

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1389

September Term, 2016

BRIAN GRACE, *et al.*

v.

BOARD OF LIQUOR LICENSE
COMMISSIONERS FOR BALTIMORE CITY

Nazarian,
Reed,
Krauser, Peter B
(Senior Judge, Specially
Assigned),

JJ.

Opinion by Reed, J.

Filed: January 11, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellants Brian Grace, Haley Taggart and Fireball Entertainment, Inc., t/a “Big Easy” (“The Big Easy”), appeal the Circuit Court of Baltimore City’s decision to affirm the Board of Liquor License Commissioners for Baltimore City’s (“the Liquor Board”) decision denying their request to renew their Adult Entertainment License. The Liquor Board denied Appellants’ license renewal after holding a protest hearing on January 7, 2016. Appellants filed a petition for Judicial Review of the Liquor Board’s denial. The Circuit Court for Baltimore City held a hearing on the matter on July 11, 2016 and affirmed the Liquor Board’s decision on July 25, 2016.

Appellants assert that the Liquor Board made insufficient findings of fact to allow for meaningful judicial review, that the Liquor Board erred when it denied their request to renew their Adult Entertainment License, and that the Baltimore City Ordinance governing Adult Entertainment is overly broad and unenforceable under the First Amendment. Ultimately, we conclude that the Liquor Board based its decision on sufficient evidence and that Appellants’ First Amendment challenge fails.

Appellants filed this timely appeal and presents three questions for our review, which have been reduced to two and rephrased:¹

- I. Did the Liquor Board make insufficient findings of fact to deny Appellants’ license renewal?

¹ The Appellants provided the following questions *verbatim*:

1. Did the liquor board make sufficient findings of fact and conclusions of law to allow for meaningful judicial review?
2. Did the liquor board err in refusing to renew the 2015 adult entertainment license?
3. Is the adult entertainment ordinance overly broad in violation of the First Amendment of the US Constitution and is thereby unenforceable?

II. Is the adult entertainment ordinance overly broad in violation of the First Amendment of the U.S. Constitution and thus unenforceable?

For the following reasons, we answer both questions in the negative and affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Brian Grace was the original licensee of Fireball Entertainment, Inc., t/a Big Easy, located at 2000 Eastern Avenue, Baltimore, MD 21231. Grace acquired ownership of the establishment around April or May of 2013. Haley Taggart was named as the future, proposed licensee on The Big Easy's Adult Entertainment renewal application.² *Id.* When Grace began as owner of The Big Easy, he was at the establishment every night to oversee all activities. On August 15, 2014, Grace hired Richard Mariano to manage the venue and thereafter, Grace's attendance at the venue diminished to a few hours, one or two nights a week.³ Prior to hiring Mariano, Grace asked him whether he was a felon, to which Mariano responded he was not. Grace never conducted a background check on Mariano.

Grace left a majority of The Big Easy's activities at the hands of Mariano. Grace had no knowledge of who worked at the venue at night or of who was on payroll. On or about September 20, 2014, a fight occurred at The Big Easy. As a result, the Liquor Board

² A man by the name of Paul Gunshol served The Big Easy as secretary. After moving out of Baltimore City, he was removed as the business' secretary and his name replaced with Ms. Taggart.

³ Grace lived on the Eastern Shore of Maryland and worked full time at the Washington D.C. Fire Department.

charged the licensees with violations of the Cooperation⁴ and Public Welfare⁵ rules. The Board found the licensees guilty on both charges at a Liquor Board hearing held November 20, 2014. The public welfare charge was later reversed on a petition for judicial review in the Circuit Court for Baltimore City.

As time progressed with Mariano as manager, complaints about The Big Easy increased. In addition to the public's complaints, the Bureau of Alcohol, Tobacco, and Firearms (ATF), Baltimore Police Department, and the Department of Homeland Security were investigating Mariano for his drug trafficking organization, the Mariano DTO. Using confidential informants and wiretaps, the ATF obtained incriminating information regarding Mariano's drug involvement. On November 23, 2014, the ATF executed a search warrant, raiding The Big Easy based on a federal investigation of Mariano's involvement with drug trafficking. Mariano was arrested by Maryland State Police the next day and charged with one count of possession of cocaine with intent to distribute. Mariano pleaded guilty to the charges.

On March 30, 2015, the Fells Prospect Community Association filed a protest of renewal against Appellants. The Liquor Board held a hearing on the matter on April 30, 2015. At that time, the Board denied Appellants' license renewal. On May 22, 2015, Grace filed a Petition for Judicial Review. On October 19, 2015, the Honorable W. Michel

⁴ Liquor Board Rule 3.02

⁵ Liquor Board Rule 3.12

Pierson ruled that the hearing on April 30, 2015 was premature because Appellants had not yet filed their license renewal application,⁶ reversed, and remanded the case.

On November 16, 2015, Appellants filed a 2015 Adult Entertainment Renewal Application. On December 15, 2015, property owners and residents in the community filed a Petition to Protest the Renewal of the Adult Entertainment License. At a hearing on the matter, the property owners and residents in opposition to the license renewal were represented by counsel and submitted to the Liquor Board a written plea agreement in the then recent federal criminal prosecution of Mariano. The agreement referenced wire taps of Mariano and two confidential informants. These wire taps revealed that Mariano was selling drugs during the time in which he managed The Big Easy and that he directed a confidential informant to pick up drugs from a wastebasket in the establishment's restroom.

Again, on January 7, 2016, the Liquor Board held a hearing for the renewal of Appellants' adult entertainment license. At this hearing, the Liquor Board heard from five witnesses and reviewed six exhibits admitted into evidence. The Liquor Board voted against renewing the Appellants' license.⁷ On February 5, 2016, Appellants filed a second Petition for Judicial Review.⁸ Judge Pierson recused himself from the case and a hearing was held before the Honorable Audrey J. S. Carrion on July 11, 2016. Judge Carrion affirmed the Liquor Board's decision. Appellants timely filed this appeal.

STANDARD OF REVIEW

⁶ Appellants' license expired on June 30, 2015.

⁷ Liquor Board Chairman Neil abstained from voting. The vote against the Appellants' license renewal was 2-0.

⁸ The property owners and residents opposed to Appellants' application for renewal did not participate in the second action.

Judicial review of the decision of a local licensing board is governed by Md. Code (2016), § 4-901 *et seq.* of the Alcoholic Beverages Article (“AB”).⁹ Pursuant to AB § 4-905(a), “the court shall presume that the action of the local licensing board was proper and best served the public interest.” In addition, the

[P]etitioner has the burden of proof to show that the decision of the local licensing board being reviewed was:

- (1) against the public interest; and
- (2)(i) not honestly and fairly arrived at;
 - (ii) arbitrary;
 - (iii) procured by fraud;
 - (iv) unsupported by substantial evidence;
 - (v) unreasonable;
 - (vi) beyond the powers of the board; or
 - (vii) illegal.

AB § 4-905(b); *see also Bd. of License Comm’rs For Prince George’s Cnty. v. Glob. Exp. Money Orders, Inc.*, 168 Md. App. 339, 346 (2006).

We have “consistently explained that judicial review of a decision by the Board is similar to review of decisions by most other administrative agencies.” *Blackburn v. Bd. of Liquor License Comm’rs for Baltimore City*, 130 Md. App. 614, 623 (2000) (citations omitted). When reviewing administrative decisions, we look through the circuit court, although applying the same standard of review, and evaluate the decision of the agency. *Cnty. Council of Prince George’s Cnty. v. Zimmer Dev. Co.*, 444 Md. 490, 553 (2015) (citation omitted).

In so doing, we are limited to determining if there is substantial evidence in the record as a whole to support the agency’s finding and conclusions, and

⁹ Prior to July 1, 2016, this statute was codified at Md. Code (1957, 2011 Repl. Vol.) Art. 2B, § 16-101.

to determine if the administrative decision is premised upon an erroneous conclusion of law. Stated differently, [o]ur primary goal is to determine whether the agency's decision is in accordance with the law or whether it is arbitrary, illegal, and capricious. In applying the substantial evidence test, we must decide whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.

Matthews v. Hous. Auth. of Baltimore City, 216 Md. App. 572, 582 (2014) (internal citations omitted). Moreover, “[w]hen reviewing factual issues, we must review the agency’s decision in the light most favorable to the agency since its decision is *prima facie* correct and carries with it the presumption of validity.” *Bd. of License Comm’rs for Prince George’s Cnty.*, 168 Md. App. at 345 (citation omitted).

“When deciding issues of law . . . our review is expansive, and we may substitute our judgment for that of the agency if there are erroneous conclusions of law,” employing a *de novo* standard of review. *Matthews*, 216 Md. App. at 582. But,

[e]ven with regard to some legal issues, a degree of deference should be accorded the position of the administrative agency. Therefore, an administrative agency’s interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. As the [Court of Appeals] noted, the expertise of the agency in its own field should be respected. Similarly, we defer to an agency’s interpretation of its own regulations.

Young v. Anne Arundel Cnty., 146 Md. App. 526, 569 (2002) (internal citations omitted).

Only “when statutory language is clear and unambiguous” should a reviewing court give no weight to an agency’s interpretation and application of the statute it administers. *Macke Co. v. Comptroller of the Treasury*, 302 Md. 18, 22-23 (1984).

DISCUSSION

I. Did the Liquor Board Rely on Insufficient Findings of Fact?

Appellants argue that the Liquor Board failed to specify which section of Baltimore City Code Article 15 § 1-28 the Appellants violated, explain how each of the subsections were violated, and that the Liquor Board “made no findings or conclusions as to what section of the law was violated.” As such, they assert that the Board erred when it denied their adult entertainment license renewal. Additionally, Appellants assert that the Liquor Board’s failure to make sufficient findings of fact and conclusions does not allow this court to conduct meaningful judicial review.

The Liquor Board contends that they gave appropriate consideration to the Baltimore City Code and the substantial evidence presented before them, which is all that the law requires.

A. Analysis

Appellants argue that the Liquor Board did not make sufficient findings of fact and conclusions of law to deny their renewal, and therefore requests that this Court reverse and remand for a reviewable decision. Appellants base their argument on the premise that the Board failed to “state the basis for the conclusion[s]” and “made no findings or conclusions as to what section of the law was violated...and what facts supported each element of the violation.” However, the Board appropriately considered appellants license renewal by way of a hearing, reviewing evidence, the ordinance, and by listening to testimony, and thus, appellants’ argument fails.

“There is no express requirement that the Board set forth specific findings of fact and conclusions of law.” *See Sheeler v. Handleman*, 212 Md. 152, 162, 129 A.2d 78, 84

(1957). In order for any meaningful review to be conducted, however, the Board must do so, at least informally.” *Blackburn*, 130 Md.App. at p. 623-624. 747 A.2d at p. 729-730;

The denial of Appellants license renewal is based on Baltimore City Code Article 15 § 1-28. Appellants set forth the three provisions the property owners and residents in opposition based their argument against the appellants’ license renewal: Baltimore City Code Article 15 §1-28(a)(5), (b)(1), and (c).

a. Public Nuisance

Section 1-28 (a)(5) permits the denial of a license renewal when a licensee “fail[s] to comply with any provision of this subtitle-referencing Baltimore City Code Article 15 §1-23 creating a public nuisance.”

The Court of Appeals has defined a public nuisance as an act that causes substantial interference with the public’s right to public safety, public health, and public convenience. *See Tadjer v. Montgomery County*, 300 Md. 539, 551 (1984). This definition also encompasses whether the actor knew or should have known that his actions would cause such an interference. *Id.*

The Restatement (Second) of Torts defines a public nuisance as:

(1) A public nuisance is an unreasonable interference with a right common to the general public.

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821B (1979).

Sections (1) and (2) of the Restatement apply here. A set of community letters, marked as Exhibit Number 2, was submitted to the Liquor Board and received into evidence. These letters detail the ways in which appellants disturbed the peace and convenience of the community and engaged in violent activities.

On April 20, 2015, one community resident wrote in an email to the Board:

For 2 years under previous ownership/management, The Big Easy was a quiet neighbor... Unfortunately that changed with the new owners/management. The bouncer disappeared. Scantily dressed women were outside. The noise level rose dramatically. For me it culminated on Sunday Sept [sic] 21 when I was awakened by the sounds of fighting... The community association (Fells Prospect) has repeatedly tried to ask The Big Easy to live up to their agreement to keep the noise levels down... There has been no indication that The Big Easy intends to once again become a good, quiet neighbor. At this juncture, a strip club near a school in the midst of a neighborhood is not desirable. Please consider termination of the liquor license.

On January 4, 2016, Baltimore City Council President, Bernard C. "Jack" Young, on behalf of Fells Prospect Community Association in its opposition to appellants' license renewal, wrote:

By law, liquor establishments in Baltimore City must operate in a way that avoids disturbing the peace, safety, health, quiet, and general welfare of the community. Given The Big Easy's proximity to neighboring homes and institutions, it is especially important for these standards to be met. It is my

understanding that community residents are consistently disrupted by noise, levels of trash, public intoxication, parking, public urination and fighting directly relate to this establishment.

Another community letter dated January 6, 2016 stated:

I am not opposed to adult entertainment or “strip clubs”, [sic] per se; however, I am opposed to bad business that engage in illegal activities and are a neighborhood nuisance. The Big Easy is one of these bad businesses. An investigation and raid that was conducted by the US Bureau of Alcohol, Tobacco, and Firearms (BATF) revealed serious drug trafficking violations that were committed by a former employee of The Big Easy (Richard Mariano)... In addition to the raid, a fight occurred inside the premise of The Big Easy on September 21, 2014, in which one of the patrons who was involved in the fight was found to have been storing a firearm, illegally, in his vehicle... I ask that the board that [sic] they deny Fireball Entertainments’ adult entertainment license renewal request.

The activities surrounding The Big Easy, in addition to Mariano’s actions in planning a drug transaction within the establishment, all meet the definition of a public nuisance. In her vote to deny Appellants’ license renewal, Commissioner Hafey stated:

[T]his license was his and his responsibility only. I do find it significant that—it sounds like the community, at various times, has attempted to come to an agreement with Grace, to work with Grace. And I find that very significant as well. Significant because I think that the community has done its part to meet in the middle. What really concerns me is that we have, you know, a significant criminal, we had ATF agents raid this establishment, which is a block and a half from a school. It’s a residential neighborhood.

Mariano, in his capacity as manager of The Big Easy, was or should have been aware that such conduct surrounding this establishment constituted a public nuisance. Accordingly, the Liquor Board had sufficient facts and evidence to conclude that the

appellants' activities constituted a public nuisance in violation of Baltimore City Code Article 15 §1-28(a)(5).

b. Manager's Violation by the Distribution of a Controlled Dangerous Substance

Baltimore City Code Article 15 § 1-28(b)(1) permits the denial of a renewed license “for the violation by any owner, operator, or manager of any law that involves the manufacture, distribution, possession, or administration of controlled dangerous substances.”

Grace asserts that he was “the sole owner, operator and manager, and Mariano was his employee.” He states that he was not involved with any controlled dangerous substance in any way and therefore, could not have violated Section 1-28(b)(1). However, on examination at the hearing held on January 7, 2016, Grace admitted that Mariano was the manager of The Big Easy.

Grace's cross exam is as follows:

Q: [W]hen you first took ownership, did you operate the establishment personally?

A: I was there every night that I could be, and was there to oversee everything. Yes.

...

Q: All right. So Mr. Mariano approached you about being a manager. Is that correct?

A: Yes. He ultimately wanted to buy it, but we were trying to find somewhere in the middle. But yes, he wanted to run it.

Q: All right. So did you sell it to him?

A: No.

Q: And you did not relinquish control to him?

A: No.

Q: All right. So [Mariano] was a manager?

A: Yes.

...

Q: And when you first put Mr. Mariano in there as your employee, you were not going there every day, is that correct?

A: No, I was not going every day.

Additionally, Grace did not know who was working at the establishment, what the payroll was, or about any arrangements Mariano entered into regarding the establishment.

Furthermore, the Liquor Board had evidence of the ATF's multiple wiretaps of Mariano discussing drug transactions, Mariano's plea agreement admitting his involvement in drug trafficking, as well as an affidavit from Bradley Crosby, an investigative or law enforcement officer, indicating that his confidential sources had conversations with Mariano at The Big Easy about Mariano's ability to get grams of heroin and kilograms of cocaine whenever he needed it.

"Mariano informed [Confidential Source]-1 and [Confidential Source]-2 to go into his club, The Big Easy, 2000 Eastern Avenue, and walk into the bathroom. In the bathroom, the three "8 balls" of cocaine would be in the waste basket for their retrieval."

Accordingly, the Board had sufficient evidence to determine that appellants violated Section 1-28(b)(1) and thus, did not err when it denied appellants license renewal.

c. Violation on the Premises by an Employee and the Manager/Owner Knew or Should Have Known

Baltimore City Code Article 15 § 1-28(c) permits the Liquor Board to deny a license renewal "for the violation, by any employee, agent, independent contractor, or vendor of the adult-entertainment business, of any law referred to in subsection (b) of this section, if:" the offense occurred on the premises, and the owner, operator or manager affirmative

or tacitly approved, had actual or constructive knowledge, should have known, or the offense was the failure of supervision.”

In reviewing the evidence submitted to the Board, the Board discovered from Grace’s testimony from a hearing held on April 23, 2015, that Grace did not conduct a background check on Mariano prior to or during his time as manager of The Big Easy and that when Grace questioned Mariano about being a felon, Mariano told him that he was not but had a couple of minor drug mishaps, including a minor marijuana possession.¹⁰

In the Liquor Board’s decision to deny Appellants’ adult entertainment license, Commissioner Trotter stated, “It’s the lack of management that really got me. When you didn’t have—you don’t know what the payroll is. You don’t know who’s working there at night. You know, it’s just open—the decision to hire Mariano opened you up to be a drug dealership, period.”... [B]ackground checks are fairly easy to do. A lot of people don’t do them. A lot of businesses don’t do them, and they suffer the consequences of them.” Commissioner Hafey stated, “Again, we’ve reiterated time and time again that this—the establishments, they’re under the control of the licensee. And I understand things happen, but this wasn’t just one day. It was over a significant period of time that there was this oversight — or lack of oversight. And I think that’s the problem.” “I do agree that this does violate Article 15 Section 1-28(a), (b), and (c).” “I vote not to renew the adult entertainment license.”

¹⁰ Mariano had previously been convicted for drug possession.

Had Grace conducted a background check of Mariano, he would have known of Mariano's prior involvement with drugs. His failure to do so is no excuse. Grace as owner of The Big Easy also failed to supervise Mariano and the establishment. Grace lived on the Eastern Shore of Maryland and worked full-time for the Washington D.C. Fire Department. He visited The Big Easy about 1-2 times a week for a few hours after hiring Mariano and admitted that he wanted to be there as little as possible.

Accordingly, the Liquor Board had sufficient evidence to determine that Appellants violated Section 1-28(c). Based on the evidence relied on by Board, the Board made sufficient findings of fact, at least informally, and did not err when it failed to renew the Appellants adult entertainment license.

II. Is the ordinance overly broad?

Appellants contend that "Baltimore City Code Article 15 § 1-1, *et. seq.* prohibits a substantial amount of expression protected by the First Amendment by limiting the range of permissible conduct." Consequently, they argue that the entire licensing ordinance is void and unenforceable.

The Liquor Board argues that the appellants' argument that the Baltimore City Adult Entertainment Ordinance is overbroad should be "skirted" because of the doctrine of constitutional avoidance. The Liquor Board asserts that "a court will not reach a constitutional issue when the case can be decided on non-constitutional grounds." *Professional Staff Nurses Ass'n v. Dimensions Health Corp.*, 346 Md. 132, 138 (1997). They conclude that the Liquor Board's decision to deny Appellants license renewal was

not on constitutional grounds but on the ground that Appellants violated the Baltimore City Code.

A. Analysis

Appellants aver that the Adult Entertainment Ordinance is overly broad and therefore violates the First Amendment.¹¹ We find that the ordinance is not overbroad, however assuming *arguendo* that it is, this court finds that the doctrine of constitutional avoidance permits the court to find this case can be decided without conducting a constitutional analysis.

The doctrine of constitutional avoidance provides that “a statute will be construed so as to avoid a conflict with the Constitution whenever that course is reasonably possible.” *Koshko v. Haining*, 398 Md. 404, 426 (2007) (internal citations omitted).” “If a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.” *Bell Atlantic Maryland, Inc. v. Prince George’s County, Maryland*, 212 F.3d 863, 886 (2000) (internal citation omitted).

Appellant’s issues can be addressed on non-constitutional grounds. The Liquor Board declined to renew Appellants adult entertainment license because Appellants violated Article 15 of the Baltimore City Code. The Board’s decision was not centered on the restriction of speech or expression.

¹¹ The First Amendment states “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend I.

For these reasons, this court declines to further address Appellants' First Amendment argument.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**