

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

In the Matter of:

NAI Saturn Easter LLC
t/a Safeway

Application to Renew a
Retailer's Class B License

at premises
2845 Alabama Avenue, S.E.
Washington, D.C. 20020

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) Case No.: 20-PRO-00059
) License No.: ABRA-097704
) Order No.: 2021-185
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BEFORE: Donovan Anderson, Chairperson
James Short, Member
Bobby Cato, Member
Rafi Aliya Crockett, Member
Jeni Hansen, Member
Edward S. Grandis, Member

ALSO PRESENT: NAI Saturn Easter LLC, t/a Safeway, Applicant

Jerry A. Moore, Counsel, on behalf of the Applicant

Tiffany L. Brown, Chair, Advisory Neighborhood Commission (ANC)
7B, Protestants

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

INTRODUCTION

The Alcoholic Beverage Control Board (Board) approves the Application to Renew a Retailer's Class B License filed by NAI Saturn Easter LLC, t/a Safeway (hereinafter "Applicant" or "Safeway") without conditions.

Procedural Background

The Notice of Public Hearing advertising Safeway's Application was posted on October 23, 2020, and informed the public that objections to the Application could be filed on or before December 28, 2020. *ABRA Protest File No. 20-PRO-00059*, Notice of Public Hearing [*Notice of Public Hearing*]. The records of the Alcoholic Beverage Regulation Administration (ABRA) indicate that Advisory Neighborhood Commission (ANC) 7B filed a protest against the Application. *ABRA Protest File No. 20-PRO-00059*, Roll Call Hearing Results. The Protest Hearing in this matter occurred on March 10, 2021.

The Board recognizes that an ANC's properly adopted written recommendations are entitled to great weight from the Board. D.C. Code §§ 1-309.10(d), 25-609; *Foggy Bottom Ass'n v. District of Columbia Alcoholic Beverage Control Bd.*, 445 A.2d 643, 646 (D.C. 1982). Accordingly, the Board "must elaborate, with precision, its response to the ANC[']s issues and concerns." *Foggy Bottom Ass'n*, 445 A.2d at 646. The Board notes that it received a properly adopted written recommendation from ANC 7B, which indicated that its protest is based on concerns regarding Safeway's compliance with its settlement agreement. The ANC's issues and concerns shall be addressed by the Board in its Conclusions of Law below.

The Board further notes that it may only grant the Application if the request will not have an adverse impact on the peace, order, and quiet; residential parking and vehicular and pedestrian safety; and real property values of the area located within 1,200 feet of the establishment. D.C. Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2021). During the hearing, the parties agreed to the renewal of the license and restricted their presentation to whether conditions on this license were warranted. *Transcript (Tr.)*, Mar. 10, 2021 at 21-24.

FINDINGS OF FACT

The Board, having considered the evidence, the testimony of the witnesses, the arguments of the parties, and all documents comprising the Board's official file, makes the following findings:

I. Background

1. Safeway has submitted an Application to Renew a Retailer's Class B License at 2845 Alabama Avenue, S.E., Washington, D.C. *Notice of Public Hearing*.
2. ABRA Investigator Christopher M. Condon investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 20-PRO-00059, Protest Report* (Mar. 2021) [*Protest Report*].
3. The proposed establishment is located in a MU-7 zone. *Protest Report*, at 4. No other licensed establishments are located within 1,200 feet of the proposed location. *Id.* at 5. There are two day care centers, one elementary school, and one recreation center located with 400 feet of the establishment. *Id.* Safeway's hours of operation run from 5:00 a.m. to midnight every

day. *Id.* at 6. The store is currently authorized to sell alcohol from 9:00 a.m. to 10:00 p.m. every day, except Sunday, when its alcohol sale hours begin at 10:00 a.m. and end at 10:00 p.m. *Id.*

4. The records of the Metropolitan Police Department (MPD) indicate that MPD received 280 calls for service between February 1, 2020, and February 1, 2021. *Id.* at 7. None of these calls led to a violation of the District's alcohol laws. *Id.* The records of ABRA's Noise Task Force indicate that no noise complaints were filed against the establishment between February 1, 2020, and February 1, 2021. *Id.* at 7-8. Safeway's investigative history indicates that the business has never committed a violation of the District's alcohol laws. *Id.* at 8.

5. ABRA investigators visited the establishment on five separate occasions between February 2021 and March 2021. *Id.* at 6. Investigator Condon did not observe any indication that the operation of the store was having a negative impact on peace, order, and quiet. *Id.* While monitoring the store on February 11, 2021, he observed a sign advising that loitering and panhandling on the premises are prohibited. *Tr.*, 3/10/21 at 30. He further saw that store security staff were monitoring the alcohol aisles regularly. *Id.* at 31. He also observed some beer packs with single containers removed but noted that the manager removed those packages from the shelves. *Id.* at 38, 46-47. He further observed an alcohol sale at the store where a store clerk placed the alcohol purchase in a translucent bag. *Id.* Finally, the investigator confirmed that Safeway maintained an MPD call log. *Id.* at 32.

II. Settlement Agreement

6. Safeway has entered into a settlement agreement that governs the operations of the establishment. *Id.* The pertinent provisions include requirements:

- (1) . . . [to] take action reasonably necessary to prohibit and prevent loitering and panhandling within 100 feet of the premises by . . . (a) posting and maintain "No Loitering, No Panhandling" signs . . . [and] requesting that customers not contribute to panhandlers on the premises; (b) asking loiterers to "move on" whenever they are observed on the premises; (c) calling MPD to enforce the Applicant's policy against loitering and panhandling. The Applicant shall maintain a logbook detailing the time and date of such calls made to MPD.
- (2) . . . [to] maintain human and/or electronic surveillance in its aisles in which beer and wine are displayed . . . [; and]
- (8) . . . [to] package alcoholic beverages in translucent bags and not place items other than alcoholic beverages in these bags

Protest Report, Exhibit No. 35.

III. LaShawna Burke

7. LaShawna Burke serves as an "assistant store director" at Safeway and has worked at Safeway for the past five years. *Id.* at 50-51. She noted that many people waiting outside the

store are not vagrant, homeless, or otherwise engaging in panhandling. *Id.* at 51-52. Instead, many people, such as senior citizens, are waiting for pickups by public transportation, ride sharing services, and other courtesy driving services. *Id.* at 52-53. Moreover, these services provide an important service to the community because the store serves a large low-income population. *Id.* at 53.

8. She disagreed with the ANC's assessment that the store suffered from a loitering problem. *Id.* In particular, she has never observed anyone engaged in loitering accost or hassle Safeway's customers or otherwise observed people drink alcohol on the store's premises. *Id.* at 55, 58. She also has never heard a customer or employee complain about loitering at the store. *Id.* at 57-58. The store has also posted signs advising that loitering and panhandling on the premises are prohibited. *Id.* at 59.

9. The store also instructs its staff to bag alcoholic beverages in translucent bags. *Id.* at 58; *see also id.* at 79.

10. Finally, Safeway has further taken measures to provide security. *Id.* at 58. The store also has installed security cameras over its alcoholic beverage aisles. *Id.* at 60. The store also has security conduct walkthroughs on a half-hour or hourly basis. *Id.* at 61. Ms. Burke further indicated that Safeway's calls for police assistance generally are for medical assistance, theft, or disorderly customers. *Id.* at 66.

IV. Robert Rosato

11. Robert Rosato currently works for Safeway and was previously in charge of security at all Safeway stores for approximately five years. *Id.* at 73. He has never received complaints regarding loitering from the ANC, customers, or employees at the store. *Id.* at 75. He also does not regularly observe people loitering when visiting the store. *Id.* at 76. He indicated that Safeway has at least two cameras monitoring its alcohol aisles and approximately 80 cameras monitoring the store. *Id.* at 78. He further indicated that the theft level at the store is not abnormal. *Id.* at 84.

V. Timothy Ley

12. Timothy Ley is a liquor sales manager for Albertson's, which is associated with Safeway. *Id.* at 107. He is not aware of any complaints regarding the operation of the store prior to the present protest proceeding. *Id.* at 109-110.

VI. ANC 7B Chair Tiffany L. Brown

13. Tiffany L. Brown serves as the Chair of ANC 7B. *Id.* at 10. She has received several complaints from members of the community regarding loitering at Safeway. *Id.* at 117. On one occasion, when she visited the store, she observed one person engage in loitering in the parking lot. *Id.* at 117-18.

CONCLUSIONS OF LAW

14. The Board may approve an Application to Renew a Retailer's Class B License when the proposed establishment will not have an adverse impact on the neighborhood. D.C. Code §§ 25-104, 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2021). Specifically, the question in this matter is whether Safeway's Application is appropriate and merits the imposition of conditions on the license. D.C. Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2021).

I. Safeway is Appropriate for the Neighborhood and Does Not Merit the Imposition of Conditions on the License.

15. In this case, the ANC conceded the issue of appropriateness for the purpose of renewing Safeway's license but requested additional conditions be placed on the license to combat loitering, theft, and otherwise ensure compliance with the store's settlement agreement.

16. Under the appropriateness test, "the applicant shall bear the burden of proving to the satisfaction of the Board that the establishment for which the license is sought is appropriate for the locality, section, or portion of the District where it is to be located" D.C. Code § 25-311(a). The Board shall only rely on "reliable" and "probative evidence" and base its decision on the "substantial evidence" contained in the record. 23 DCMR § 1718.3 (West Supp. 2021). The substantial evidence standard requires the Board to rely on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clark v. D.C. Dep't of Employment Servs.*, 772 A.2d 198, 201 (D.C. 2001) *citing Children's Defense Fund v. District of Columbia Dep't of Employment Servs.*, 726 A.2d 1242, 1247 (D.C.1999).

17. In determining appropriateness, the Board must consider whether the applicant's future operations will satisfy the reasonable expectations of residents to be free from disturbances and other nuisances—not just whether the Application complies with the minimum requirements of the law. D.C. Council, Bill 6-504, the "District of Columbia Alcoholic Beverage Control Act Reform Amendment Act of 1986," Committee on Consumer and Regulatory Affairs, 38 (Nov. 12, 1986); *see Panutat, LLC v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 269, 277 n. 12 (D.C. 2013) ("However, in mandating consideration of the effect on peace, order, and quiet, § 25-313(b)(2) does not limit the Board's consideration to the types of noises described in § 25-725."). As part of its analysis, the Board should evaluate each "unique" location "according to the particular circumstances involved" and attempt to determine the "prospective" effect of the establishment on the neighborhood. *Le Jimmy, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 433 A.2d 1090, 1093 (D.C. 1981). Furthermore, the analysis may also include the Applicant's efforts to mitigate or alleviate operational concerns, the "character of the neighborhood," the character of the establishment, and the license holder's future plans. *Donnelly v. District of Columbia Alcoholic Beverage Control Board*, 452 A.2d 364, 369 (D.C. 1982) (saying that the Board could rely on testimony related to the licensee's "past and future efforts" to control negative impacts of the operation); *Upper Georgia Ave. Planning Comm. v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 992 (D.C. 1985) (saying the Board may consider an applicant's efforts to "alleviate" operational concerns); *Citizens Ass'n of Georgetown, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 410 A.2d 197, 200 (D.C. 1979); *Gerber v. D.C. Alcoholic Beverage Control Bd.*, 499 A.2d

1193, 1196 (D.C. 1985); *Sophia's Inc. v. Alcoholic Beverage Control Bd.*, 268 A.2d 799, 800-801 (D.C. 1970). “In determining the appropriateness of an establishment, the Board shall consider . . . [t]he effect of the establishment on peace, order, and quiet, including the noise and litter provisions set forth in §§ 25-725 and 25-726.” D.C. Code § 25-313(b)(2); *see also* D.C. Code §§ 25-101(35A), 25-314(a)(4). Among other considerations, the Board is instructed to consider “noise, rowdiness, loitering, litter, and criminal activity.” 23 DCMR § 400.1(a) (West Supp. 2021).

18. There is no indication that the store suffers from any serious problems related to loitering, theft, or compliance with its settlement agreement. The ANC in this case did not present sufficient evidence that loitering or theft is an ongoing problem or that the store is not taking commercially reasonable steps to combat inappropriate behavior. *Supra*, at 13. The Board further observes that loitering and panhandling are activities protected by the First Amendment. *McFarlin v. Dist. of Columbia*, 681 A.2d 440, 447 (D.C. 1996) (begging is a “form of speech” protected by the First Amendment); *Kirkwood v. Loeb*, 323 F. Supp. 611, 616 (W.D. Tenn. 1971) (ordinance prohibiting loitering without “legitimate business or purpose” deemed unconstitutional for vagueness and overbreadth). Therefore, without a showing that loitering or panhandling is connected to some other type of disturbance or illegal activity, any additional conditions imposed by the Board would likely be deemed unconstitutional. In regard to theft, there is no indication in the record that any theft occurring at the store is abnormal or otherwise causing a negative impact in the neighborhood surrounding Safeway. Finally, there is no indication in the record that Safeway is failing to comply with its settlement agreement on a regular basis. For these reasons, the Board finds the store appropriate and is not persuaded that the imposition of additional conditions on the license are warranted.

II. The Establishment’s Record of Compliance Merits Renewal.

19. Under § 25-315, “[t]he Board shall consider the licensee's record of compliance with this title and the regulations promulgated under this title and any conditions placed on the license during the period of licensure, including the terms of a settlement agreement.” D.C. Code § 25-315(b)(1). In this case, Safeway’s license merits renewal where Safeway has no prior violations of the District’s alcohol laws. *Supra*, at ¶ 4.

III. The Application Satisfies All Remaining Requirements Imposed by Title 25.

20. Finally, the Board is only required to produce findings of fact and conclusions of law related to those matters raised by the Protestants in their initial protest. *See Craig v. District of Columbia Alcoholic Beverage Control Bd.*, 721 A.2d 584, 590 (D.C. 1998) (“The Board's regulations require findings only on contested issues of fact.”); 23 DCMR § 1718.2 (West Supp. 2021). Accordingly, based on the Board’s review of the Application and the record, the Applicant has satisfied all remaining requirements imposed by Title 25 of the D.C. Official Code and Title 23 of the D.C. Municipal Regulations.

ORDER

Therefore, the Board, on this 21st day of April 2021, hereby **APPROVES** the Application to Renew a Retailer's Class B License at premises 2845 Alabama Avenue, S.E., filed by NAI Saturn Easter LLC, t/a Safeway.

IT IS FURTHER ORDERED that the Board's findings of fact and conclusions of law contained in this Order shall be deemed severable. If any part of this determination is deemed invalid, the Board intends that its ruling remain in effect so long as sufficient facts and authority support the decision.

The ABRA shall deliver a copy of this order to the Parties.

District of Columbia
Alcoholic Beverage Control Board

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Donovan Anderson
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Donovan Anderson, Chairperson

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James Short, Member

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Edward S. Grandis, Member

Pursuant to D.C. Official Code § 25-433(d)(1), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, Reeves Center, 2000 14th Street, NW, 400S, Washington, D.C. 20009.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 430 E Street, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. *See* D.C. App. Rule 15(b) (2004).