

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1485

September Term, 2015

BOARD OF LICENSE COMMISSIONERS
FOR WASHINGTON COUNTY,
MARYLAND

v.

FOXSHIRE LIQUORS, LLC, *et. al.*

Eyler, Deborah S.,
Woodward,
Nazarian,

JJ.

Opinion by Eyler, Deborah S., J.

Filed: December 5, 2016

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

The Board of License Commissioners for Washington County (“the Board”), the appellant, denied an application by Sohail Tajammal, Jacob Manley, Richard Adkins, and Foxshire Liquors, LLC (collectively “Foxshire”), the appellees, for a “Class A (off-sale)” beer, wine, and liquor license and a “Special Sunday” license (“the licenses”). The Circuit Court for Washington County reversed that decision.

On appeal, the Board presents three questions, which we have combined as follows:

- I. Was there substantial evidence to support the Board’s exercise of discretion to deny the licenses for failure to demonstrate a public need for the license?
- II. Did the circuit court err in declining to consider additional evidence regarding the exact number and location of existing licensees and the satisfaction of the local “population ratio quota” in its consideration of whether the Board had a reasonable basis for its exercise of discretion?

We answer Question I in the affirmative and therefore shall reverse the judgment of the circuit court and remand this matter to that court with instructions to affirm the Board’s decision denying Foxshire’s application. Our disposition of Question I makes it unnecessary to address Question II.

FACTS AND PROCEEDINGS

Tajammal, Manley, and Adkins applied for the licenses in question for the benefit of Foxshire Liquors, LLC, a limited liability company that they own and are the sole members of. They sought the licenses for use at a liquor store they intended to open in the Foxshire Plaza Shopping Center (“the Shopping Center”), at 1423 Dual Highway, Hagerstown, in the 10th election district in Washington County.

On March 11, 2015, the Board held a hearing on Foxshire’s licenses application. Testifying in support of the application were: Tajammal; Scott Schubel, counsel for Foxshire; Sassoon Shaool, the owner of the Shopping Center; Rodrigo Avellaneda, an architect and project manager who designed the floor plan for the proposed liquor store; Rich Robinson, the owner of a restaurant in the shopping center; and Andy Lapcoff, a commercial realtor.

Tajammal detailed his 20-year background in selling alcoholic beverages and business management. He opined that the proposed liquor store would be successful because of its location on the eastbound side of Dual Highway in an established shopping center. He explained that the store would set itself apart from others by emphasizing “more craft beers” and a large wine selection. Schubel supplemented Tajammal’s testimony further, explaining that nearby liquor stores were located on the westbound side of Dual Highway, in different election districts, whereas election district 10 had only one other Class A beer, wine, and liquor licensee, despite having the “highest population” in the County.¹ Schubel and Lapcoff both testified that eastbound travelers on Dual

¹ The Class A beer, wine, and liquor license “authorizes the holder to keep for sale and to sell all alcoholic beverages at retail, in any quantity, at the place described in the license[,]” which must be sold “in a sealed package or container...[that] may not be opened nor its contents consumed on the premises where sold.” Maryland Code (1981, 2011 Repl. Vol.), Art. 2B, § 6-101(a). Article 2B, § 6-101 has since been re-codified and appears at Maryland Code (2016), Section 31-901 of the Alcoholic Beverages Article (“AB”).

Highway could only access the liquor stores on the westbound side by making a difficult and dangerous U-turn across traffic.

Shaool and Avellaneda testified that the proposed liquor store would not have an adverse impact on the traffic around the Shopping Center or the parking there. Shaool also testified that local businesses believed the proposed liquor store would be a “good fit” and “complimentary” to the stores in the Shopping Center, and members of the community only had “positive things” to say about the proposed liquor store. In addition, he opined that the store’s location would be “a convenience for shoppers” due to its proximity to several restaurants. Robinson similarly testified that the proposed liquor store would “increase traffic flow” to his sandwich shop.

Foxshire also presented a list of Class A, B, C, D, and P liquor license holders and population per Washington County election district (current as of February 20, 2014), and a petition in support of its application signed by over 100 area residents.²

Testifying in opposition to Foxshire’s application were: Lou Thomas, president of the Washington County Restaurant and Beverage Association; Tom Potts, Beverly Bell, and a person named “Dixi,”³ representatives of nearby liquor stores located on Dual Highway; and several local residents and citizens.

² Foxshire presented several other exhibits that are not relevant to this appeal.

³ The record does not disclose “Dixi’s” last name.

Thomas testified that there was no need for an additional liquor store on Dual Highway because there was “a total of six [liquor stores] with in less than 2 miles” of the Shopping Center, including one store that could be accessed without having to make a U-turn. He opined that the proposed liquor store would not provide anything unique from other liquor stores in the area, because “all the stores sell the craft beer” and Foxshire would “have to sell the same product to compete anyway.” Thomas urged the Board to consider that “the impact on . . . existing licenses in the area” would create “a bad situation” by taking income “from all the other business in the community[.]” Potts, Bell, and Dixi gave testimony supporting that offered by Thomas.

Two local residents testified in opposition, expressing concern that the area had “enough liquor stores” already. One of them was concerned that adding another liquor store would attract a “bad element”:

I am opposed to this my reasoning basically what this gentleman just said there is to [sic] many liquor shops in the area as it is. It brings in a bad element which I see which is very close to my house, there is people urinating behind C & R liquors on a regular basis, there is people standing behind the tattoo shop at Foxshire plaza [Shopping Center] for whatever reason and if we bring a liquor store in there it will just bring in more bad element, we certainly don't need that we have enough of that.

Three County citizens similarly testified that the area was “served well with liquor stores[.]” One said that she did not “think it matter[ed] to cross the Dual [H]ighway to get to another liquor store[.]”

At the conclusion of the hearing, Commissioner Dunham moved to deny the application, stating that “from all the testimony that was presented here today[,] the

[B]oard reason [being] that [Foxshire] has failed to prove a need for an additional license at . . . the location that has been applied for” under Article 2B, Section 10-202(2).⁴ Commissioner Mades seconded Commissioner Dunham’s motion and offered additional reasons for denying the application:

I kind of concur that the guidelines under article 2B [Section 10-202(2)] were not fully complied with there is no need for the applicant to say that this is the only [liquor store] on the east side or its [sic] built for the customer base. The fact that we had more opposed then [sic] supporting it and the fact that most of those against it I can look at it from one point the business side but the fact that these are residents in the community that are opposed to another store. So I have to say at this point I concur with [Commissioner] Dunham’s motion that we deny the license at this time.

The Board issued a written decision denying the licenses on March 16, 2015, in a letter to Foxshire. It stated in the letter that it had “researched [its] own records and found that the number of existing off sale licensed establishments more than adequately covered the Dual Highway Area[,]” and cited “7 prominent off sales establishment[s] in the immediate area . . . Liquor Locker, C & R Liquors, Benny’s Pub, Dual Highway Liquors, Grand Venice, Clarion Hotel, [and] Hampton Inn.” It concluded that the area was “adequately served” and that Foxshire had “failed to present evidence of need to the contrary.”

⁴ This statute has since been re-codified at AB Section 4-210.

On March 17, 2015, in the Circuit Court for Washington County, Foxshire filed a Petition for Judicial Review, under Article 2B, Section 16-101(b).⁵ The circuit court held a hearing on July 24, 2015. On August 19, 2015, it issued a written opinion and order reversing the decision of the Board.⁶ The court concluded that the Board’s “determination that there was not a ‘need’ for [Foxshire’s] liquor license” was “not supported by substantial evidence”:

[T]he evidence before the Board...even when viewed in a light most favorable to the Board, was not such that the Board reasonably could have concluded that a liquor store at the Foxshire Plaxa [sic] [Shopping Center] was not convenient, useful, appropriate, suitable[,] proper[,] or conducive to accommodation of the public. It does not logically follow from the fact that there are other off-sale licensed establishments in the area that a liquor store at Foxshire Plaza was not necessary to accommodate the public.

On September 2, 2015, the Board filed this timely appeal pursuant to Art. 2B Section 16-101(f).⁷

STANDARD OF REVIEW

Our review of decisions of a local liquor licensing board is similar to our review of other administrative agency decisions. *Bd. of License Comm’rs v. Global Express Money*

⁵ That statute has since been re-codified and now appears at AB Section 4-902.

⁶ Under Art. 2B Section 16-101(e)(3), the circuit court may affirm, modify, or reverse the local licensing board’s decision. The circuit court does not have the authority to remand to the local licensing board in Washington County. Art. 2B, § 16-101(e)(4)(ii). That statute has since been re-codified and now appears at AB Section 4-907.

⁷ This statute has since been re-codified and appears at AB Section 4-908(a). The Board subsequently filed a Motion for Stay Pending Appeal of the circuit court’s order on September 23, 2015, which the circuit court granted on October 22, 2015.

Orders, Inc., 168 Md. App. 339 (2006); *Baltimore Cty Licensed Beverage Ass’n, Inc. v. Kwon*, 135 Md. App. 178 (2000). Accordingly, “this Court performs the same function as the circuit court” and reviews the Board’s decision directly. *Global Express*, 168 Md. App. at 344 (additional citations omitted).

In reviewing the decision of an administrative agency, our role is to “determine if its conclusions are arbitrary, capricious, or contrary to law.” *Kushell v. Dep’t of Natural Resources*, 385 Md. 563, 575 (2005). We view the agency’s factual determinations “in the light most favorable to the agency since its decision is prima facie correct and carries with it the presumption of validity.” *Global Express*, 168 Md. App. at 345. We may not “substitute our own judgment” for that of the agency and will affirm its decision unless it is unsupported by substantial evidence, which is “such evidence as a reasonable mind might accept as adequate to support a conclusion[.]” *Id.* (quoting *Mastandrea v. North*, 361 Md. 107, 133 (2000)) (additional citations omitted). In other words, the test is whether a “reasoning mind reasonably could have reached the factual conclusion the agency reached.” *Id.*

In addition, Article 2B, Section 16-101(e) specifically governs our review of appeals from an action of a local liquor licensing board.⁸ Under that subtitle, the Board’s action is presumed to be “proper” and to “best serve the public interest.” Art. 2B § 16-101(e). The burden of proof is on the petitioner to show the Board’s decision was

⁸ That statute has since been re-codified at AB Section 4-905 “without substantive change[.]” Revisor’s Note following AB § 4-905.

“against the public interest[,]” an unfair or dishonest exercise of the Board’s discretion, or “arbitrary,” “procured by fraud,” “unsupported by any substantial evidence,” “unreasonable,” “beyond the powers of the local licensing board,” or “illegal.” *Id.*

DISCUSSION

The Board contends there was substantial evidence to support its finding that there was not a “public need” for the licenses under Article 2B, Section 10-202(a)(2)(i), because, “notwithstanding any showing of convenience” by Foxshire, there already were “sufficient [liquor] licenses” in “close proximity” to the relevant area. Therefore, the decision to deny the licenses as not “necessary for the accommodation of the public” under Article 2B, Section 10-202(a)(2)(ii) was a proper exercise of its discretion.

Foxshire responds that there was substantial evidence before the Board to show “need,” as defined in *Kwon*, and that to the extent the Board considered the potential effect of the licenses on competition, it erred as a matter of law.

When the Board held the hearing on Foxshire’s application on March 11, 2015, the issuance of a liquor license by a local liquor licensing board was governed by Article 2B, Section 10-202(2). That statute provided:

- (i) Before approving an application and issuing a license, the board shall consider:
1. The public need and desire for the license;
 2. The number and location of existing licensees and the potential effect on existing licensees of the license applied for;
 3. The potential commonality or uniqueness of the services and products to be offered by the applicant’s business;
 4. The impact on the general health, safety, and welfare of the community, including issues relating to crime, traffic conditions, parking, or convenience; and

5. Any other necessary factors as determined by the board.
- (ii) The application shall be disapproved and the license for which application is made shall be refused if the Board of License Commissioners for the City or any county determines that:
 1. The granting of the license is not necessary for the accommodation of the public;
 2. The applicant is not a fit person to receive the license for which application is made;
 3. The applicant has made a material false statement in his application;
 4. The applicant has practiced fraud in connection with the application;
 5. The operation of the business, if the license is granted, will unduly disturb the peace of the residents of the neighborhood in which the place of business is to be located; or
 6. There are other reasons, in the discretion of the board, why the license should not be issued.

We have held that in deciding to approve or deny a liquor license application under the statute, the Board is not required to “set forth specific findings of fact and conclusions of law,” *Dakrish, LLC v. Raich*, 209 Md. App. 119, 144 (2012) (quoting *Blackburn v. Bd. Of Liquor License Comm’rs for Baltimore City*, 130 Md. App. 614, 624 (2000)), nor must it “address seriatim the factors that it must consider under the statute.” *Id.* However, for this Court to be able to conduct “any meaningful review” of the Board’s decision, “the Board must [address the various factors], at least informally.” *Id.* (quoting *Blackburn*, 130 Md. App. at 624) (alterations in *Dakrish*).

Here, the Board had before it evidence regarding the public need and desire for the licenses; the proximity, number, and impact the licenses would have on other licenses in the area; the uniqueness of the proposed liquor store; the impact the store would have on traffic and parking at the proposed location; and the effect the store would have on the

surrounding community. This included testimony that there were six other liquor stores within two miles of the proposed store's location, with one accessible to eastbound traffic on Dual Highway by means other than a U-turn, and all of them within five to ten minutes of each other; that the proposed liquor store would take income from other liquor stores in the area; that the proposed liquor store promised nothing new in products or services; that area residents were concerned the store would "bring in more bad element" and increase traffic problems near the shopping center; and that residents also did not feel that crossing Dual Highway to access the liquor stores on the westbound side "matter[ed]."

In denying Foxshire's application at the close of the hearing, the Board concluded that Foxshire had "failed to prove a need" for the licenses based on "*all the testimony* that was presented" (emphasis added). It specifically cited "the fact that we had more opposed than [sic] supporting it[.]" and that "most of those against it" represented both "the business side" and "residents in the community that are opposed to another store." In its written decision, the Board additionally referenced the existence of "7 prominent off sales establishment[s] in the immediate area" as evidence that the "Dual Highway Area" was "adequately served." Accordingly, the Board's decision was founded on consideration of all the enumerated factors under Article 2B, Section 10-202(2), and clearly was supported by substantial evidence. Viewing the record in the light most favorable to the Board, "a reasoning mind" could have "reasonably" concluded that the licenses were "not necessary for the accommodation of the public."

Our holding in *Kwon* supports that conclusion. There, the Board of Liquor License Commissioners for Baltimore County (“BLLCBC”) applied the wrong standard in denying the Kwons’ application to transfer their existing liquor license to a new location. The only evidence before the BLLCBC that there was not a “public need” for the transfer consisted of testimony by competitor license holders and community members that “customers were not left waiting in long lines” at the “several stores in the area,” and “increased competition . . . might result” if the BLLCBC approved the transfer. 135 Md. App. at 184. In contrast, the Kwons presented expert testimony that the new location “would draw patrons from a three-mile radius[,]” the “surrounding area was heavily populated and easily accessible[,]” “the number of liquor licenses [for the area] had remained unchanged” despite substantial population growth for the past decade, and the new location would “serve the public better . . . because of changes in the center of population and in traffic flow.” *Id.* at 183-84. The Kwons also presented a petition signed by community residents in support of the transfer. In addition, there was evidence before the BLLCBC that “two of the [competitor] license holders had themselves inquired about leasing space” at the requested transfer location. *Id.* at 184. The BLLCBC nevertheless denied the Kwons’ request on the ground that the Kwons failed to show “need” for the transfer.

Given the record before the BLLCBC, we concluded that its decision incorrectly “focused, at least in part, on the effect the transfer would have on other licensees who are competitors of the Kwons” (*Id.* at 188):

Although the proper exercise of the [BLLCBC]’s power may produce a secondary effect of limiting economic competition, its power must be used for the primary purpose of protecting the public and promoting general welfare, and not to benefit and protect individual license holders. Md. Code, (1957, 1998 Repl. Vol.) Art. 2B § 1-101(a)(3), (b)(1). *See also* [Board of Liquor License Comm’rs for Baltimore County v.] *J.R. Bros., Inc.*, 119 Md. App. [308, 320 (1998).] Accordingly, [BLLCBC] may not subvert the “necessity” standard to use it to shield license holders from increased competition.

Id. We rejected the argument that, in the context of issuing liquor licenses, the term “necessary” means “absolute physical necessity[,]” instead explaining that it means whether the requested license “will be ‘convenient, useful, appropriate, suitable, proper, or conducive’ to the public in that area.” *Kwon*, 135 Md. App. at 193–94. Under that standard, we affirmed the circuit court’s judgment reversing the BLLCBC’s decision as unsupported by substantial evidence.

In *Kwon*, the BLLCBC relied solely on evidence that “bore no connection whatsoever to the state of affairs” at the proposed transfer location. *Id.* at 195. By contrast, here the Board—in addition to assessing the presence of other license holders in the area and the financial impact the requested licenses might have on other licensees—considered testimony that adding a liquor store at the proposed location would increase traffic issues, attract undesirable patrons, and not offer any new products. These factors bore specifically on the convenience and appropriateness of the requested licenses at the proposed location. Accordingly, the Board applied the correct standard under *Kwon* when it found that the licenses were “not necessary for the accommodation of the public.” Moreover, this Court made clear in *Kwon* and *Dakrish* that a local licensing

board only is prohibited from *singularly* relying on the license's potential effect on competing licensees in deciding whether to approve or deny the license. As we have explained, the Board considered all the factors enumerated under Article 2B, Section 10-202(2)(i) in deciding to deny Foxshire's application. There was substantial evidence to support the Board's finding that there was not a public need for the licenses and to deny the application for that and other reasons it enumerated.

**JUDGMENT OF THE CIRCUIT COURT
FOR WASHINGTON COUNTY
REVERSED. CASE REMANDED WITH
INSTRUCTIONS TO ENTER AN ORDER
AFFIRMING THE DECISION OF THE
BOARD OF LICENSE COMMISSIONERS
FOR WASHINGTON COUNTY. COSTS
TO BE PAID BY THE APPELLEES.**