 foot restriction is not applicable to the Café.

Fourth, petitioners argue that the Board failed to make the requisite statutory finding that a door connecting the Brookland Inn and the Brookland Café is effectively closed. D.C. Code § 25-761 (Supp. 2009) provides that:

> No license shall be issued for the sale or consumption of beverages in any building, a part of which is used as a dwelling or lodging house, unless the applicant files an affidavit stating to the satisfaction of the Board that access from the portion of the building used as a dwelling or lodging house to the portion where the applicant desires to sell alcoholic beverages is effectively closed; provided, that the provisions of this section shall not apply to a hotel or club licensed under this title. The Board may provide for waiver of the provisions of this section upon application of a licensee.

The Board admits that it failed to find that the door between the Brookland Inn and the Brookland Café is effectively closed under § 25-761. As with good character and cleans hands, the closed door requirement is a statutory prerequisite for obtaining a Class CR license. Consequently, we must remand the case to the Board for further findings on the door issue.

Finally, petitioners assert that the Board's decision to grant the Café a stipulated licence during the pendency of their protest prejudged their case.[5] The District asserts that petitioners have waived their prejudice claim by failing to bring it before the Board in the lower proceedings and, in any event, were not prejudiced by the Board's grant of the

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[5] Petitioners contend that the ANC's letter recommending the Board grant the Café a stipulated license was insufficient, and that under 23 DCMR § 200.1 the Board was required to terminate the license when petitioners filed their protest.

stipulated license. We agree with the District that petitioners neither preserved this issue nor demonstrated prejudice as a result of the Board's decision to issue the Café a stipulated license. The Board granted the license after receiving a letter from the ANC supporting the Café and recommending that the Board grant the Café a stipulated license, as is required by 23 DCMR § 200. Furthermore, the Board revoked the license as soon as it recognized petitioners' protest. Petitioners did not raise any concerns about how the Café operated during the time it was afforded a temporary license, nor do they assert any such concerns on appeal. Accordingly, we agree with the District that "[t]he Board's grant of a stipulated license to the Café was, at all times, proper and consistent with its regulations."

Accordingly, for the foregoing reasons, we affirm the Board's rulings concerning the ownership and 400 foot restriction issues, but we reverse its decision granting the Café a CR restaurant license and we remand this case so that the Board may make required findings and conclusions pertaining to the clean hands and good character issues, the successive applications issue, and the door issue.

So ordered.
ENTERED BY THE DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

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Test:

Julio Castillo
Clerk of the District of Columbia Court of Appeals

BY DEPUTY CLERK

Julio Castillo
Clerk of the District of Columbia
Court of Appeals