Circuit Court for Anne Arundel
Case No.: C-02-CV-15-002843

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 204

September Term, 2016

MICHAEL MANGUM, ET AL.

v.

BOARD OF LICENSE COMMISSIONERS
FOR ANNE ARUNDEL COUNTY, ET AL.

**Eyler, Deborah S.
Reed,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.
Harrell, J. joins the judgment for the reasons explained in Part C, 1, I of the opinion.

Filed: September 26, 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.

**Deborah S. Eyler, J., participated in the hearing and conference of this case while an active member of this Court; she participated in the adoption of this opinion as a specially assigned member of this Court.

This case comes to this Court from the Circuit Court for Anne Arundel County, which affirmed the decision of the Anne Arundel County Board of License Commissioners (hereinafter "the Board"). The Board denied the application of, Michael E. Mangum and Kathrynn C. Mangum (hereinafter "Appellants"), for a Class A liquor license for their proposed large, high-end wine store to be located in the Gateway Village Shopping Center in Parole, Maryland. On appeal, Appellants present two questions for our review, which we have reduced to one and rephrased:[1]

> 1. Did the Board violate Md. Code Ann., Art. 2B, § 16-101(e)(1)(i)[2] when it denied Appellants' application for a new Class A liquor license?

[1] Appellants present the following questions:

> 1. Whether the Board erred as a matter of law by applying an uncodified, undefined numeric standard and by misconstruing and minimizing the Court's standard in *Baltimore County Licensed Beverage Ass'n, Inc. v. Kwon* for determining whether a liquor license is necessary for the accommodation of the public?
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> 2. Whether the Board's decision was unsupported by substantial evidence where Appellants presented extensive, unrebutted testimony and evidence demonstrating that The Depot will be convenient, useful, appropriate, suitable, proper and/or conducive to the public?

[2] Effective July 1, 2016, after Appellants filed their notice of appeal in this case, Md. Code Ann., Art. 2B, § 16-101(e)(1)(i) was recodified without substantive change to Md. Code Ann., Al. Bev. § 4-905.

For the following reasons, we reverse the judgment of the circuit court and direct it to remand the matter to the Board for a hearing in accordance with Art. 2B, § 9-201(b)(1).[3]

FACTUAL AND PROCEDURAL BACKGROUND

In October of 2013, Appellants submitted an application for a new Class A liquor license on behalf of The Depot, LLC (hereinafter "The Depot") to the Board. The application proposed a large, high-end liquor store specializing in wine in the Gateway Village Shopping Center (hereinafter "Gateway Village"), which is located on the northern side of the Anne Arundel County growth management area ("GMA"), known as the Parole Town Center. Eighty-five percent of the floor space of the proposed 3,900-square-foot liquor store would be dedicated to its inventory of 3,500 to 4,000 labels of wine. Festival Wine & Spirits, Liquor Mart & Deli, and The Italian Market & Restaurant, (hereinafter "Appellees") opposed Appellants' application. Appellees each possess either a Class A or Class B liquor license and operated their business within the Parole Town Center GMA.

The Board held a hearing on Appellants' application on April 8, 2014. The hearing was attended by representatives of Appellants, Appellees, and the owner of Gateway Village. On August 12, 2014, the Board denied Appellants' application. Upon judicial review, the Circuit Court for Anne Arundel County reversed the decision of the Board and remanded the case for additional testimony to "allow [Appellants] and other parties to address . . . [certain] facts the Board considered which were not in evidence." Therefore, the Board conducted additional hearings on May 19 and July 27, 2015, to supplement its

[3] The hearing requirement of Art. 2B, § 9-203 was recodified, effective July 1, 2016, to Md. Code Ann., Al. Bev. § 11-1601.

existing record. The following constitutes evidence that was presented to the Board, either before or after remand.

Appellants' exhibits established that Gateway Village is "a successful power retail center" located off Maryland Route 450 near the Annapolis Mall. Its complement of stores includes Safeway, Best Buy, PetSmart, and Burlington Coat Factory. As of 2012, the median household income in the five-mile radius surrounding the shopping center was over $100,000.

Two expert witnesses testified on behalf of Appellants. The first was Greg Goldberg, a Gateway Village Executive, who testified as an expert in the leasing of the retail premises. He testified that Gateway Village draws customers from 20 to 30 miles away because its Best Buy store is one of the largest in the country. According to him, customers also travel far distances to shop at Gateway Village's Burlington Coat Factory store, while Staples and PetSmart attract customers from two to four miles away. Mr. Goldberg further testified that The Depot would be a convenient amenity in Gateway Village, based on both "the style of product that they're selling" and the fact that they would have a freestanding building in the middle of the shopping center's parking lot.

The second expert to testify on behalf of Appellants was Joseph Cronyn, who testified as an expert in retail market analysis. Mr. Cronyn prepared a public needs analysis of the impact of The Depot, and concluded that Gateway Village customers would "bundle trips within the shopping center to make it have a more effective mix of retail uses and to be convenient to the customers." In Mr. Cronyn's opinion, The Depot would generate "at least a million and a half dollars' worth of [yearly sales]" from Safeway customers alone.

Based on reports compiled by the Alcohol and Tobacco Tax Bureau of the Comptroller of Maryland, Mr. Cronyn testified that demand for wine is increasing in Anne Arundel County, the population of which is growing faster than the State of Maryland as a whole. Mr. Cronyn explained that currently, the three closest holders of off-sale[4] liquor licenses in the North Parole area, *i.e.*, north of U.S. Route 50, operate entirely different business models than the one proposed by Appellants. He testified that, in addition to selling liquor, Liquor Mart & Deli has "a very healthy sandwich business." In addition, H & B Fuller Wine and Spirits is a small, traditional liquor store located within a strip plaza, and the Italian Market & Restaurant is primarily a restaurant, but is permitted to supplement its business by selling wine to its customers. Furthermore, according to Mr. Cronyn, the Parole-based liquor stores south of Route 50, which include Festival Wine & Spirts, primarily draw customers from the south and, by and large, are already paired with an existing supermarket. Thus, Mr. Cronyn opined that, based on its proposed location and unique business model, The Depot would accommodate the public's need.

Appellees presented Shep Tullier as their own expert witness before the Board. Mr. Tullier conducted a needs analysis by drawing a circle with a three-mile radius around The Depot's proposed location. He then examined the population and number of liquor stores and restaurants that currently hold off-sale liquor licenses. Mr. Tullier's conclusion was that there was no need for the Depot's license. He testified that there are twenty off-sale liquor license holders within a three-mile radius, including restaurants such as Chili's,

[4] An "off-sale" liquor license refers to a license that permits the holder to sell alcohol for off-site consumption.

Outback Steakhouse, and TGI Friday's, and six within one mile. He acknowledged the traffic difficulties associated with Route 50 and the Annapolis Mall, but stated, "but everybody does it." Mr. Tullier ultimately concluded that "the current [off-sale] facilities…service the need as it exists today and will exist in the future."

The Board considered, over Appellants' objection, evidence of six liquor stores located within three miles of The Depot's proposed location. In response to this evidence, Appellants introduced testimony that, on a Friday evening, it would take someone approximately 15 minutes to drive from Gateway Village to the closest City liquor store.

Finally, the Board was presented with petitions containing 280 signatures in favor of The Depot's proposal and nearly 500 against it. However, the sign-in sheet for the April 8, 2014, hearing told a different story, namely, that 65 out of the 83 members of the public who attended the hearing, supported The Depot's application. After requesting a show of hands from the audience at the April 8, 2014 hearing, counsel for the Board observed that there were "substantially more [attendees] in support than in opposition."

On August 25, 2015, the Board again denied Appellants' application. In its Memorandum Opinion & Resolution, the Board found that "there is no public need for the license applied for, because within the trade area, there already exist sufficient licenses that are suitable, proper, convenient and useful to the public." Furthermore, regarding *Baltimore Cty. Licensed Beverage Ass'n, Inc. v. Kwon*, 135 Md. App. 178 (2000), a case that was central to Appellants' argument before the Board, the Board found that

> . . . . the only similarity between the subject license application and *Kwon* is that in both instances, a supermarket was in the same shopping area as the proposed licensed

> establishment. While the existence of a supermarket may have been a factor in *Kwon* as to "need," the Court of Special Appeals could not have meant to rule that wherever there is a supermarket, there must be a need for a liquor license. . . .
>
> . . . . If the legislature, in its wisdom, wanted to mandate that a Class A liquor license was appropriate in every shopping center containing a supermarket, it could have and yet still can say so. Absent such legislation, this Board evaluates every license application based on the facts and evidence presented to it, and not on an absolute proximity of a Class A liquor store license to any other particular facility.

By the Board's own admission, the denial of Appellants' application was a "partially subjective decision."

Appellants filed a Petition for Judicial Review on August 28, 2015. This time, following a hearing on March 7, 2016, the Circuit Court for Anne Arundel County, by Opinion and Order dated March 17, 2016, affirmed the decision of the Board as supported by substantial evidence. Appellants subsequently noted a timely appeal.

DISCUSSION

A. Parties' Contentions

Appellants argue that the Board violated Article 2B of the Maryland Code and failed to properly apply this Court's decision in *Kwon* when the Board found that "the proposed license is not necessary for the accommodation of the public." Citing Md. Code Ann., Art. 2B, § 9-201, Appellants assert that per Art. 2B, § 9-201, "[w]hen a local liquor board seeks to limit and restrict the number of licenses it considers 'sufficient' in a particular area, it must do so 'by regulation' and 'in accordance with a definite standard.'"

Moreover, pursuant to Art. 2B, § 9-203,[5] the Board must conduct a hearing on any proposed restricted area. Appellants contend that, in this case, the Board neither conducted an appropriate hearing nor passed any regulation imposing a "definite standard" for the number of off-sale licenses it considers sufficient for the area. Appellants argue that Mr. Tullier's three-mile-radius methodology, which the Board relied upon to determine that there are "3,643 people per liquor store and 2,357 people per off-sale license[]," was not only arbitrary, but also allowed the Board to consider liquor stores in the City of Annapolis over which it does not have jurisdiction. And to the extent the Board asserts that Mr. Tullier's methodology has become its own administrative practice, Appellants assert that there is no evidence in the record that this particular numeric standard has ever been applied before. Accordingly, Appellants assert that the Board failed to follow "any of the statutorily required procedures" required by Art. 2B, §§ 9-201 and 9-203.

In addition, Appellants contend that the Board improperly applied this Court's standard as articulated in *Kwon* for evaluating whether a given liquor license is necessary for the accommodation of the public. Appellants point out that "'necessary' in this context [of a liquor board license application] invokes a standard of convenience." *Kwon*, 135 Md. App. at 178. "[B]y attempting to make this case solely about a grocery store," Appellants argue, "the Board misconstrued and failed to properly apply a complete *Kwon*-based analysis." Moreover, Appellants assert that "the Board misconstrued the standard by inserting the word 'and.'" In fact, an applicant need only show that the proposed

[5] The hearing requirement of Art. 2B, § 9-203 was recodified, effective July 1, 2016, to Md. Code Ann., Al. Bev. § 11-1601.

establishment will be convenient *or* useful *or* appropriate *or* suitable *or* proper *or* conducive." Appellants contend that if the Board had applied *Kwon* correctly, it would have realized that it was "presented [with] substantial, compelling, and unrebutted evidence of how a high-end wine store like The Depot would be 'convenient, useful, appropriate, suitable, proper, or conducive' to the public at Gateway Village." Therefore, Appellants argue, by misapplying *Kwon*, "the Board rendered a decision that is unsupported by substantial evidence."

Appellees respond that Appellants have not met their burden of showing that the decision of the Board was against the public interest. Appellees assert that the Board did not violate § 9-201[6] or § 9-203 of Article 2B because it did not take any action under either of those sections. Instead, Appellees contend, the Board denied Appellants' application "[solely] by evaluating the specific license application as required by Md. Code Ann., Art. 2B § 10-202(a)(2)."[7]

Appellees further argue that "Appellants' argument that this Court's decision in . . . *Kwon* . . . is binding has no merit." Appellees assert that *Kwon* can be distinguished on the grounds that the applicants in *Kwon* were applying for a liquor license transfer, rather than a new liquor license, and that *Kwon* did not involve any expert testimony. Assuming, however, that *Kwon* does apply, Appellees contend that only a small subset of the overall

[6] In response to Appellants' arguments regarding the Board's violation of § 9-201, Appellees refer to § 9-102. We believe Appellees inadvertently inversed the statute's numbers and therefore address Appellee's counterarguments as they relate to § 9-201.

[7] Effective July 1, 2016, Art. 2B, § 10-202(a)(2) was recodified without substantive change to Md. Code Ann., Al. Bev. § 4-210.

public would benefit from the application being granted, and that Appellants' misreading of *Kwon* leads to the illogical conclusion that that "a[ny] grocery store could be used to substantiate a public need."

Finally, Appellees argue that "the Board's decision was supported by substantial evidence." Appellees assert that "[t]he Board's decision is presumed to be in the public interest," and that "Appellants have not explained how the Board's decision was arbitrary, or procured by fraud, or was unreasonable."

B. Standard of Review

In cases such as this, "[w]e review the decision of the [Board], not that of the circuit court." *Bd. of License Comm'rs For Prince George's Cty. v. Glob. Exp. Money Orders, Inc.*, 168 Md. App. 339, 344 (2006) (citing *Wisniewski v. Dep't of Labor, Licensing & Regulation*, 117 Md. App. 506, 515–16 (1997)). In doing so, we "perform[ ] the same function as the circuit court," *Glob. Exp. Money Orders, Inc.*, 168 Md. App. at 344 (citing *Dep't of Labor, Licensing & Regulation v. Muddiman*, 120 Md. App. 725, 733 (1998)), which, pursuant to statute, applies the following standard of judicial review:

> [T]he action of the local licensing board shall be presumed by the court to be proper and to best serve the public interest. The burden of proof shall be upon the petitioner to show that the decision complained of was against the public interest and that the local licensing board's discretion in rendering its decision was not honestly and fairly exercised, or that such decision was arbitrary, or procured by fraud, or unsupported by any substantial evidence, or was unreasonable, or that such decision was beyond the powers of the local licensing board, and was illegal.

Art. 2B, § 16-101(e)(1)(i).

Decisions of the Board are said to be supported by substantial evidence if the evidence is such that "a reasonable mind might accept [it] as adequate to support a conclusion." *Blackburn v. Bd. of Liquor License Comm'rs for Baltimore City*, 130 Md. App. 614, 634 (2000) (quoting *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 512 (1978)). Put another way, substantial evidence exists if "a reasoning mind reasonably could have reached the factual conclusion the [Board] reached." *Mayor & Aldermen of City of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 398 (1979) (quoting *Insurance Comm'r v. Nat'l Bureau*, 248 Md. 292, 309 (1967)). "If the Board's decision is not supported by substantial evidence or if it committed an error of law, we must reverse." *Baltimore Cty. Licensed Beverage Ass'n, Inc. v. Kwon*, 135 Md. App. 178, 187 (2000). We may only uphold the Board's decision if "it is sustainable on the [Board's] findings and for the reasons stated by the [Board]," *Blackburn*, 130 Md. App. at 624 (quoting *Baines v. Bd. of Liquor License Comm'rs for Baltimore City*, 100 Md. App. 136, 143 (1994)), and "may [not] substitute [our] judgment for that of the Board [except] on questions of law." *Blackburn*, 130 Md. App. at 624 (citing *Patten v. Bd. of Liquor License Comm'rs for Baltimore City*, 107 Md. App. 224, 230 (1995)).

C. Analysis

1. Denial of Application for Class A Liquor License

The Board made two findings related to Art. 2B, § 10-202 in its August 25, 2015, Memorandum Opinion & Resolution. First, the Board found that "[Appellants] have failed to show that there is a public need and desire for the proposed liquor store as required under Section 10-202(a)(2)(i)(1)." Second, the Board concluded that "the proposed license is not

necessary for the accommodation of the public . . . under Section 10-202(a)(2)(ii)(1)." These two findings, in addition to the Board's interpretation and application of our holding in *Kwon*, served as the primary basis for the denial of Appellants' application on behalf of The Depot. Therefore, we begin our analysis with the relevant language of Art. 2B, § 10-202.

i. Article 2B §, 10-202(a)(2)(i)- Public Need and Desire for the License

The factors the Board shall consider before approving an application are set forth in Art. 2B, § 10-202(a)(2)(i), which provides as follows:

> (2)(i) Before approving an application and issuing a license, the board shall consider:
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> 1. *The public need and desire for the license*;
>
> 2. The number and location of existing licenses 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.

Art. 2B §, 10-202(a)(2)(i)(1) (emphasis added).

As it relates to the public need and desire for the proposed license, in a transcript from the April 8, 2014 hearing, the Board asked those present at the hearing to raise their hands to indicate whether they supported or opposed Appellants' license. The Board stated,

"so it's substantially more here in support than in opposition, and we'll note that for the record. Numbers really don't matter to the Board, but we afford this courtesy to you." However, in the Board's findings the Board stated that of the petitions signed (500 opposed and 280 in support), it appeared that "there d[oes] not appear to be strong community support" for the license. The Board's inconsistency as to the weight of community support, or said otherwise, the public interest, is indicative of the Board's arbitrary application of Art. 2B, § 10-202(a)(2) (i)(1).

Accordingly, the Board had insufficient facts and evidence to conclude that there was no "public need and desire" to grant the proposed license pursuant to Art. 2B §, 10-202(a)(2)(i)(1). Based on the evidence relied on by the Board, the Board made insufficient findings of fact when it found that there did not appear to be strong community support to grant Appellants' license.

ii. **Article 2B §, 10-202(a)(2)(i) - Necessary for the Accommodation of the Public**

Article 2B, § 10-202(a)(2)(i), lays out factors for when the Board shall deny an applicant's application for a liquor license. Article 2B, § 10-202(a)(2)(i), provides as follows:

> (2)(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.

(Emphasis added).

As indicated above, the Board's decision in this case rested upon its application of the facts to Subsections 10-202(a)(2)(i)(1) and 10-202(a)(2)(ii)(1). More specifically, the Board denied Appellants' application based on its determination that the number of existing liquor stores within a three-mile radius of Gateway Village rendered Appellants' request unnecessary for the accommodation of the public. Appellants argue that the Board erred by restricting the number of licenses in the area nearby Gateway Village using an arbitrary standard in violation of Art. 2B, §§ 9-201 and 9-203. Appellants contend that the Board failed to properly apply this Court's decision in *Kwon* when the Board found that "the proposed license is not necessary for the accommodation of the public." Specifically, Appellants assert that pursuant to Art. 2B, § 9-201, "[w]hen a local liquor board seeks to limit and restrict the number of licenses it considers 'sufficient'" in a particular area, it must do so 'by regulation' and 'in accordance with a definite standard.'"

In this case, the Board found that the Appellees' expert witness testimony was sufficient to restrict the number licenses issued within the three mile radius around The Depot. Pursuant to Art. 2B, § 9-201(a)(1), "[t]he Board of License Commissioners for any county or for Baltimore City by regulation *may* limit and restrict, *in accordance with a definite standard*, the number of licenses which they consider sufficient for any neighborhood." (Emphasis added). Subsequent sections of Article 2B provide geographic restrictions that apply specifically to individual counties or the City of Baltimore. The section pertaining to Anne Arundel County does not set forth a definite standard for the restriction of the number of licenses in a particular area, but provides:

> (b)(1)(i) The Board of License Commissioners *may* restrict any specified area within the county to the existing number of licenses in that area or to any other number of licenses it *deems appropriate*.
>
> (ii) *Before any specified area is restricted*, the Board *shall* conduct a hearing on the proposed restricted area. The hearing shall be advertised in the manner required for the issuance of a new license. After testimony is taken for and against the restriction of licenses in a specified area, the Board *may* prohibit the issuance of additional licenses, or fix the number of licenses to be permitted in that area, and shall determine the limits of that area.

Id. at § 9-203(b)(1) (emphasis added).[8]

This Court concedes that the Board has the discretion to restrict the number of licenses issued. However, the board must do so in accordance with a definite standard. As

[8] Recodified as Md. Code Ann., Al. Bev. § 11-1601.

it pertains to Anne Arundel County, the Board has the discretion to "restrict *any specified area* within the county to the existing number of licenses in that area …. it deems appropriate." However, before restricting a specified area, the Board "*shall* conduct a hearing on the proposed restricted area." Moreover, the hearing for the proposed restricted area "s*hall* be advertised in the manner required for a new license." In this case, the Board found that there was no public need for the proposed license. As noted above, the Board had the discretion to hold that there was no public need for the proposed license within the three mile radius around The Depot. However, the Board failed to hold a hearing before restricting the licenses within the specified area and failed to advertise the hearing "in the manner required for a new license." Because the Board failed to follow the procedures set forth in Art. 2B, § 9-201(a)(1), we need not address whether the Board's finding that granting Appellants license was not necessary for accommodating the public nor if the Board misapplied our holding in *Kwon*.

Accordingly, we reverse the judgment of the circuit court and direct it to remand the matter to the Board for a hearing in accordance with Art. 2B, § 9-201(b)(1).

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. THE CIRCUIT COURT IS DIRECTED TO ENTER AN ORDER REMANDING THIS CASE TO THE BOARD IN ACCORDANCE WITH MD. CODE ANN. ART. 2B, § 9-201(b)(1). COSTS TO BE PAID BY APPELLEES (the "Board").