Circuit Court for Howard County
Case No. C-13-CV-19-000536

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2059

September Term, 2019

GRAPE AND GRAIN LLC t/a
PERFECT POUR, *et al.*

v.

THOMAS J. QUICK, *et al.*

Nazarian,
Arthur,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: July 14, 2021

The key issue in this appeal is whether the issuance of a liquor license to Thomas J. Quick and The Loft Wine and Spirits, LLC ("Quick"), a tenant of Wegmans food market, runs afoul of the "Chain Store/Supermarket Law," Md. Code (2016), Alcoholic Beverages Article (AB), § 4-205(b), which prohibits the issuance of certain alcoholic beverages licenses "for use in conjunction with, or on the premises" of a chain store, supermarket or a discount house. This is a mixed question of law and fact decided by the Alcoholic Beverage Hearing Board for Howard County,[1] in favor of Quick and against protestants, Grape and Grain, LLC and Barry Coughlin, owner of the Perfect Pour in Howard County ("Coughlin"). The Hearing Board granted Quick's application for a license and Coughlin sought judicial review in the Circuit Court for Howard County.[2] After a hearing, the court on November 13, 2019 upheld the decision of the Hearing Board. The court concluded that Coughlin was not sufficiently aggrieved to have standing in the circuit court, but also found that the Hearing Board's decision was supported by substantial evidence. We assume without deciding that Coughlin has standing,[3] but agree that the Board did not violate the Chain Store/Supermarket Law and that its decision to issue the license is supported by substantial evidence.

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[1] The Hearing Board is created by AB § 23-204. Except for certain cases heard by the Board of License Commissioners, under § 23-208(a), the Board of License Commissioners "shall delegate to the Hearing Board the authority to hold hearings and decide cases involving a license holder."

[2] According to the Board's brief, "[t]he License has not been issued and the proposed store is not operating."

[3] On occasion, Maryland appellate courts have assumed standing and, in varying contexts, have gone on to address the merits of an appeal. See, e.g., *Osburn v, State*, 301 Md. 250, 253 (1984) (standing in 4th Amendment case); and *Mayor and Town Council of*

FACTS AND PROCEEDINGS

Wegmans Food Markets, Inc. is a family-owned supermarket chain with stores in the Mid-Atlantic and Northeastern regions. www.wegmans.com. One of its supermarkets is located on 8855 McGaw Road in Columbia, Maryland, where Wegmans leases space.

A. Prior Applications

Over the last decade, three applications for an off-sale alcoholic beverage license were made for space in the McGaw Road building. The first applicant in 2012 was Ralph Michael Smith on behalf of Columbia Wine Partners, LLC. After a hearing, the Board, on May 15, 2013, denied his application, in part, because the premises were "in close proximity to the common area entrance of the Wegmans café and [are] fully enclosed within Wegmans Food Market" and thus, would run afoul of what is now AB § 4-205(b). In 2014, after signing a sublease with Wegmans, Thomas J. Quick on behalf of The Loft Wine and Spirits, LLC applied for a Class A-1 license. The Board declined to hold a hearing on the application because of § 4-205(b) concerns. Quick then sought a hearing before the Board of License Commissioners, which agreed to hold the hearing. Before the matter could be finally resolved, Quick withdrew the application because of zoning problems.

B. The 2018 hearing

Apparently believing that the third time might be a charm, after zoning had been approved, Quick in 2018 filed a new application with the Board. Among those protesting

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New Market v. Armstrong, 42 Md. App. 227, 242 (1979) (standing in adverse possession case).

the issuance of the license was Coughlin, whose store was 1.9 miles in driving distance from the proposed location of The Loft Wine and Spirits.

The Board held three evenings of hearings on the application. The testimony and evidence focused on: access, control, common areas, sub-lease details and whether the sublease was an arm's-length transaction. The Loft would be located in the same structure as Wegmans and would be the only other business in the building. However, as a result of structural changes by Wegmans, there would be no access from Wegmans to the Loft. The entrance to the liquor store would be from the second floor of the parking garage. Quick would have exclusive possession of the licensed premises and control over hours of operation, employees and product line. He would also bear the cost of alterations, additions and improvements, although Wegmans paid for installation of and owned the fixtures and the coolers. Not part of the licensed premises, but accessible by the licensee, would be certain common areas: a freight elevator, loading dock and bathrooms – all located on Wegmans' property.[4] Deliveries would be received at the loading dock and would move into a shared area, through a part of Wegmans, up a freight elevator into a corridor, and enter the licensed premises. No alcoholic beverages would be stored on Wegmans' property.[5]

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[4] Unlike like the elevator and loading docks, the bathrooms are not mentioned in the sublease.

[5] Section 5.1 of the sublease provides:

> Landlord has provided Tenant with a dedicated loading dock, freight elevator and passageway for the exclusive use of Tenant and its suppliers. Tenant's suppliers shall not be permitted to unload or store merchandise at the loading docks of Landlord's store or to transport such merchandise into

A major bone of contention at the hearing involved certain details of the sub-lease, most notably the type of lease and the amount of the rent.[6] Quick's The Loft had a "full service lease" with Wegmans, while Coughlin's Perfect Pour had a "net lease" or "triple net lease" with their landlord.[7] The parties disagreed over how common a full service lease was for a retail location. Coughlin's expert testified that a full service lease was "very uncommon in commercial retail space" and would be a "tremendous advantage to the tenant." On the other hand, Quick's expert said that the full service lease was "becoming more common in unique situations."[8] A representative of Wegmans testified that the food market "tend[s] not to do a triple net lease."[9]

> Tenant's premises through Landlord's store. Tenant shall not store any merchandise on the loading dock, elevator or passageway leading to Tenant's store.

[6] The 2018 rent was the same as that provided under the 2014 lease.

[7] According to one commentator,

> The gross or full-service lease, and the net lease are the basic leases for commercial use, although there are many variations on these two documents. A gross or full-service lease specifies a monthly rent and includes all operating expenses such as utilities, janitorial service, and building insurance. A net lease provides a base rental amount, with operating costs to be absorbed by the tenant directly.

Paul D. Lapides, 2 Real Estate Transactions: Structure and Analysis with Forms (Thomson Reuters 2021) at § 18.43.

Another author describes a "triple net lease" as one where the tenant "pays all (i) real estate taxes; (ii) insurance premiums; and (iii) costs of utilities, repairs and maintenance of the [p]roperty." Rodney J. Dillman, The Lease Manual (ABA Section of Real Property, Probate and Trust Law (2007)) at 317.

[8] Another legal commentator has said that a "full service lease is typical in a multi-tenant building, whereas the net lease is more typical with a single tenant building." W. Leighton Lord III, David v. Goliath: Negotiating a Commercial Lease on Behalf of the Tenant, 13-DEC S.C. Law 31, 33 (S.C. Bar 2001).

[9] The representative, Ralph Cittaro, explained why Wegmans was reluctant to use a triple net lease with its tenants:

Quick's rent for the 9,930 square foot premises was $43.30 per square foot or $35,833.33 monthly. The 5-year lease provided for a $10,000 annual increase in rent. Perfect Pour's rent was $48 per square foot. Quick's existing liquor store was charged $23 per square foot in rent. However, Coughlin's expert testified that rents in the area of Wegmans ranged from "$35 to $58 a square foot triple net."

The hearing particularly focused on the allegedly unusual benefits Quick obtained from his arrangement with Wegmans, such as:

1) The supermarket paid for fixtures and coolers for The Loft;
2) The lease did not require a deposit or personal guarantee;
3) The freight elevator, loading dock, hallway and restroom were on Wegmans' premises and was "free space" for Quick;
4) Wegmans paid for the wall that made separation of the two businesses possible.

In his closing argument, Coughlin's counsel argued that the lease was not an arm's-length transaction and the two businesses were working together in combination: "It's in conjunction with [and] it's on the premises of [Wegmans]."[10]

Quick's counsel emphasized the physical separateness of the licensed premises from Wegmans: "You don't have to go through one store to get to the other." He said there was "no weaving of common space at all" and "the wall cuts out close proximity."

> [I]t would be very difficult to split the taxes because it's not easily divisible into a separate tax parcel. Beyond that it's all part of a similar structure and any time we do something of this sort we have it as a gross lease. It's expensive to split the utilities. Our common area charges are generally higher compared to tenants. We have parking deck and a number of issues and whenever we have a situation where we have tenants in a single building, we tend not to do a triple net lease. We have dozens of these throughout our chain.

[10] Coughlin raised additional issues not discussed here.

Addressing the AB § 4-205(b) issue, counsel stated that there is "no evidence that the operation of this business for the liquor store will be used in conjunction with the supermarket."

C. The Board's decision

On December 20, 2018, the Hearing Board issued its Decision and Order. By a 3-1 vote (one member abstaining) the Board granted Quick's application for a license and rejected Coughlin's challenge. The Decision characterized the § 4-205(b) question as "an issue of first impression for the Hearing Board," *viz*., "whether a liquor store physically separate from, but located on the second floor of a building that contains a supermarket, which operates as the liquor store's landlord, implicates the prohibitions" of § 4-205(b).

The Board determined that the record demonstrated that the proposed liquor store would not be operated "in conjunction with or on the premises of" Wegmans:

> The Hearing Board concludes that the mere status of a supermarket as a landlord does not implicate the prohibitions of §4-205(b). Although a lease with revenue sharing provisions might implicate the "in conjunction with" prohibition, that is not the case here. Here, the terms of the lease indicate an "arms-length" transaction, with the proposed liquor store being owned and operated as a completely separate business from Wegmans.
>
> The Hearing Board concludes that the term "premises as it is used in § 4-205(b), means the area where business activity occurs. Thus, just as the licensed premises of a liquor store is the area where alcohol storage and sales may occur, the premises of a supermarket is the area where the storage and sale of groceries is transacted. Here, alcohol sales and storage and grocery sales and storage will occur on separate premises. Mere proximity is not enough to implicate the prohibition. If it were, numerous liquor stores located in shopping centers near, or adjacent to, supermarkets would be prohibited, and the Board takes notice of the fact that there are numerous shopping centers throughout the State that include a supermarket and a liquor store.
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> Similarly, the Hearing Board concludes that the existence of shared, unlicensed common space is not uncommon and does not implicate the

> prohibition of § 4-205(b). The transitory movement of alcohol across a public sidewalk or through the common space of a shopping center does not require that those areas be licensed. However, the Board notes that any storage of alcohol in such areas would require that the areas be licensed. Here, the testimony is that there would be no alcohol storage, sales, or service in the common areas. Use of the common areas for alcohol storage, sales, or service would be a violation of alcoholic beverage law and would subject the license to revocation, as would any combined business activity between The Loft and Wegmans. (Paragraph numbers omitted).

The Board's order approving Quick's application for a license imposed a number of conditions, including:

> [T]hat there be only one public entrance to the proposed liquor store that is completely separate from any entrance to Wegmans and accesses the exterior of the building only, and that there be no interconnection or means of access or egress between the proposed store and Wegmans, except for temporary emergency egress required by law; and [t]hat final as-built floor plans be submitted to the Hearing Board; and [t]hat any changes to the lease between The Loft and Wegmans be communicated immediately to the Hearing Board along with a copy of the new lease; and [t]hat no alcohol be present in the common areas of the building unless attended at all times by liquor store employees…. [11] (Paragraph lettering omitted).

D. Subsequent Proceedings

Coughlin requested the Board of License Commissioners to conduct a new hearing on the case. Following a hearing on this request, the Commissioners, on May 8, 2019, decided not to rehear the matter. The challenger filed a petition for judicial review of the Hearing Board's decision in the Circuit Court for Howard County. After a hearing, the

[11] Quick was also required to cease involvement in his present liquor store.

court upheld the ruling of the Board, after first finding that Coughlin had no standing in the circuit court to challenge of the Board's decision.[12]

QUESTIONS PRESENTED

Coughlin presents three questions which we have renumbered and reformulated:

1. Whether the circuit court erred in deciding that he was not aggrieved and lacked standing?
2. Whether the Board acted arbitrarily by "reversing" its 2013 decision denying a license to Columbia Wine Partners on § 4-205(b) grounds "without a substantial change in circumstances"?
3. Whether the Board violated § 4-205(b) by issuing the license to Quick "despite evidence that The Loft would be using the license on the premises of and in conjunction with [the] Wegmans [S]upermarket"?

DISCUSSION

We can dispose of the first two questions without too much difficulty.

A. Standing

Maryland appellate courts have distinguished "jurisdictional standing" – which must be addressed – from a party's standing under a statute to challenge an administrative agency's adverse decision in circuit court. *See Dorsey v. Bethel A.M.E. Church*, 375 Md,. 59, 70 (2003); *County Council of Prince George's County v. Zimmer*, 217 Md. App. 310, 319-20 (2014), aff'd 444 Md. 490 (2015). It is clear that the latter type of standing was the basis for the circuit court's standing ruling in this case.[13]

[12] The court cited to AB § 4-903(b), which, among other things, requires that petitioners show that they have been "aggrieved" by the local board's decision.

[13] Some of the briefs discuss Coughlin's ability to appeal the circuit court's decision to this Court. He clearly has that right. Exercise of that right has no impact on the issue of standing in the circuit court.

It is noteworthy that the circuit court, after rejecting Coughlin's standing, went on to rule on the merits of this challenge. So will we. *See Sugarloaf Citizens' Ass'n v. Northeast Maryland Waste Disposal Authority*, 323 Md. 641, 650 n. 6 (1991) ("In light of our decision on the merits, we need not and do not reach any issue of standing.")

For this reason and in the interests of judicial economy, we will assume, without deciding, that Coughlin had the necessary standing in the circuit court. See n. 3 *supra*.

B. Arbitrary reversal of position

Coughlin asserts that the Board was arbitrary because it "completely reversed" its 2013 decision denying a license at the same location. *Citing Montgomery Cnty v. Anastasi*, 77 Md. App. 126, 137-38 (1988), and *Whittle v. Bd. of Zoning Appeals*, 211 Md. 36, 45 (1956), he concedes that to be arbitrary the Board must have reached the opposite conclusion on "substantially the same state of facts."

However, the record is abundantly clear that the 2018 decision of the Board relied on critical facts not present in the 2013 case. In the latter application, the licensed premises were "in close proximity to the common area entrance of the Wegmans café and [were] fully enclosed within Wegmans Food Market." The 2018 decision emphasized the "physical separateness" of the businesses and specifically characterized this application as presenting an issue of first impression.[14]

[14] We need not recite all the other differences from the 2013 application.

Also relevant is AB § 23-1507(a), which allows a denied application to be considered after 12 months. This is an obvious recognition by the General Assembly that an applicant may reapply for license for a location previously rejected.

For these reasons, we conclude that the 2018 decision of the Board did not arbitrarily reverse the 2013 decision.[15] Thus, we turn to the major issue in this case.

C. "[F]or use in conjunction with or on the premises" of a supermarket.

Whether § 4-205(b) prohibits the issuance of the license to Quick is a mixed question of fact and law. We must examine the Board's application of this law to these facts under a deferential standard of review. *See HNS Development, LLC v. People's Counsel for Baltimore County*, 200 Md. App. 1, 14 (2011) (Applying the law to the facts "is a judgmental process involving a mixed question of law and fact, and great deference must be accorded the agency."); *Patten v. Board of Liquor License Com'rs for Baltimore City*, 107 Md. App. 224, 230 (1995) (The scope of review for mixed questions of fact and law "is narrow."). Here, we look to the same substantial evidence test we employ when reviewing agency fact finding to determine whether a reasoning mind could have reached the conclusion the agency reached. *Patten*, 107 Md. App. at 230.[16]

Of course, this case also involves the interpretation of a statute, a question of law that we review *de novo*. *Woodburn's Beverage, Inc. v. Board of License Com'rs for*

[15] The 2013 decision also concluded that the proposed license "would have an impact on the health, safety and welfare of the community." Apparently, this finding was based on a problem with the owner of Columbia Wine Partners, as well as § 4-205(b) concerns. The record here demonstrates no such problems with Quick's application.

[16] The facts in this case are for the most part, undisputed, so their correctness is not really at issue.

Calvert County, 216 Md. App. 543, 554 (2014). The text of the controlling statute is our starting point. Section 4-205(b) states:

> A local licensing board may not issue a Class A, Class B, or class D beer license, beer and wine license, or beer, wine, and liquor license for use in conjunction with or on the premises of:
> (1) a chain store;
> (2) a supermarket; or
> (3) a discount house.

Three words leap out to the reader of this subsection: (1) "use"; (2) "conjunction with"; and (3) "premises". Coughlin would fix our gaze on the "conjunction with" language to highlight the dealings between Wegmans and Quick that made the license happen and the related benefits to the supermarket. On the other hand, Quick would have us focus on "use," meaning the operations of the licensee that are separate from that of Wegmans.

Coughlin argues that the word, "premises" in the statute includes the loading dock, freight elevator, passageway and restrooms located on Wegmans' property. Quick responds that because these areas are legally and physically excluded from the leased premises where alcoholic beverages are sold and stored, they are not being "used" on the premises of a supermarket.

Of the three quoted statutory terms, we believe that "use" is the key component. Like Quick and the Board, the Court concludes that "use" refers to the operation of the alcoholic beverage business. *See* www.meriam-webster.com/dictionary/use, where "operation" is listed as a synonym for "use." As such, absent a subterfuge where the supermarket is the de facto licensee, it would not ordinarily include pre-operation

activity, like a supermarket cooperating with an applicant to help secure a license or facilitate that result. Nor, viewed in isolation, would the real benefits a supermarket could obtain by the location of a nearby liquor store amount to a "use" under § 4-205(b). Even assuming the statute requires an arm's-length transaction between a supermarket landlord and a liquor store tenant with respect to pre-operational activities, the Board made a contrary finding that a reasoning mind could accept because it was supported by substantial evidence.[17]

We think it is clear that the Board was correct in concluding that the license would not have been "used" on the "premises" of the supermarket, because the relevant business activities of the licensee are occurring on the leased premises, not on Wegman's unleased property.

In our view, the Board's apparent reliance in part on property law concepts in interpreting the "in conjunction with" language does not make its decision suspect. Transfer of possession and control are key features of a lease. *See* 49 Am Jur 2d Landlord and Tenant at § 390 ("Property law regards a lease as equivalent to a sale of the premises for the term of the lease, making the tenant both owner and occupier during the lease."); and Restatement (Second) of Property, Land and Tenant at § 1.2 (1977) ("The right to possession is normally transferred if the arrangement contemplates that the transferee will assume a physical relationship to the leased property which gives him control over the

[17] Whether Quick got a "sweetheart deal," doesn't undermine the approval of the license. The rent was not suspect. The fixtures and coolers belong to Wegmans not Quick. While Wegmans helped get the project off the ground, the record indicates that it would be solely up to the licensee to keep it flying.

power to exclude others from the property."). Quick is the "owner" of the leased premises, albeit for a limited time. The Loft is legally distinct from Wegmans.[18] It is physically distinct, because the only entrance is through the parking garage. It is financially distinct because there is no sharing of profits or of business activity. Neither business controls the other. Finally, a reasoning mind could conclude, like the Board, that the transitory movement of alcohol through the shared unlicensed common space of Wegmans is not a significant combination of business activity or a significant presence of the licensee on the supermarket premises. In short, The Loft is not operated in conjunction with or on the premises of the supermarket.

For these reasons, we uphold the decision of the Board to grant a license to Quick and The Loft.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

[18] Thus, the Board was correct when it concluded that "the mere status of a supermarket as a landlord does not implicate the prohibitions of § 4-205(b)."