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DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA COURT OF APPEALS

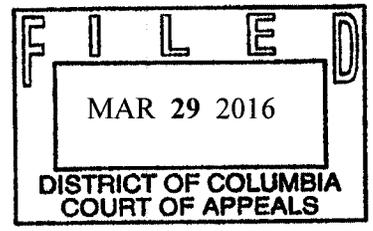
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No. 14-AA-1287

APPELLATE DIVISION

THE VIP ROOM LLC, PETITIONER,

v.



DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD, RESPONDENT.

On Petition for Review of an Order of the
District of Columbia
Alcoholic Beverage Control Board
(PRO-38-14)

(Submitted March 22, 2016

Decided March 29, 2016)

Before BECKWITH and MCLEESE, *Associate Judges*, and PRYOR, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner The VIP Room LLC challenges a decision by the District of Columbia Alcoholic Beverage Control Board (“Board”) denying its application for a new tavern license pursuant to D.C. Code § 25-314 (2012 Repl.). For the reasons stated below, we affirm the Board’s decision and deny the petition for review.

I.

On February 28, 2014, Petitioner submitted an application to the Board for a Retailer C Class Tavern License for its establishment at 6201 3rd Street, Northwest. After a Notice of Public Hearing was posted, the Advisory Neighborhood Commission (“ANC”) 4B and a group of 23 residents protested the Petitioner’s application. One of the objections raised by the residents was that granting the application would violate D.C. Code § 25-314 (b), which prohibits the issuance of licenses for establishments within 400 feet of a school or recreation center.

John Suero, an investigator for the Alcoholic Beverage Regulation Administration (ABRA), submitted a supplemental report to the Board on July 24, 2014, in which he determined that Petitioner's establishment was located within 400 feet of a school, the National Children's Center (NCC), as well as a recreation center, the Takoma Community and Aquatic Center. The NCC has a number of campuses in the District and Maryland; the two NCC locations at issue are located at 201 Rittenhouse Street Northwest and 210 Sheridan Street Northwest. Mr. Suero determined that both NCC locations were within 400 feet of Petitioner's establishment.

On August 5, 2014, Petitioner and ANC 4B reached a settlement agreement and moved to dismiss both the ANC's protest and the protest by the group of residents. The Board held a hearing on August 13, 2014, during which the Board's chairperson cited D.C. Code § 25-314 (b) to explain that a tavern license could not be issued given that Petitioner's establishment was within 400 feet of both a school and a recreation center.¹ Petitioner objected to Mr. Suero's supplemental report on grounds of "bias and appropriateness." Petitioner further challenged Mr. Suero's finding that NCC was a school for purposes of § 25-314 (b).

On October 15, 2014, the Board issued its findings of fact and conclusions of law. The Board cited the Office of the State Superintendent of Education's (OSSE) List of Approved Nonpublic Day Schools, in which the NCC campus at 201 Rittenhouse Street was included as of July 8, 2014. Ultimately, the Board determined that NCC was a private elementary and high school within the meaning of § 25-314 (b) and denied Petitioner's application. The Board also concluded that the "motions filed by the parties in this matter are moot." This petition for review followed.

II.

Petitioner advances two main arguments on appeal: (1) the Board's decision was not supported by substantial evidence, and (2) the Petitioner was not afforded certain procedural rights as provided by the District of Columbia Administrative

¹ "No license shall be issued for any establishment within 400 feet of a public, private, or parochial primary, elementary, or high school . . . or recreation area operated by the District of Columbia Department of Parks and Recreation . . ." D.C. Code § 25-314 (b).

Procedure Act.² We find these arguments unpersuasive and affirm the Board's denial.

We review the Board's decisions with deference. See *Tiger Wyk Ltd. v. District of Columbia Alcoholic Beverage Control Bd.*, 825 A.2d 303, 307 (D.C. 2003). "Unless the Board has committed an error of law, this court will overturn its decision only if it is unsupported by substantial evidence." *Id.* at 307. "Substantial evidence" is not a high evidentiary burden and our task is not to "substitute our judgment" for that of the Board. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 217 (1938) (defining substantial evidence as "relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1387 n.26 (D.C. 1977) ("[O]ur duty [is] to assess both substantiality and the logical connection between the evidence and conclusions . . .").

Relying on a single District of Columbia Graphic Information System ("GIS") map which states that "[t]here are no schools [or] recreation centers . . . within 400 feet" of its establishment, Petitioner argues that the Board's decision was not supported by substantial evidence. Nevertheless, contrary to Petitioner's assertion, we find the record contains relevant and sufficient evidence showing that Petitioner's establishment was within 400 of a school for purposes of § 25-314 (b).

First, both NCC locations at issue are within 400 feet of Petitioner's establishment. According to a GIS map outlining a 400 foot buffer requested by Mr. Suero, the NCC campus at 201 Rittenhouse Street is within 400 feet of Petitioner's establishment. Another GIS map shows the NCC campus at 210 Sheridan Street is also within 400 feet of Petitioner's establishment.

Second, Mr. Suero's investigation revealed that NCC is a "non-profit, private school that provides special education services" for students from six to twenty-two years of age who have "behavioral, learning, and other disabilities." According to Mr. Suero's interview with Ms. Tarlesha S. Wayne, NCC's principal, NCC is funded by the public school systems in the Washington Metro area, such as

² Petitioner also argues that the Board erred in failing to address its motion to dismiss pursuant to a settlement agreement with ANC 4B. We need not address this argument because § 25-314 (b) operated as a complete bar on the Board's ability to issue a license in this case. Therefore, Petitioner's motion to dismiss was moot.

the D.C. Public Schools, Baltimore City Public Schools, Montgomery County Public Schools, and Prince Georges County Public Schools. Mr. Suero also testified to observing children on the premises. The Board's finding was further supported by the OSSE List of Approved Nonpublic Day Schools in which the NCC campus at 201 Rittenhouse Street was included as of July 8, 2014.

As discussed above, unless there is a legal error, we will affirm the Board's decision as long as it is supported by substantial evidence. On this record, evidence was clear that NCC is a school and two of NCC's locations are within 400 feet of Petitioner's establishment. Therefore, we hold that the Board properly denied Petitioner's application under § 25-314 (b).

Petitioner also argues that the Board failed to afford it certain procedural rights because (1) it did not have the opportunity to call witnesses and (2) it was not given notice and the opportunity to rebut the OSSE list. We find this argument unpersuasive. During the hearing, Petitioner's counsel only raised a general objection to Mr. Suero's supplemental report on the ground of "bias and appropriateness" without articulating a specific reason. He did not raise any objection to Mr. Suero's testimony and to the Board's procedures. His failure to raise such objection renders this issue forfeited, and thus we need not consider this argument.³ See *Randolph v. District of Columbia Zoning Comm'n*, 83 A.3d 756, 760 n.4 (D.C. 2014) (refusing to consider the petitioners' claim regarding a major flaw the calculation of lot occupancy because they failed to raise the issue during the contested case below or in their motion for reconsideration).

Even if we deem Petitioner's objection to Mr. Suero's supplemental report as effectively preserving the issue for appellate review, this argument still fails considering the circumstances of this case. Section 2-509 states in pertinent part that "[e]very party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." D.C. Code § 2-509 (b) (2012 Repl.). Here, Petitioner, through counsel,

³ Petitioner argues that the Board's reliance on Mr. Suero's testimony was improper because he conducted a site visit and had personal interviews with NCC's principals instead of using "readily available public records." However, Petitioner does not point to any authority supporting its argument.

had the opportunity to present its case and offer its evidence.⁴ At no time did Petitioner offer to present a rebuttal witness that was denied by the Board. Accordingly, it was not the Board that failed to afford Petitioner its rights under § 2-509 (b); it was Petitioner that failed to offer such witness.

Regarding Petitioner's challenge to the OSSE list,⁵ its reliance on § 2-509 (b) is similarly unfounded. Section 2-509 provides that "[w]here any decision of the Mayor or any agency in a contested case rests on official notice of a material fact not appearing in the evidence in the record, any party to such case shall *on timely request* be afforded an opportunity to show the contrary." D.C. Code § 2-509 (b) (emphasis added). A plain reading of the statute shows that Petitioner had the burden to make a timely request in order to be afforded an opportunity to provide evidence and argue the contrary. Here, the OSSE list was first referenced in the Board's final decision. Petitioner had the opportunity to challenge this evidence by filing a motion for reconsideration or rehearing as provided by D.C. Code § 25-433 (d) (2012 Repl.). Nevertheless, Petitioner failed to do so. In other words, it failed to make a timely request as required by § 2-509. Accordingly, given the Board's proper reliance on the OSSE list and Petitioner's failure to make the appropriate request, we affirm the Board's decision.

For the forgoing reasons, we deny the petition for review.

⁴ The only evidence that Petitioner chose to offer was a certificate of occupancy for one of the buildings in which the NCC campus is located describing the building as a "child development center." This evidence is consistent with the Board's factual finding that NCC was a school.

⁵ The Board's rules pertaining to "Post-Hearing Submissions" allow for taking such official notice:

No document or other information shall be accepted for the record after the close of a hearing, except as follows:

(a) Until all parties are afforded due notice and an opportunity to rebut the information; or

(b) Upon official notice of a material fact not appearing in the evidence in the record, in accordance with D.C. Code § 2-509 (b).

So ordered.

ENTERED BY DIRECTION OF THE COURT:

A handwritten signature in cursive script that reads "Julio A. Castillo". The signature is written in black ink and is positioned above the printed name and title.

JULIO A. CASTILLO
Clerk of the Court

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