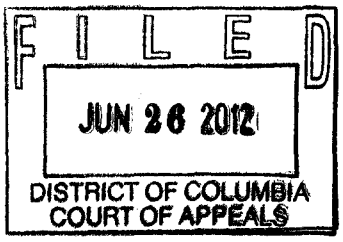
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 11-AA-831



KINGMAN PARK CIVIC ASSOCIATION, ET AL.,
PETITIONERS,

v.

DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD,
RESPONDENT.

On Petition for Review of a Decision of the
District of Columbia Alcoholic Beverage Control Board
(PRO-153-10)

(Argued April 5, 2012 Decided June 26, 2012)

Before GLICKMAN and BECKWITH, *Associate Judges*, and FERREN, *Senior Judge*.

OFFICE OF THE
ATTORNEY GENERAL FOR THE
DISTRICT OF COLUMBIA

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: The Kingman Park Civic Association ("petitioner," or "Kingman Park") asks us to reverse the decision of the District of Columbia Alcoholic Beverage Control Board ("the Board") to grant a liquor license to Rail Station Lounge, LLC ("Rail Station").[1] Petitioner challenges the Board's factual determination that Rail Station's operation will not adversely affect the surrounding neighborhood, and contends the Board erred in denying its motion to recuse the Board's Chairperson, allowing Rail Station to amend its license application, and admitting into evidence a voluntary agreement between Rail Station and Advisory Neighborhood Commission ("ANC") 7D. We affirm the decision of the Board.

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[1] Petitioner purportedly is joined in this request by several individual protestants, who are referred to in petitioner's brief as the "Group of Five." There is some question, which we need not resolve, as to whether the Group of Five properly joined in the petition for review (though, following the parties' lead, we refer to "petitioners" in the caption of this opinion). For convenience, and because Kingman Park is clearly the lead (if not, also, the only) party seeking review of the Board's decision, we refer to "petitioner" in the singular throughout this opinion.

I.

Rail Station applied for a retailer's class CT liquor license on June 22, 2010. The establishment is located in the basement of a building at 2001 Benning Road, N.E., approximately 165 feet from a campus of the Friendship Public Charter School. Its certificate of occupancy allows it to serve a maximum of 200 persons. Rail Station sought permission from the Board to serve and sell alcohol between the hours of 6 p.m. and 2 a.m. daily, to provide live entertainment until 12 a.m. (and recorded music thereafter until closing), and to stay open until 3 a.m. on Friday and Saturday. There are five other liquor-licensed establishments within 1200 feet of Rail Station. None of them offers entertainment.

Petitioner filed a timely protest, complaining that Rail Station's proposed operations would have an adverse impact on the peace, order, quiet, parking, public safety, and real property values in the neighborhood, as well as on the nearby school.

The Board conducted a hearing on the protest on March 2, 2011. Tyrone Lawson, an investigator for the Alcoholic Beverage Regulation Administration ("ABRA"), testified that ABRA investigators had monitored the establishment on 31 separate occasions, at various times during the day and night, between January 5 and February 24, 2011, and did not observe loitering, excessive noise, or any other ABRA violations. (Rail Station was not open for business at the times of these observations.)[2] Lawson further testified that Rail Station was accessible by public transportation and also had parking nearby. Regarding its potential impact on Friendship Public Charter School, Lawson testified that the school let out around 2:30 p.m., that he had observed no after-school activities, and that the schoolyard was "encased and blocked by a fence that is locked every evening when the school is closed."

On behalf of Rail Station, Randy Johnson, its landlord and also the brother of one of Rail Station's principals, testified that the building had previously housed a jazz nightclub in the basement, which the nightclub's owners had soundproofed. Genea Garcia, a co-owner

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[2] We note that although Lawson testified and the Board found that he "monitored the establishment," because the observations did not take place when Rail Station was open for business, it would be more precise to say that Lawson "monitored the vicinity of the establishment" rather than the establishment itself. However, the Board was not without evidence about Rail Station's operations: The establishment's co-owner described Rail Station's special one-day events, held pursuant to temporary licenses issued by the Board, and testified that there had been no complaints about these events; and two witnesses who opposed Rail Station's application testified that they had noticed no parking problems or other ill-effects from the events. *See infra.*

of the venture, confirmed that the basement venue had no windows, would not be open during school hours, was not adjacent to any residences, and had ample parking because the surrounding area is generally vacant and businesses in the area close at night. Garcia testified that Rail Station had held several special one-day events (pursuant to temporary licenses issued by the Board), which had included live jazz, rhythm and blues, singers, and poetry readings, and which were attended by 40 to 80 persons. There had been no complaints about these events.[3] Garcia also testified, based on her experience as a licensed realtor for approximately 12 years, that an influx of new businesses in an area increases property values because it makes the area more attractive to live in.

ANC 7D Commissioner Lisa White testified that, after holding a community meeting on the subject, the ANC had entered into a voluntary agreement with Rail Station and supported its application. The voluntary agreement was admitted in evidence without objection; afterward, petitioner moved to strike it on the ground that ANC 7D was neither a protestant nor a party before the Board, but the Board denied that motion.

The Board also heard testimony from persons opposed to the application. Notably, Joseph Powell, a vice-president of Kingman Park, expressed concern that Rail Station would have an adverse effect on Friendship Public Charter School students who would be in the vicinity in the late afternoon when the establishment was setting up, and that the addition of another seller of alcohol in the locality would lead to an increase in neighborhood violence. Powell acknowledged that he had not noticed any ill effects from the one-day events Rail Station had held. Joan Johnson, a member of Kingman Park, testified that, although she had not observed any parking problems during Rail Station's one-day events, she believed the establishment would generate traffic and safety problems if its application for a liquor license were granted. Veronica Raglin, another Kingman Park member and a licensed real estate broker, testified that the over-concentration of liquor-serving establishments would be detrimental to other local retail businesses and would discourage families from purchasing homes in the neighborhood.[4]

After the hearing, at the Board's request, Rail Station amended its license application to correct some minor errors in the original application (which incorrectly listed Garcia as a 51% owner in one place and a 49% owner in another, and inaccurately described Rail Station's hours of operation and the types of entertainment it would offer). Petitioner filed

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[3] Michael Richardson testified that he had attended several of these special events, that they had been peaceful, and that he had no problem parking.

[4] Petitioner submitted two academic studies concluding that bars and nightclubs had some adverse consequences on neighboring communities.

a motion asking the Board to deny the amended application on the grounds that it was incomplete, inaccurate, and not permitted by statute.

In addition, petitioner moved to disqualify the Board's Interim Chairperson, Nick Alberti, for a conflict of interest arising out of his contemporaneous service as an ANC 6A Commissioner. Petitioner argued that Alberti had a conflict because Lisa White had sought advice from two other ANC 6A Commissioners on how to draft ANC 7D's agreement with Rail Station, and was directed by them to the sample agreements on ANC 6A's website.[5]

On June 15, 2011, the Board issued its Findings of Fact, Conclusions of Law, and Order granting Rail Station's application. The Board denied petitioner's motions and found that Rail Station's proposed operations would not contribute to an over-concentration of liquor establishments or otherwise have an adverse impact on the neighborhood or the children at the Friendship Public Charter School.

II.

We review the Board's decision with deference and will uphold it if it is in accordance with the law and supported by substantial evidence.[6] Substantial evidence means more than a mere scintilla; we demand such relevant evidence as reasonable minds might accept as adequate to support the conclusion.[7] "When there is substantial evidence in the record to support the Board's decision, we will not substitute our judgment for that of the Board, even though there may also be substantial evidence to support a contrary decision . . . ."[8] We also defer to the Board's interpretation of the statutes it is charged with administering unless that interpretation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

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[5] When White so testified at the protest hearing, Alberti interjected on the record that he "had no part of this discussion" and "no idea" ANC 7D was inquiring about ANC 6A's voluntary agreements.

[6] *See, e.g., Aziken v. D.C. Alcoholic Beverage Control Bd.*, 29 A.3d 965, 972 (D.C. 2011); *see also* D.C. Code § 2-510 (a)(3)(A), (E) (2001).

[7] *See, e.g., 2641 Corp. v. D.C. Alcoholic Beverage Control Bd.*, 950 A.2d 50, 52 (D.C. 2008).

[8] *Aziken*, 29 A.3d at 972 (internal quotation marks omitted).

with the law.[9]

III.

Petitioner first asserts that the Board's finding that Rail Station would not adversely affect the surrounding neighborhood is not supported by substantial evidence. We disagree. The Board made detailed findings with regard to the impact of Rail Station's licensure on the neighborhood's peace, order, quiet, parking, real property values, school and school-children, and concentration of liquor-licensed establishments. The Board relied on substantial evidence in the record for those findings – notably, in brief, the testimony that Rail Station is a sound-proofed basement venue without windows, situated near public transportation in an otherwise blighted neighborhood with only five other establishments in the vicinity that were licensed to sell alcohol; that Rail Station would not be open for business during school hours; and that there had been no ABRA violations, parking problems, or other significant difficulties during its special one-day events.[10] Although petitioner argues that the Board's findings are contradicted by other evidence in the record, "[i]f there is substantial evidence to support the Board's finding, then the mere existence of substantial evidence contrary to that finding does not allow this court to substitute its judgment for that of the Board."[11]

Petitioner also argues that the Board erred in declining to exclude Chairperson Alberti from further participation in the protest proceeding on account of his alleged conflict of interest. "[T]he criteria governing recusal of judicial officers apply also to agency decisionmakers acting in an adjudicative or quasi-judicial capacity. In seeking recusal on the ground of bias, a party initially must allege facts that (1) are material and stated with particularity; (2) are such that, if true, they would convince a reasonable person that a bias exists; and (3) show that the bias is personal as opposed to judicial, in nature."[12] In this case, the record shows, and the Board found, that Alberti had no involvement in the exchange between Lisa White and ANC 6A regarding the drafting of a voluntary agreement between ANC 7D and Rail Station. We therefore agree with the Board that "no reasonable person

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[9] *Id.*

[10] The Board recognized that at one of Rail Station's events, the police reported an incident of disorderly conduct. However, the Board noted that this was not an ABRA violation and that the details of that incident were not presented to it.

[11] *Spevak v. D.C. Alcoholic Beverage Control Bd.*, 407 A.2d 549, 554 (D.C. 1979).

[12] *Dupont Circle Citizens Ass'n v. D.C. Alcoholic Beverage Control Bd.*, 766 A.2d 59, 65 (D.C. 2001) (internal citation, quotation marks, and brackets omitted).

would believe that . . . Chairperson Alberti has a conflict of interest or even the appearance of one in this matter." Accordingly, we find no error in the Board's denial of petitioner's motion to recuse Alberti.[13]

We likewise reject petitioner's contention that the Board erred by receiving in evidence the voluntary agreement between ANC 7D and Rail Station. D.C. Code § 22-446 (a) (2011 Supp.) states that "[t]he applicant and any protestant may, at any time, negotiate a settlement and enter into a written voluntary agreement." The Board reasonably interprets this statute "broadly to include potential protestants, now and in the future, and not just protestants protesting a current application." It is logical that any potential protestant could enter into a voluntary agreement, and the statute says nothing to preclude the Board's construction.

Although petitioner also complains of procedural irregularities in ANC 7D's consideration of the voluntary agreement, any such irregularities do not taint the Board's ruling admitting the agreement as evidence of support for the application.[14] The Board made it clear in its Order that its decision to grant the license application did not turn on the existence or validity of the agreement.[15] The Board did so because when the Board granted

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[13] Petitioner also argues on appeal that Alberti had another conflict of interest by virtue of his dual positions on the Board and ANC 6A, because as an ANC 6A Commissioner he was sworn to represent the interests of Kingman Park residents. Because petitioner failed to raise this claim before the Board, it is factually unsupported, and we decline to consider it here. *See Hughes v. D.C. Dep't of Emp't Servs.*, 498 A.2d 567, 570 (D.C. 1985). Moreover, ANC 6A did not participate in the application proceeding, so there is no basis for any claim that Alberti's dual positions created a conflict of interest in that respect or that there was any conflict between ANCs 6A and 7D regarding Rail Station's application.

[14] The Board admitted the voluntary agreement into evidence because "'the wishes of the persons voting, owning property or residing in the vicinity' are potentially relevant to the Board" and found the voluntary agreement was "admissible as evidence *only* insofar as it demonstrates ANC 7D's support for the Application." *See* Order at 9 (emphasis added) (quoting 23 DCMR § 1718.4 (c) (2012)).

[15] *See* Order at 13 ("Because the Voluntary Agreement was submitted during the Protest Hearing, the Board did not consider the Voluntary Agreement as part of the Applicant's license when it decided to approve the Application. As a result, the Board's approval of the Voluntary Agreement is entirely separate and independent of the Board's decision regarding the appropriateness of the Application. The Board includes its approval

(continued...)

Rail Station's license, the Board had not yet approved ANC 7D's voluntary agreement.[16] As a result, the Board did not condition its granting of the license on compliance with the terms of the voluntary agreement,[17] thus rendering petitioner's objections to the voluntary agreement irrelevant to its challenge of the Board's decision to grant the license. Although the Board approved the voluntary agreement separately, rendering it enforceable against Rail Station, petitioner has not sought review of that decision of the Board (nor is it clear that petitioner would have standing to do so).

Finally, petitioner contests the Board's decision to allow Rail Station to amend its application after the conclusion of the protest hearing. However, petitioner cites no authority prohibiting the Board from accepting an amended application. Moreover, the amendments merely corrected minor errors that were discussed during the hearing, and petitioner had an opportunity to cross-examine the relevant witnesses about them. The Board's acceptance of the amended application did not prejudice petitioner, and it was within the ambit of the Board's discretion.

For the foregoing reasons, we hereby affirm the order of the Board granting the application of Rail Station Lounge, LLC, for a retailer's class CT liquor license.

So ordered.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

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[15](...continued)
of the Voluntary Agreement in this Order for the sake of administrative efficiency.").

[16] *See* Order at 13 (approving the appropriateness of the application and "separate[ly] and independent[ly]" approving the voluntary agreement).

[17] *See* D.C. Code § 25-446 (c) ("If it determines that the voluntary agreement complies with all applicable laws and regulations and the applicant otherwise qualifies for licensure, the Board shall approve the license application, conditioned upon the licensee's compliance with the terms of the voluntary agreement. The Board shall incorporate the text of the voluntary agreement in its order and the voluntary agreement shall be enforceable by the Board.") (2011 Supp.).

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