

ATTACHMENT K

Petitioner next contends that the Board's finding that the location of the Shepherd Park Restaurant was "appropriate" was not supported by substantial evidence. It cites the complaints about the nude dancers, the patrons' disorderly conduct, and the parking problems associated with the restaurant as evidence of the inappropriateness of its location. There is abundant evidence in the re-cord on both sides of the issue.

[7][8] Under D.C. Code § 25-115(a)(6) (1985 Supp.), before the Board may issue a license, it must satisfy itself "[t]hat the place for which the license is to be issued is an appropriate one considering the character of the premises, its surroundings, and the wishes of the persons residing or owning property in the neighborhood of the premises for which the license is desired." Its decision to grant or deny a license application must meet the three-part test which we have established for contested cases:

(1) [T]he decision must state findings of fact on each material, contested factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings.

Perkins v. District of Columbia Department of Employment Services, 482 A.2d 401, 402 (D.C.1984); accord, *Donnelly v. District of Columbia Alcoholic Beverage Control Board*, 452 A.2d 364, 366 (D.C.1982)*992 ; *Foggy Bottom Ass'n v. District of Columbia Alcoholic Beverage Control Board*, 445 A.2d 643, 645 (D.C.1982); *Citizens Ass'n of Georgetown v. District of Columbia Zoning Commission*, 402 A.2d 36, 42 (D.C.1979). We must uphold the Board's decision so long as it is supported by substantial evidence, even though there may also be substantial evidence to support a contrary decision, as there is in this case. See *Haight v. District of Columbia Alcoholic Beverage Control Board*, 439 A.2d 487, 495 (D.C.1981); *Spevak v. District of Columbia Alcoholic Beverage Control Board*, 407 A.2d 549, 554 (D.C.1979).

[9] Petitioner first argues that the restaurant's use of nude go-go dancers makes its location inappropriate to the "stable, traditional, family-oriented community" in which it is located. The Board found, however, that the dancing was not illegal under applicable zoning regulations, FN4 and therefore it could not be used as a basis for finding the location inappropriate. The Board's ruling was correct as a matter of law. *4934, Inc. v. Washington*, 375 A.2d 20 (D.C.1977); accord, *D.T. Corp. v. District of Columbia Alcoholic Beverage Control Board*, 407 A.2d 707, 708 (D.C.1979).

FN4. A 1977 amendment to the District of Columbia Zoning Regulations prohibited "sexually-oriented business establishments" from operating in areas zoned C-2-A, which is the restaurant's zoning classification. The restaurant apparently meets the definition of a "sexually-oriented business establishment." See 11 DCMR § 199.9 (1984). However, be-cause the restaurant has offered nude dancing since 1976, the 1977 amendment does not affect it; it was, as the Board found, "grandfathered in as a sexually-oriented business in a C-2-A zone."

[10] Second, petitioner maintains that the disorderly behavior of the restaurant patrons has made the location inappropriate. It cites testimony regarding several incidents in

which some patrons harassed neighborhood residents and were seen urinating in public. The Board found, however, that the owners of the restaurant have sought to alleviate these problems by hiring an off-duty police officer to patrol the outside of the premises. Moreover, the Board noted that its investigator did not find any evidence of such activity in his several visits to the restaurant. We rejected a similar argument, on a comparable record, in *Donnelly v. District of Columbia Alcoholic Beverage Control Board*, *supra*, 452 A.2d at 369. We hold that *Donnelly* is dispositive here. *See also Citizens Ass'n of Georgetown v. District of Columbia Alcoholic Beverage Control Board*, 410 A.2d 197, 200-201 (D.C.1979) (upholding Board's finding of appropriateness when the licensee had made efforts to eliminate kitchen odors, noise, trash, and parking problems).

[11][12] Finally, petitioner challenges the Board's ruling with respect to the parking problems allegedly caused by the restaurant's patrons. Petitioner argues that the restaurant's thirty parking spaces cannot be sufficient for its twenty-five employees and all of its patrons, since it has a seating capacity of approximately ninety-six persons. However, petitioner cites no evidence showing how many employees work at the same time, whether they drive their cars to work, or whether the restaurant has ever been filled to capacity. Moreover, the Board pointed out that on several occasions its investigator had checked the parking lots in the surrounding area and found a sufficient number of parking spaces. The investigator also spoke with the manager of a nearby restaurant, who stated that there were no parking problems. The Board noted in addition that the investigator had "made additional visits to the premises during different hours of the evenings and early mornings and found no violations outside of the premises in and around the parking lots." On this record we are satisfied that there was substantial evidence to support the Board's decision on the parking issue. *See Haight v. District of Columbia Alcoholic Beverage Control Board*, *supra*, 439 A.2d at 494-495 (upholding Board's finding of *993 appropriateness despite allegations of parking problems). FN5

FN5. Petitioner also contends that the Board erred in failing to consider adequately the views of neighborhood residents, particularly those who did not live in the immediate area of the restaurant. Although it could have disregarded entirely the views of such persons, *Donnelly*, *supra*, 452 A.2d at 367 n. 7, the record makes clear that it did not do so. In the same vein, petitioner argues that the Board's findings implied that the community was not predominantly opposed to the license renewal and that this was error because the Board refused to hear unduly repetitious testimony. We find no such implication in the Board's decision; on the contrary, the Board expressly noted that "many more persons were prepared to give repetitious evidence" and that petitions containing more than 900 signatures were submitted in opposition to the application.

IV

Petitioner's last claim of error is that the Board failed to accord "great weight," as it is required to do by statute, to the views expressed by the local Advisory Neighborhood Commission (ANC). We hold that the Board fully complied with the statute.

[13] Under D.C. Code § 1-261(a) (1981), each ANC is given the responsibility to advise the Mayor and agencies of the District of Columbia government with respect to a variety of issues that affect its area. Section 1-261(d) provides that “[t]he issues and concerns raised in the recommendation of the commission shall be given great weight during the deliberations by the governmental agency....” This means simply that the Board must carefully consider the ANC's recommendations. So long as the Board makes “explicit reference to each ANC issue and concern as such, as well as specific findings and conclusions with respect to each,” it meets the requirements of section 1-261(d); it is not obliged to follow the ANC's recommendations or adopt its views. *Kopff v. District of Columbia Alcoholic Beverage Control Board*, *supra* note 2, 381 A.2d at 1384 (emphasis in original); accord, *Gerber v. District of Columbia Alcoholic Beverage Control Board*, 499 A.2d 1193, 1197-1198 (D.C.1985); *Donnelly v. District of Columbia Alcoholic Beverage Control Board*, *supra*, 452 A.2d at 367; *Spevak v. District of Columbia Alcoholic Beverage Control Board*, *supra*, 407 A.2d at 555.

[14][15] In this case ANC 4-B at first took no position, but later it decided to oppose renewal of the license because of the nude dancing, the disorderly behavior of the patrons, and the parking problems. FN6 The Board expressly took note of these concerns and rejected them for reasons which it stated in its decision. This was all that section 1-261(d) required it to do. We hold, therefore, that the Board fulfilled its statutory duty in this respect. FN7

FN6. ANC 4-B represents the neighborhood in which the Shepherd Park Restaurant is located. Petitioner argues that the Board should also have given great weight to the views of ANC 4-A, which represented a nearby neighborhood. D.C. Code § 1-261(a) (1981) provides that each ANC may advise the Board on issues “which affect that commission area.” Petitioner reads this language broadly to give any ANC that may remotely be affected by action taken in an adjacent neighborhood the right to have its views taken into account. Although we are not persuaded that the statute should be so construed, we need not decide the point because we are satisfied that, if there was error, it was harmless. Since ANCs 4-A and 4-B both made the same objections to the renewal, the Board necessarily considered the views of ANC 4-A when it considered those of ANC 4-B.

FN7. Petitioner makes one additional argument which is entirely without merit. It contends that the Board's action in amending its findings was arbitrary and capricious, citing *Food Marketing Institute v. ICC*, 190 U.S.App.D.C. 388, 587 F.2d 1285 (1978). In that case the court held that it must apply “a somewhat greater degree of scrutiny than might otherwise be appropriate” to an agency order which “reaffirmed a decision that itself departed drastically from [an earlier order in the same case].” *Id.* at 392-393, 587 F.2d at 1289-1290. It was this departure from precedent that had led to a remand from the Court of Appeals for a fuller explanation of the agency's reasoning. But the court did not hold the post-remand order to be arbitrary and capricious; in fact, it found the order to be well reasoned and affirmed it. The *Food Marketing* case is sufficiently different from

the case at bar to be of no help to us here, and in any event there is nothing in it that would lead us to conclude that the Board erred in amending its findings.

*994 V

Because the Board failed to make a finding that the restaurant's "chief source of revenue" was the sale of meals rather than alcoholic beverages, we reverse the order granting the application for renewal of its license and remand the case for further proceedings with respect to that issue, and for the entry of a new final order. In all other respects we affirm the Board's findings and conclusions.

Affirmed in part, reversed in part, and remanded.

D.C., 1985.

Upper Georgia Ave. Planning Committee v. Alcoholic Beverage Control Bd.
500 A.2d 987

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