DISTRICT OF COLUMBIA COURT OF APPEALS

No. 12-AA-1823

INDEPENDENT GAS STATION OPERATORS ALLIANCE, *et al.*, PETITIONERS,

v.

DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD, RESPONDENT,

and

COSTCO WHOLESALE CORPORATION, INTERVENOR.

Petition for Review of a Decision of the
District of Columbia Alcoholic Beverage Control Board

(Argued January 14, 2014 Decided February 4, 2014)

Before WASHINGTON, *Chief Judge*, THOMPSON, *Associate Judge*, and FARRELL, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioners, who are (a) independent gas station owners (and their Alliance) and (b) individual neighborhood residents, oppose the transfer by the Alcoholic Beverage Control Board ("the Board") of a Retailer's Class A License to Costco Wholesale Corporation ("Costco"), enabling Costco to sell alcoholic beverages at its warehouse store in the Fort Lincoln area of Ward 5. Petitioners claim that transferring the license would contravene D.C. Code § 25-313 (d) (2012 Repl.), which forbids the issuance of a liquor license to an "outlet, property, establishment, or business" that sells motor vehicle gasoline. A wholly-owned subsidiary of Costco, CWC WDC LLC ("CWC"), has received a special exception from the Board of Zoning Adjustment ("BZA") to operate a gas station on land owned by CWC adjoining the property occupied by the warehouse store.

Petitioners' challenge to the license transfer confronts a formidable barrier, however, because their protest to the Board was filed after expiration of the 45-day period for such challenges. *See* D.C. Code § 25-602 (a), & -101 (41). Indeed, as the Board pointed out, the protest was filed on September 20, 2012, "long after the June 29, 2012 [statutory] deadline passed" and after the Board had approved the application for transfer on July 18. Petitioners are thereby forced to frame the issue before this court as procedural: They contend that the Board erred, as a matter of law, in not extending the time for protest under D.C. Code § 25-602 (b), and therefore in not addressing – or not explicitly addressing – the merits of their challenge to the license transfer. For the reasons that follow, we discern no abuse of authority by the Board in concluding that petitioners had not provided grounds warranting an extension of the protest period.[1]

I.

Section 25-602 (b) provides:

> If the Board has reason to believe that the applicant [for a license or license transfer] did not comply fully with the notice requirements set forth in [D.C. Code § 25-421], it shall extend the protest period as needed to ensure that the public has been given notice and has had adequate opportunity to respond.

"[N]otice" in the above text refers to the public notice the Board must give, under § 25-421, of a pending application for (among other things) transfer of a retailer's license. Petitioners argue that the Board had "reason to believe" that the notice previously issued in this case misled the public because it failed to disclose that the operation Costco proposed to carry out included not only the sale of merchandise

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[1] Respondents argue at length that none of the petitioners have either constitutional or prudential standing to challenge the Board's action. *See generally Padou v. District of Columbia Alcoholic Beverage Control Bd.*, 70 A.3d 208, 211 (D.C. 2013). Our decisions, however, "enable us to pretermit such an issue" – at least a "complex" question of standing such as this case presents – "where alternative grounds clearly dictate the correct resolution of the appeal." *Boy Scouts of Am. v. District of Columbia Comm'n on Human Rights*, 809 A.2d 1192, 1196-97 n.4 (D.C. 2002). We follow that course here.

(including alcoholic beverages) in the warehouse store, but also the sale of gasoline through its subsidiary on the adjoining property.

This argument first requires us to examine the obligation ("it shall extend . . .") that § 25-602 (b) imposes on the Board. By its terms, the section commits to the Board's judgment in the first instance whether there is "reason to believe" that the notice given was non-compliant. Petitioners do not dispute that the statute gives latitude to the Board in deciding what is "reason to believe" and that only a decision on the issue that is arbitrary or capricious, or an abuse of discretion, will allow the court to substitute its judgment for the Board's. See Brief for Petitioners at 17-18. Here the Board naturally looked to, as we do also, the elements of proper notice under § 25-421 to see whether reason existed to believe that there had been non-compliance.

Section 421 (b) states that "[t]he notice shall contain the legal name and trade name of the applicant, the street address of the establishment for which the license is sought, the class of license sought, and a description of the nature of the operation the applicant has proposed," including "the hours of sales or service of alcoholic beverages." Further, to the extent specific notice to the Board of Education was once required,[2] the notice had to "state the proximity of the establishment to the nearest public school of the District . . . ." Section 25-421 (c). Specific notice of the application must also be given to "[a]ny ANC [Advisory Neighborhood Commission] within 600 feet of where the establishment is or will be located." *Id.*, § 25-421 (a)(4).

This focus on the "establishment" where the alcoholic beverage will be sold or served, as the Board recognized, dovetails with the information that a license applicant must supply and that in turn provides the content of the Board's notice. Thus, the application must furnish, among other things, "the name and address of the owner of the [proposed] establishment . . . and the premises where it is located," D.C. Code § 25-402 (a)(2), "[t]he proximity of the establishment to the nearest" schools up through high school, and "[t]he size and design of the establishment." *Id.* § 25-402 (a)(4) & (5).

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[2] Section 421 (c) refers to "[t]he notice to the Board of Education," but a previous inclusion of that Board and a relevant member of it as parties required to be given specific notice has been repealed. *See* Omnibus Alcoholic Beverage Amendment Act of 2004, 51 D.C. Reg. 6525, 6530 (July 2, 2004).

Significantly, D.C. Code § 25-101 (21) defines an "[e]stablishment" as "a business entity operating at a specific location." The Board looked to both the statutory emphasis on an "establishment" and this site-specific definition in concluding that Costco's notice was compliant, because the company was "*a* business entity" (emphasis added) "operating at a specific location," in both respects distinct from the adjoining gasoline-sale operation:

> [T]he sale of gasoline is occurring on property that is legally distinct from the Applicant's property . . . . [T]he Board of Zoning Adjustment [has previously] separated the property occupied by the Applicant and CWC into separate plats; therefore, Lot 4, occupied by the Applicant[,] and Lot 5, occupied by CWC, are legally separated properties.

This distinction was reinforced, in the Board's view, by CWC's existence as "a legitimate corporation, wholly separate from [Costco]." While the two entities "share a similar princip[al] address" and "the same registered agent," and CWC had listed Costco "as its sole member," these were "activities that may only be characterized as normal corporate behavior" providing no basis, in the Board's view, to ignore Costco's existence as a separate business entity operating at a location distinct from CWC. Thus, rejecting petitioners' argument that Costco had camouflaged "the operation [it] proposed," § 25-421 (b), the Board said that "the sale of gasoline does not constitute a part of [Costco's] operations," particularly when Costco "does not share property with CWC and their operations will inhabit completely separate structures that are at least 460 feet from each other." The Board therefore denied the motion to extend.

II.

Petitioners' argument for why the Board acted arbitrarily or capriciously, or abused its discretion, in finding the public notice compliant rests entirely on the language of D.C. Code § 25-313 (d).[3] More precisely, it rests on two words in the

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[3] That section states in relevant part: "No license shall issue for an outlet, property, establishment, or business which sells motor vehicle gasoline . . . ."

statute, "outlet" and "business," because petitioners cannot credibly argue that the Board neglected to address whether Costco's operation would involve a separate "establishment" or "property." They maintain that, without construing those key words in a statute expressly prohibiting licensure for an entity selling gasoline, the Board could not fairly decide that it had no reason to believe Costco's notice had been misleading by its failure to mention the neighboring gasoline operation. We do not agree.

It is necessary to emphasize once more that we view this case through the prism, as it were, of an untimely protest to a license transfer, from which petitioners seek relief under a statute requiring redress only if the Board has been given reason to believe the public notice did not comply with the statutory requirements. The issue before us thus is not whether, in a timely protest before it under § 25-313 (d), the Board could have denied the protest without expressly coming to grips with whether, as petitioners argue, terms such as "outlet" and "business" expand – beyond the definition of "establishment" – the class of unpermitted licenses to include those, for example, operating through subsidiaries and selling gasoline on a closely proximate, indeed contiguous, lot or property.

The twin terms "outlet" and "business" in § 25-313 (d) do not persuade us that the Board abused its discretion. The word "outlet," of course, does not appear in the notice statute, and "business" does so only indirectly in the definition of "establishment" as "*a* business entity operating at a specific location" – a use scarcely suggesting that a notice is non-compliant for failure to list affiliated business entities, a corporate parent or other.[4] Petitioners point to the dictionary definition of an "outlet" as a "commercial market for goods or services" (Br. for Petitioners at 27), but that definition is too general, we think, to have compelled the Board to find that a corporate interlock between Costco and CWC, operating as different establishments, had to be disclosed in the public notice. Petitioners are right, of course, that generally statutes must be read so as to give effect to each word used by the legislature, *see, e.g.*, *Qi-Zhuo v. Meissner*, 315 U.S. App. D.C. 35, 38, 70 F.3d 136, 139 (1995), but petitioners rely on two words of considerable generality and ambiguous import, neither mentioned helpfully to them in the notice requirements, to rebut the Board's finding of compliance. No doubt different

[4] Section 25-402 (a)(1) expressly lists the information a corporate applicant must provide to the Board, and does not refer to related corporate entities.

explanations can be offered for why the D.C. Council defined the class of prohibited licensees broadly in § 25-313 (d);[5] but in deciding this petition challenging the Board's inability to find reason to believe an untimely protest must be excused, we do not think the Board was required to accept petitioners' gloss on those words or to discuss them *in haec verba* before holding Costco's public notice compliant.[6]

Finally, § 25-602 (b) requires the Board, when it concludes that notice has been inadequate, to extend the protest period "as needed." Here, over and above the foregoing considerations, the Board could fairly question whether any omission from Costco's notice had indeed misled petitioners such that they had been denied an adequate opportunity to respond. In arraying petitioners' myriad contentions, the Board noted their concession that "counsel for the Alliance [had] attended the community meeting on June 23, 2012" – two days before the protest period expired – "and made public statements regarding the prohibition on licensing an entity selling gasoline . . . ." The record likewise reflects that others at the meeting, sponsored by the ANC that had received the same notice the public did, also discussed the nearby gas station proposed by a Costco-related entity. Moreover, the contemporaneous proceedings for land-subdivision and a special exception before the BZA beginning in March 2012 also revealed that the separate operations would be conducted on separate lots through different corporate entities. These facts could fairly cause the Board to question whether any omissions from the public notice indeed had materially contributed to petitioners' long-overdue

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[5] Respondents at oral argument offered their own explanation, which is that the legislature included descriptions like "outlet" or (still broader) "business" to ensure that an entity could not, just by denominating itself something other than an "establishment," sell gasoline and liquor simultaneously at a single location. Issues of proximity, even contiguity, of locations are dealt with elsewhere in the licensing statute, they contend. We note that the Council defined "establishment" at the same time it enacted § 25-313 (d). *See* Title 25, D.C. Code Enactment and Related Amendments Act of 2001, 48 D.C. Reg. 2959, 2962, 2983 (Apr. 6, 2001).

[6] The petitioners assertion that the Board's ruling never mentions § 25-313 (d) is mistaken. The Board three times mentioned the statute as forming the basis of petitioners' challenge to the license transfer.

protest, rather than – for instance – delays they encountered in forming the lead organization of petitioners, the Alliance.[7]

For the foregoing reason, the Board's order denying the request to extend the protest period is

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
CLERK OF THE COURT

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[7] The Board noted petitioners' claim that the Alliance was not formed until after the June 23 community meeting – perhaps well after, since the protest was not filed until September 20.