Circuit Court for Montgomery County
Case No. 483611-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 580

September Term, 2021

---

MARLENY MARKET, LLC

v.

JOHNNY & PRUM, INC.

---

Kehoe,
Leahy,
Beachley,

JJ.

---

Opinion by Beachley, J.

---

Filed: February 17, 2022

In July of 2020, Glenda Sanchez filed an application with the Montgomery County Board of License Commissioners (the "Board") for an alcohol license for Marleny Market, LLC ("Marleny"), a planned grocery store/market at 2307 University Boulevard in Silver Spring, Maryland. The Board granted the application, but Johnny & Prum, Inc. (t/a "Wheaton Winery"), a party that had opposed Marleny's application, challenged the Board's decision by filing a petition for judicial review in the Circuit Court for Montgomery County. Following a hearing, the circuit court reversed the Board's decision to grant Marleny's application. Marleny timely noted an appeal and presents three questions for our review, which we have slightly rephrased, as follows:

1. Did the circuit court err in reversing the Board's decision to grant Marleny a license?

2. Did the circuit court err in denying Marleny's motion to introduce new evidence?

3. Did the circuit court err by not remanding the case to the Board?

We answer all three questions in the negative and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

On July 23, 2020, Ms. Sanchez filed an application for a Class D Beer and Wine License for Marleny. The application showed that Ms. Sanchez planned to open Marleny in a storefront with 7,000 square feet of space—3,500 square feet each for both the first floor and basement level. On September 3, 2020, the Board held a hearing to consider Marleny's application. At the hearing, Ms. Sanchez, who appeared without the assistance of counsel, testified that she planned to open Marleny as a grocery store, and that, due to

the Covid-19 pandemic, it would be convenient for shoppers to simply purchase beer and wine in the same store that they purchased their food.

During the hearing, Ms. Sanchez correctly answered the Board's questions regarding Maryland and Montgomery County alcohol distribution laws. She also testified that Marleny's business plan would focus on the sale of food more than on the sale of alcohol. Specifically, of the 3,500 square feet of store space,[1] Ms. Sanchez anticipated devoting 1,000 square feet to the sale of beer and wine. Although Ms. Sanchez explained that the market's food products would be geared toward the Hispanic community, she told the Board that the alcohol she planned to sell would be "day-to-day" common beverages as opposed to unique international beverages. On cross-examination by Wheaton Winery's counsel, Ms. Sanchez conceded that her application inaccurately indicated that the nearest alcohol establishment was two miles from Marleny. She acknowledged that Wheaton Winery was already located in the same shopping center where she planned to open Marleny. As we shall explain in further detail below, Marleny, through Ms. Sanchez, presented almost no evidence regarding the statutory factors that the Board must consider when granting an application for an alcoholic beverage license.

Johnny Keth, the owner of Wheaton Winery, a 2,500 square foot liquor store, testified at the hearing in opposition to Marleny's application. Mr. Keth submitted evidence showing that Wheaton Winery was located approximately 85 to 200 feet from

[1] Ms. Sanchez testified that the basement area would be used for storage.

Marleny's planned location in the same shopping center. He testified that since he purchased Wheaton Winery in 1991, two new alcohol stores had opened in the area, causing Wheaton Winery's sales to drop. He explained that if he suffered a 5 to 10 percent loss in business, it would be "very hard" for Wheaton Winery to stay open. Mr. Keth also testified that there are apartments located behind the shopping center and that, due to the location of an alleyway, customers living in those apartments would have to pass Marleny to get to Wheaton Winery, potentially siphoning away those customers.

Jeff Bobrow, the owner of Elbe's Beer and Wine, an establishment approximately two blocks from Marleny, also testified at the hearing in opposition to Marleny's application. Mr. Bobrow testified that there were already numerous full-service liquor stores within a three-block area of Marleny, and that there were also three restaurants with "off-sale" beer licenses. Mr. Bobrow further noted that, if Marleny received a license, there would be nothing to stop it from using even more than 1,000 square feet of store space for alcohol sales.

By a vote of 3-1, the Board voted to grant Marleny's application. Following that decision, Wheaton Winery filed a petition for judicial review in the Circuit Court for Montgomery County, challenging the Board's decision.[2] Prior to the hearing, Marleny filed a motion requesting the opportunity to present new testimony and evidence. The

[2] We note that Marleny filed an untimely response to Wheaton Winery's petition for judicial review, but the circuit court denied Wheaton Winery's motion to strike Marleny's response. We also note that the Board filed a line indicating that it would not participate in the proceedings in the circuit court.

circuit court denied this motion. Following a hearing, the circuit court reversed the Board's decision to grant Marleny's application, concluding that "the Board's approval of the application was against the public interest and was not supported by substantial evidence." As noted above, Marleny timely appealed. We shall provide additional facts as necessary.

## DISCUSSION

Marleny presents three issues for our review: 1) whether the circuit court erred in reversing the Board's decision; 2) whether the circuit court erred in denying its motion to present additional evidence; and 3) whether the circuit court erred in declining to remand the case to the Board. We shall address these arguments in turn.

### I. THE CIRCUIT COURT DID NOT ERR IN REVERSING THE BOARD'S DECISION

Marleny first argues that the circuit court erred in reversing the Board's decision. "Judicial review of a decision by a liquor board 'is similar to review of decisions by most other administrative agencies.'" *Dakrish, LLC v. Raich*, 209 Md. App. 119, 141 (2012) (quoting *Blackburn v. Bd. of Liquor License Comm'rs for Balt. City*, 130 Md. App. 614, 623 (2000)). Rather than review the circuit court's decision, "[w]e review the decision of the agency[.]" *Id*. (citing *Wisniewski v. Dep't of Lab., Licensing & Regul.*, 117 Md. App. 506, 515-16 (1997)). "Our role is limited to determining if there is 'substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Id*. at 141-42 (citing *Dep't of Lab., Licensing & Regul. v. Muddiman*, 120 Md. App. 725, 733 (1998)). Appellate courts have defined "substantial evidence" to mean "'such evidence as

a reasonable mind might accept as adequate to support a conclusion' and 'whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *Id*. at 142 (quoting *Mastandrea v. North*, 361 Md. 107, 133 (2000)). "Under the substantial evidence test, we may not substitute our own judgment for that of the board." *Id*. (citing *Blackburn*, 130 Md. App. at 623-24). Finally, we note that, "[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." *Id*. (citing *Bd. of License Comm'rs for Charles Cnty. v. Toye*, 354 Md. 116, 125 (1999)). Despite this deferential standard of review, we conclude the Board's decision was not supported by substantial evidence. We explain.

Md. Code (2016), § 4-210(a) of the Alcoholic Beverages Article ("AB") provides a list of factors a local licensing board *must* consider when deciding whether to approve a license. The factors are:

> (1) the public need and desire for the license;
> (2) the number and location of existing license holders;
> (3) the potential effect on existing license holders of the license for which application is made;
> (4) the potential commonality or uniqueness of the services and products to be offered by the business of the applicant;
> (5) the impact of the license for which application is made on the health, safety, and welfare of the community, including issues relating to crime, traffic, parking, or convenience; and
> (6) any other factor that the local licensing board considers necessary.

Our review of the administrative record demonstrates that Marleny provided almost no evidence in support of its application concerning these mandatory factors. Whereas Marleny produced a dearth of favorable evidence concerning the statutory factors,

Marleny's opponents produced considerable evidence in opposition to the application. Regarding the public need and desire for the license under AB § 4-210(a)(1), Wheaton Winery introduced into evidence a petition with 142 signatures from "residents, patrons and/or business owners surrounding and in close proximity to the property known as Wheaton Winery," who protested Marleny's application. The petition specifically mentioned that its signees "believe[d] the issuance of [Marleny's] license will negatively impact the general health and welfare of [the] community and will adversely affect other licensees in close proximity who have been serving the needs of [the] community for many years."

The only evidence Marleny "produced" concerning this factor was Ms. Sanchez's uncorroborated and ambiguous statement that "a lot of the residents have stopped by and they're really happy because there's going to be convenient [sic] for them to . . . ." Unfortunately, Ms. Sanchez was cut off before she could clarify whether the residents were happy about the availability of groceries tailored to the Spanish-speaking community or the ability to purchase alcohol.[3] Nevertheless, even assuming Ms. Sanchez was referring to residents being happy about the availability of alcohol in the grocery store, no reasonable person would construe her ambiguous and imprecise statement as establishing a public

[3] The context of Ms. Sanchez's comments suggest that she was primarily referring to the convenience of purchasing food. Prior to her being cut off, Ms. Sanchez testified, "And it's going to be convenient for the parents to purchase food since their kids are home. And that's what is working more. The customers are buying more food to prepare at home [rather] than going out."

need and desire for the license when compared with Wheaton Winery's petition and signatures that directly address public need and desire. *Raich*, 209 Md. App. at 142. Indeed, the Board did not find that Ms. Sanchez's statement satisfied the "public need and desire" factor enumerated in the statute.

The second factor under AB § 4-210(a)—"the number and location of existing license holders"—also weighed against granting the application. In her application, Ms. Sanchez erroneously indicated that the "nearest place of business licensed to sell alcoholic beverages" was two miles away, and she provided no evidence on the total number of nearby alcohol beverage establishments.[4] Wheaton Winery, on the other hand, introduced documentary evidence, including maps of the area showing nearby liquor stores as well as a table listing the establishments and their distances from Marleny's storefront. According to Wheaton Winery's exhibits, there are already twelve alcohol beverage stores within two miles of Marleny (including Wheaton Winery).

Regarding AB § 4-210(a)(3)—"the potential effect on existing license holders of the license for which the application is made"—the only evidence introduced at the hearing before the Board came from Johnny Keth of Wheaton Winery and Jeff Bobrow of Elbe's Beer and Wine. Mr. Keth testified that Wheaton Winery's profit margins had declined with the addition of two stores that opened nearby and that his remaining business would struggle to remain open if he suffered a 5 to 10 percent loss in business. Similarly, Mr.

[4] At the hearing, Ms. Sanchez candidly admitted that she made a mistake with regard to this portion of her application.

Bobrow warned the Board that, "By giving out another licensee [sic] so close to each other you are jeopardizing the wellbeing of a successful store, which is Wheaton Winery and others in the area." Mr. Bobrow explained that by granting "additional licenses in a small geographical area" the Board was simply "making each slice of the pie smaller for existing stores." Thus, the only evidence the Board received on this factor was that granting Marleny's application would be detrimental to existing license holders.

Concerning AB § 4-210(a)(4)—"the potential commonality or uniqueness of the services and products to be offered by the business of the applicant"—Ms. Sanchez did testify that Marleny would be unique by selling groceries desired by the Spanish-speaking community. Ms. Sanchez conceded, however, that Marleny would not sell special or unique alcoholic beverages. Thus, the alcohol Marleny intends to sell will, in the parlance of the statute, be "common" rather than "unique," and thus will directly compete with other nearby licensees.

There was little to no evidence produced at the hearing regarding the final two factors in AB § 4-210(a). The administrative record is silent regarding "the impact of the license for which application is made on the health, safety, and welfare of the community, including issues relating to crime, traffic, parking, or convenience" (AB § 4-210(a)(5)) and "any other factor that the local licensing board considers necessary" (AB § 4-210(a)(6)).

Given the dearth of evidence supporting Marleny's application, it is unsurprising that the Board made almost no findings of fact concerning the factors listed in AB § 4-210(a). Instead, the Board found that Ms. Sanchez "is a fit person," that "the business will

not unduly disturb the peace of the residents of the neighborhood" and "that there are no other reasons why such license should not be granted." Additionally, the Board provided the following "specific grounds" for its conclusion:

1. The applicant was able to properly answer questions regarding Alcoholic Beverage Laws.
2. The applicant was familiar with I.D. requirements, purchasing procedures, and the legal age to purchase alcoholic beverages.
3. The applicant has not been convicted of a felony.
4. There was opposition to the granting of this license.
5. The on-sale component complements the food to be offered; the [off]-sale component will be a convenience to customers.

Finally, in the "Additional Notes" section of its decision, the Board noted that Ms. Sanchez reiterated her intention to primarily focus on the sale of food and groceries. We note that, at the hearing on Marleny's application, the Board explicitly recognized the AB § 4-210(a) factors as "the factors that we must assess in deciding whether to approve a license application." Yet the Board's written decision contains no express references to the mandatory factors enumerated in AB § 4-210(a).

AB § 4-905 governs judicial review of a local liquor board's licensing decision. That statute provides that a court must presume that the action of the local board "was proper and best served the public interest." AB § 4-905(a). A party who contests the local liquor board's decision bears the burden to show that the decision 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).

As noted by the *Raich* Court, "our role is limited to determining whether there is substantial evidence in the record as a whole to support the Board's conclusion." *Raich*, 209 Md. App. at 144-45. Like the circuit court, we conclude that the Board's decision was unsupported by substantial evidence. None of the AB §4-210(a) factors the Board was required to consider weigh in favor of granting Marleny's application. Not only was there no evidence introduced indicating a public need or desire for a license, but Wheaton Winery produced evidence showing that the public was opposed to the license. AB § 4-210(a)(1). The evidence concerning the number and location of existing license holders showed that there were twelve liquor stores within a two-mile radius, including Wheaton Winery, which is located in the same shopping center and somewhere between 85 to 200 feet away from Marleny. AB § 4-210(a)(2). Regarding the potential effect on existing license holders, the only evidence adduced at the hearing showed that these businesses would suffer due to the introduction of direct competition. AB § 4-210(a)(3). Finally, the evidence did not establish any uniqueness of services and products in the context of the alcoholic beverage licensing statute. Although Ms. Sanchez testified that her store would be unique in its sale of groceries, she conceded that the alcohol itself would not be uniquely international. Accordingly, Marleny's alcohol sales will directly compete with other nearby liquor stores selling similar products. AB § 4-210(4).

Because the evidence before the Board was not such that a reasonable mind would accept it as adequate to support granting Marleny a beer and wine license, the Board's decision was unsupported by substantial evidence and was against the public interest. AB § 4-905(b). Accordingly, the circuit court did not err in reversing the Board's decision.

## II. THE CIRCUIT COURT DID NOT ERR OR ABUSE ITS DISCRETION IN DENYING MARLENY'S MOTION TO INTRODUCE EVIDENCE

Marleny's second appellate argument is that the circuit court erred in denying its motion to introduce additional testimony and evidence. In its motion to the circuit court, Marleny, with the assistance of counsel, requested the opportunity to present evidence to support the proposition that Marleny's license will be a positive impact on the nearby community. Marleny argued that its motion should be granted because Ms. Sanchez appeared at the hearing before the Board as a self-represented litigant, and that "the law generally has consideration for a Party that is not represented by legal counsel and generally finds that the interest of justice and fairness are best served when all the Parties have the benefit of legal counsel." The circuit court denied Marleny's motion and limited its consideration to the matters contained in the administrative record.

On appeal, Marleny asserts that the circuit court should have allowed it to introduce into evidence a petition signed by 209 local residents who support Marleny's application for a liquor license. Marleny also argues that it could have provided testimony and evidence before the circuit court to rebut Wheaton Winery's evidence, and to show that its license will not adversely impact the community.

The circuit court did not err. To be sure, AB § 4-905(d) does allow a court to receive additional evidence and testimony if:

> (1) it is impracticable to determine the question presented to the court without the hearing of additional evidence;
> (2) a qualified litigant has been deprived of the opportunity to offer evidence; or
> (3) the interests of justice require that further evidence should be taken.

In its motion to the circuit court, Marleny conceded that it was not "formally precluded from offering evidence" before the Board, but rather that its status as a self-represented litigant deprived it of the ability to properly present its case. The law is clear, however, that Marleny's status as a self-represented litigant does not mean that the interests of justice mandate a reopening of the record.

This Court has previously noted that, although AB § 4-905(d) expressly allows a court to hear additional evidence, "the court may hear such evidence only to ascertain the veracity of findings of fact and conclusions of law reached by the Board." *Blackburn*, 130 Md. App. at 623. In its motion to the circuit court, however, Marleny relied solely upon issues of fairness stemming from Ms. Sanchez's failure to hire legal counsel as the basis for introducing evidence that would show that the community supported and would benefit from the granting of the liquor license. Thus, Marleny failed to argue that the court should exercise its discretionary authority to hear evidence concerning the veracity of the Board's findings or conclusions as noted in *Blackburn*.

Nor are we persuaded that the court should have granted Marleny's motion on the basis that Marleny was not represented by counsel before the Board. In *Dep't of Lab.*,

*Licensing & Regul. v. Woodie*, 128 Md. App. 398, 413 (1999), this Court held that, in addition to exceeding its statutory authority in unemployment insurance appeals, the circuit court erred in remanding the case to a licensing board to allow additional testimony and evidence due to an applicant's status as a self-represented litigant. There, Woodie, a truck driver, appeared at a hearing before a licensing board as a self-represented litigant, and unsuccessfully requested unemployment benefits. *Id*. at 402. Although Woodie appeared before the licensing board without the assistance of counsel, he subsequently retained counsel when he filed his petition for judicial review. *Id*. at 403. Ultimately, the circuit court remanded for a supplemental hearing. *Id*. at 405. In doing so, the court explained that "a layman is always sort of at a disadvantage understanding the procedures and understanding the law" and that "it's clear that there's a good deal of information that [Woodie] does have to present and possibly he didn't know what was going to be said by the Employer because he didn't understand what he needed, what the legal standard was." *Id*.

We reversed the circuit court, stating,

> The court, however, erred by giving [Woodie] a "second bite at the apple" simply because he was not represented by counsel during the administrative hearings. It is a well-established principle of Maryland law that *pro se* parties must adhere to procedural rules in the same manner as those represented by counsel. Indeed, this Court has stated that "[t]he principle of applying the rules equally to *pro se* litigants is so accepted that it is almost self-evident." *Tretick v. Layman*, 95 Md. App. 62, 68, 619 A.2d 201, 204 (1993); *see also Pickett v. Noba, Inc.*, 122 Md. App. 566, 568, 714 A.2d 212, 213 (1998) ("While we recognize and sympathize with those whose economic means require self-representation, we also need to adhere to procedural rules in order to maintain consistency in the judicial system.").

*Id.* at 410-11. We likewise conclude that the interests of justice will not be served by allowing Marleny, now with the assistance of counsel, to take a second bite at the apple by presenting evidence it could have presented at the hearing before the Board. Accordingly, the circuit court did not err or abuse its discretion in denying Marleny's motion to introduce new evidence.

## III. THE CIRCUIT COURT DID NOT ERR IN FAILING TO REMAND THE CASE TO THE BOARD

Marleny's final argument on appeal is that the circuit court erred by declining to remand the case back to the Board when it found that the Board's decision was unsupported by substantial evidence and that the granting of the license was not in the public's interest. In its brief, Marleny cites to Md. Code (1984, 2021 Repl. Vol.), § 10-222(h)(1) of the State Government Article ("SGA") and asserts that this section "clearly establishes that the [c]ircuit [c]ourt may remand this case to a presiding officer of the Licensing Board should it find that the record is incomplete or does not find substantial evidence."

Marleny is wrong. Article 10 of the State Government Article concerns the Administrative Procedure Act, but a local liquor board such as the Board in this case "is not an agency subject to the requirements of the [Administrative Procedure Act]." *Raich*, 209 Md. App. at 137 (citing *Valentine v. Bd. of License Comm'rs of Anne Arundel Cnty.*, 291 Md. 523, 536 (1981)). Although we recognize the statutory authorization for remand found in AB § 25-2402 ("In addition to the other powers of the circuit court for [Montgomery County], the court may remand the proceedings to the Board"), as we explained in Part II of this opinion, it would be inappropriate to allow Marleny a second

bite at the apple to introduce evidence it was not precluded from introducing at the hearing before the Board. As with the circuit court's decision not to allow Marleny to introduce new evidence, the court's decision to deny a remand to the Board is reasonable, and well within any center mark we could imagine. *See Santo v. Santo*, 448 Md. 620, 625-26 (2016) (stating that a court abuses its discretion where no reasonable person would adopt the court's view, or where the court's decision was "well removed from any center mark imagined by the reviewing court" (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 313 (1997))).

**JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**