

ATTACHMENT P

District of Columbia Court of Appeals.
UPPER GEORGIA AVENUE PLANNING COMMITTEE, Petitioner,
v.
ALCOHOLIC BEVERAGE CONTROL BOARD, Respondent,
K.G.S., Inc., trading as Shepherd Park Restaurant, Intervenor.
No. 84-115.

Argued May 15, 1985.
Decided Nov. 15, 1985.

Group of local businessmen and residents sought review of an order of the Alcoholic Beverage Control Board, granting a renewed Class C liquor license for a restaurant. The Court of Appeals, Terry, J., held that: (1) Board, in renewing restaurant's liquor license, had to find that restaurant's "chief source of revenue" was sale of meals rather than alcoholic beverages; (2) finding that location of restaurant was "appropriate" was supported by substantial evidence; and (3) Board fulfilled its statutory duty to carefully consider recommendations of local Advisory Neighborhood Commission in renewing restaurant's liquor license.

Affirmed in part, reversed in part, and remanded.

*988 Gay Gellhorn, Washington, D.C., for petitioner. James Robertson, Washington, D.C., was on the brief, for petitioner.

*989 Karen J. Krueger, Asst. Corp. Counsel, with whom Inez Smith Reid, Corp. Counsel, John H. Suda, Principal Deputy Corp. Counsel, and Charles L. Reischel, Deputy Corp. Counsel, Washington, D.C., were on the brief, for respondent.

Robert R. Redmon, Washington, D.C., for intervenor. Stuart L. Bindeman and Douglas S. Stone, Washington, D.C., were on the brief, for intervenor.

Stephen J. O'Brien and Daniel Healey, Washington, D.C., filed a brief, for amicus curiae, Washington, D.C., Restaurant and Beverage Ass'n.

Before MACK, FERREN, and TERRY, Associate Judges.

TERRY, Associate Judge:

[1] Petitioner, the Upper Georgia Avenue Planning Committee (UGAPC), seeks review of an order of the District of Columbia Alcoholic Beverage Control Board (the Board), granting K.G.S., Inc., a renewed liquor license for its restaurant. Petitioner advances three arguments for reversal. First, it contends that the Board erred in ruling that it was not required under D.C. Code §§ 25-103(14) (1981) and 25-111(a)(7) (1985 Supp.) to make a finding that the sale of meals and not beverages was the restaurant's "chief source of revenue" before it could renew the restaurant's liquor license; second, it maintains that

the Board's finding that the location of the restaurant was appropriate was not supported by substantial evidence; third, it argues that the Board erred by failing to give great weight to the recommendation of the Advisory Neighborhood Commission. We disagree with the second and third contentions, but we agree with the first. Accordingly, we affirm the Board's order in part, reverse it in part, and remand the case for further proceedings, including a factual finding, with respect to the restaurant's chief source of revenue. FN1

FN1. Petitioner also contends that the restaurant does not qualify as a restaurant under D.C. Code § 25-103(14) (1981) because the exotic dancing which takes place there is a business that is not "incidental to a bona fide restaurant." This issue, however, was not raised before the Board. In fact, when petitioner quoted the statutory definition of a restaurant in its memorandum in support of its proposed findings before the Board, it excluded that portion of the definition relating to incidental businesses, apparently believing that it had no bearing on the case. We therefore decline to consider the issue now. *John D. Neumann Properties, Inc. v. District of Columbia Board of Appeals and Review*, 268 A.2d 605, 606 (D.C.1970); accord, *Smith v. Police and Firemen's Retirement and Relief Board*, 460 A.2d 997, 999 (D.C.1983).

I

In 1982 K.G.S., Inc., the intervenor, filed an application with the Board to renew the existing Class C liquor license for the Shepherd Park Restaurant, which features nude female "exotic" dancers for the entertainment of its patrons. The renewal was opposed by UGAPC, a group of local businessmen and residents which was organized to improve the neighborhood in which its members live and work.

A hearing on the renewal application was held on February 16, 1983, before a three-member panel of the Board. Testimony was presented by several witnesses, including one of the two stockholders of K.G.S., Inc., an investigator for the Board, a police officer who had conducted an investigation of the restaurant, four members of UGAPC, and representatives of other local citizens' groups. The principal objection of those who testified in opposition to the renewal was to the nudity of the dancers. They also cited incidents in which restaurant patrons had harassed neighborhood residents and had been seen urinating in public, as well as parking problems, as further grounds for denying renewal of the license. Testimony in support of the renewal focused primarily on recent improvements to the restaurant and on actions taken to resolve the problems cited by the opposing witnesses.

[2] In December 1983 the Board issued an order granting the application for renewal of the license. After various additional*990 proceedings, including a remand from this court to enable the Board to revise its findings, the case is now before us for a decision on the merits. FN2

FN2. UGAPC has filed protests in this case regarding the renewal of the license for both the 1982-1983 and the 1983-1984 licensing years, but it has not opposed

the renewal for 1984-1985. Nevertheless, the case is not moot, because our decision can have an impact on the restaurant's current status. If we conclude that the Board erred in granting the 1982-1983 renewal, the current license must be held void. See *Kopff v. District of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1372, 1377-1378 (D.C.1977).

II

Petitioner's main argument in this court is that the Board erred in ruling that it may renew a Class C liquor license for a restaurant without making a finding that the restaurant's chief source of revenue is from the sale of meals and not beverages. We agree.

Under D.C. Code § 25-111(a)(7) (1985 Supp.), a Class C license “shall be issued only for a bona fide restaurant....” Although the Code does not define “bona fide restaurant,” it does define “restaurant” as follows:

The word “restaurant” means a suitable space in a suitable building, approved by the Board, including such suitable space outside of the building and adjoining it as may be approved by the Board, kept, used, maintained, advertised, or held out to the public to be a place where meals are served, such space being provided with such adequate kitchen and dining room equipment and capacity, and having employed therein such number and kinds of employees for preparing, cooking, and serving meals for its guests *as shall satisfy the Board that such space is intended for use primarily as a place for preparing, cooking, and serving meals, and that the chief source of revenue to be derived from the operation of such place shall be from the preparation, cooking, and serving of meals and not from the sale of beverages*. No such space shall be considered suitable if any business is conducted therein other than the preparation, cooking, and serving of meals, except such a business as is incidental to a bona fide restaurant.

D.C. Code § 25-103(14) (1981) (emphasis added).

[3] Although the syntax is awkward, the intent of the statute is plain. The Board may not find that a place is a restaurant (and thus it may not issue a license to an establishment claiming to be a restaurant) until it is “satisf[ie]d” of two things: first, that the place is intended to be used primarily as a place for cooking and serving meals, and second, that the chief source of revenue is from the sale of meals, not beverages. In this case, however the Board ruled that the Shepherd Park was a restaurant without ever making a finding on the second point. The Board explained:

The District of Columbia Corporation Counsel has stated that the majority of an alcoholic beverage control licensed restaurant's revenues need not be derived from the sale of food. In an opinion dated [January] 26, 1956, the Corporation Counsel ruled that the Board must [only] be satisfied that it is the intent of the Applicant to sell food and meals.

See Op. Corp. Counsel at 2 (January 26, 1956) (“the Board must be satisfied that the space is intended for use, broadly speaking, as a bona fide restaurant”). “[I]n the absence

of specific action by the [Mayor] or Council to the contrary, or until overruled by controlling court decision,” the Board was entitled to rely on that opinion as a “guiding statement of law....” Reorganization Order No. 50, D.C. Code Title 1 App. at 180 (1973). We now hold, however, that both the Corporation Counsel's opinion and the Board's ruling based upon it are erroneous because they are contrary to the plain meaning of the statute. See *Jordan v. District of Columbia*, 362 A.2d 114, 118 (D.C.1976). We must give effect to the legislative intent insofar *991 as we can discern it from the statutory language. See *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C.1983) (en banc); *Varela v. Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61, 64-65 (D.C.1980) (en banc) (citing cases).

[4] Because the legislative intent in this instance is clear, we hold that the Board must find that “the chief source of revenue” of any establishment claiming to be a restaurant “shall be from the preparation, cooking, and serving of meals and not from the sale of beverages.” D.C. Code § 25-103(14) (1981). We leave it to the Board, in the first instance, to determine whether “the chief source of revenue” means that a particular amount or percentage of revenue must be derived from the sale of food rather than beverages. We also leave it to the Board to determine, as a matter within its regulatory expertise, the period of time for which the chief-source-of-revenue calculation shall be made. FN3 Any such determination, of course, will be subject to review by this court, either in this case (if it comes back to us) or in some future case involving a different applicant.

FN3. We recognize that ascertaining what sums are attributable to the sale of food rather than beverages may present some difficult accounting problems. The business may yield different ratios from week to week or from season to season, and there may be occasional periods-major holidays, for example-when a restaurant attracts an abnormal number of drinkers rather than eaters. The Board will have discretion to decide what weight to give to such factors as these, so long as it makes the ultimate finding as to “the chief source of revenue.”

[5][6] Because the Board failed to make the necessary finding that the chief source of the Shepherd Park Restaurant's revenue is from the sale of food and not beverages, we must reverse the decision of the Board and remand for further proceedings on that issue, and for the entry of an appropriate finding. In addition to the factors listed in section 25-103(14) (adequate kitchen equipment, number and kinds of employees, etc.), the Board is free to consider any relevant evidence in determining the chief source of revenue, including such items as cash register tapes, canceled checks, and paid invoices. See generally *Letz v. Fama, Inc.*, 613 S.W.2d 190 (Mo.Ct.App.1981). Of course, the Board is not free to disregard the statutory criteria and base its finding on a mere promise by the applicant to make its chief source of revenue the sale of meals rather than beverages; hard evidence is required, not promises or good intentions. See *Washington Press Club v. District of Columbia Alcoholic Beverage Control Board*, 476 A.2d 1107, 1110 (D.C.1984).

III