

**THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD**

In the Matter of:)	
)	
NAI Saturn Eastern, LLC)	Case No.: 17-PRO-00075
t/a Safeway)	License No: 97704
)	Order No: 2017-293
Application to Renew a)	
Retailer's Class B License)	
)	
at premises)	
2845 Alabama Avenue, S.E.)	
Washington, D.C. 20020)	

BEFORE: Donovan Anderson, Chairperson
Nick Alberti, Member
Mike Silverstein, Member
James Short, Member
Bobby Cato, Member

ALSO PRESENT: NAI Saturn Eastern, LLC, t/a Safeway, Applicant

Stephen O'Brien, Counsel, on behalf of the Applicant

Lisa Shaw and Wayne Young, on behalf of A Group of Five or More
Residents and Property Owners, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

INTRODUCTION

The Alcoholic Beverage Control Board (Board) approves the Application to Renew a Retailer's Class B License filed by NAI Saturn Eastern, LLC, t/a Safeway, (hereinafter "Applicant" or "Safeway") subject to the conditions described below.

Procedural Background

The Notice of Public Hearing advertising Safeway's Application was posted on October 6, 2017, and informed the public that objections to the Application could be filed on or before November 20, 2017. *ABRA Protest File No. 17-PRO-00075*, Notice of Public Hearing [*Notice of Public Hearing*]. The records of the Alcoholic Beverage Regulation Administration (ABRA) indicate that a group of five or more residents or property owners (Protestant) has filed a protest against the Application. *ABRA Protest File No. 17-PRO-00075*, Roll Call Hearing Results.

The parties came before the Board's Agent for a Roll Call Hearing on December 4, 2017, where the above-mentioned objector was granted standing to protest the Application. On January 31, 2018, the parties came before the Board for a Protest Status Hearing. Finally, the Protest Hearing in this matter occurred on March 7, 2018.

The Board recognizes that an ANC's properly adopted written recommendations are entitled to great weight from the Board. D.C. Code §§ 1-309.10(d), 25-609; *Foggy Bottom Ass'n v. District of Columbia Alcoholic Beverage Control Bd.*, 445 A.2d 643, 646 (D.C. 1982). Accordingly, the Board "must elaborate, with precision, its response to the ANC[']s issues and concerns." *Foggy Bottom Ass'n*, 445 A.2d at 646. The Board notes that it has not received a recommendation from any affected ANC; therefore, the great weight requirement does not apply to this matter.

Based on the issues raised by the Protestant, the Board may only grant the Application if the Board finds that the request will not have an adverse impact on the peace, order, and quiet of the area located within 1,200 feet of the establishment. D.C. Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2018).

FINDINGS OF FACT

The Board, having considered the evidence, the testimony of the witnesses, the arguments of the parties, and all documents comprising the Board's official file, makes the following findings:

I. ABRA Investigation

1. Safeway, a grocery store, has submitted an Application to Renew a Retailer's Class B License at 2845 Alabama Avenue, S.E., Washington, D.C. *Notice of Public Hearing*. ABRA Investigator Shawn Townsend investigated the Application and prepared the Protest Report submitted to the Board. *ABRA Protest File No. 17-PRO-00075*, *Protest Report* (Feb. 2018) [*Protest Report*]. The proposed establishment is located in a MU-7 zone. *Protest Report*, at 4. No licensed establishments are located within 1,200 feet of the proposed location. *Id.* Stanton Elementary School is located within 400 feet of Safeway. *Id.* According to the public notice, Safeway's hours of operation run from 5:00 a.m. to 12:00 a.m. *Id.* Safeway's hours of sale run from 10:00 a.m. to 10:00 p.m. on Sunday and from 9:00 a.m. to 10:00 p.m. all other days of the week. *Notice of Public Hearing*.

2. ABRA Investigator Shawn Townsend interviewed the parties in this matter. *Id.* at 75. According to the Protestant, Safeway was not following requirements to provide customers with translucent bags. *Transcript*, March 7, 2018 at 75-76. The Protestant also complained that they had observed Safeway sell single containers of alcoholic beverages and that Safeway's internal cameras were not working. *Id.* at 76. Finally, the Protestant complained that Safeway's carts were being left throughout the neighborhood. *Id.* at 77.
3. Safeway has a settlement agreement that governs the operations of the establishment. *In re NAI Saturn Eastern, LLC, t/a Safeway*, Case No. 17-PRO-00041, Board Order No. 2017-625 (D.C.A.B.C.B. Dec. 13, 2017). According to the agreement, under § 4(a), Safeway must "Maintain human and/or electronic surveillance in its aisles in which beer and wine are displayed." *Id.* at *Settlement Agreement*, at § 4(a). Section 4(l) further prohibits Safeway from selling "any single serving containers of wine under 750 milliliters" unless in a package of four or more. *Id.* at *Settlement Agreement*, at § 4(l). Safeway is also prohibited from selling single containers of beer or beer in cases containing 12 or more containers. *Id.* Finally, Safeway must sell all alcohol in the manufacturer's original packaging. *Id.*
4. Safeway is also subject to the terms of a Board Order. *In re Safeway, Inc., t/a Safeway*, Case No. 50166-02/045P, Board Order No. 2003-36 (D.C.A.B.C.B. Apr. 16, 2003). Under § 8 of the Order, Safeway must "package alcoholic beverages in translucent bags and not place items other than alcoholic beverages in these bags." *Id.* at 14. In § 1, Safeway must also keep a logbook tracking calls to MPD related to loitering and panhandling. *Id.*
5. On February 28, 2018, Investigator Townsend visited Safeway. *Tr.*, 3/7/18 at 81-82. There, he saw Safeway's alcohol aisles and observed various packages missing containers of alcoholic beverages. *Id.* at 82, 88-89, 103. Safeway's management indicated that theft was common at the premises. *Id.* Safeway has trained staff not to sell single containers of alcoholic beverages. *Id.* In addition, Safeway has recently upgraded its camera system and has security monitor the alcoholic beverage aisle. *Id.* The investigator indicated that Safeway had an unusually large amount of packages with missing containers in comparison to other licensed establishments that he has visited in the past. *Id.* at 107.
6. Safeway also has a parking lot attendant responsible for collecting shopping carts. *Id.* at 83. Additionally, the shopping carts have wheel locks to prevent theft; however, some customers have figured out ways to defeat the wheel locking system. *Id.*
7. Investigator Townsend observed the camera monitor during his visit. *Id.* at 83. At that time, the camera monitor was operable. *Id.* at 82. He also observed the area around the establishment, but did not see evidence of trash, litter, or shopping carts. *Id.* at 84. He also did not observe any negative impact on peace, order, and quiet during his other visits. *Id.* at 116.
8. The Metropolitan Police Department's records indicate that between February 1, 2017, and February 28, 2018, the agency received 400 calls for service. *Id.* at 85. None of the calls led to a violation of Title 25 of the D.C. Official Code. *Id.*

9. ABRA's records indicate that in 2016 Safeway committed a sale to minor violation and failed to have a licensed manager on duty for which it paid a fine of \$3,250 and served a suspension. *Protest Report*, at 7. In 2017, Safeway committed a second sale to minor violation, failed to have a licensed manager on duty, failed to post its liquor license, and failed to comply with its settlement agreement for which it received a fine of \$5,500 and served a suspension. *Id.*

II. Wayne Young

10. Wayne Young lives approximately five minutes walking distance from Safeway. *Id.* at 142. As a customer, he has observed many alcohol packages missing containers. *Id.* at 148. He also observed Safeway's camera monitoring system "not working." *Id.* at 150. During his visits, it appeared that only two security guards were working. *Id.* at 155. He also did not see Safeway's staff tell loiterers to disperse as required by their settlement agreement. *Id.* at 171. He has observed Safeway's shopping carts in the neighborhood. *Id.* at 156. He also found that Safeway does not clearly communicate who is in charge of the store. *Id.* at 166.

III. John Ignacio, Jr.

11. John Ignacio, Jr., serves as Safeway's Center Store Operation Specialist. *Id.* at 195. According to Mr. Ignacio, some security guards inside Safeway operate in an undercover capacity. *Id.* at 196. He noted that theft inside the Safeway store occurs at twice the rate of nearby stores in the District. *Id.* at 197. In regards to alcohol, the Safeway store loses approximately \$1,000 in retail inventory per week. *Id.* at 197, 213. Safeway's policy is to remove singles and broken packages from the shelves. *Id.* at 201. The store is supposed to monitor shelves on an hourly basis. *Id.* at 202.

12. Safeway also uses an invisible fence technology to lock the wheels of shopping carts that go beyond a certain point. *Id.* at 198. Carts end up in the neighborhood because people are lifting them up and carrying them. *Id.* He noted that under Safeway's contract, store employees are not supposed to leave the property to retrieve shopping carts. *Id.* at 199.

CONCLUSIONS OF LAW

13. The Board may approve an Application to Renew a Retailer's Class B License when the proposed establishment will not have an adverse impact on the neighborhood. D.C. Code §§ 25-104, 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2018). Specifically, the question in this matter is whether the Application will have a negative impact on the peace, order, and quiet of the area located within 1,200 feet of the establishment. D.C. Code § 25-313(b); 23 DCMR §§ 1607.2; 1607.7(b) (West Supp. 2018). Additionally, under § 25-315, "[t]he Board shall consider the licensee's record of compliance with this title and the regulations promulgated under this title and any conditions placed on the license during the period of licensure, including the terms of a settlement agreement." D.C. Code § 25-315(b)(1).

I. The Establishment is Appropriate For The Neighborhood Subject to Conditions.

14. In this case, the Protestants did not seek denial of the renewal, and the record does not warrant the denial of the renewal application. *Tr.*, 3/7/18 at 260-61; *supra*, at ¶ 7. Nevertheless, the Board is persuaded that conditions are warranted to improve security at the store.

15. Under the appropriateness test, “the applicant shall bear the burden of proving to the satisfaction of the Board that the establishment for which the license is sought is appropriate for the locality, section, or portion of the District where it is to be located” D.C. Code § 25-311(a). The Board shall only rely on “reliable” and “probative evidence” and base its decision on the “substantial evidence” contained in the record. 23 DCMR § 1718.3 (West Supp. 2018). The substantial evidence standard requires the Board to rely on “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Clark v. D.C. Dep’t of Employment Servs.*, 772 A.2d 198, 201 (D.C. 2001) *citing Children’s Defense Fund v. District of Columbia Dep’t of Employment Servs.*, 726 A.2d 1242, 1247 (D.C.1999).

16. In determining appropriateness, the Board must consider whether the applicant’s future operations will satisfy the reasonable expectations of residents to be free from disturbances and other nuisances—not just whether the Application complies with the minimum requirements of the law. D.C. Council, Bill 6-504, the “District of Columbia Alcoholic Beverage Control Act Reform Amendment Act of 1986,” Committee on Consumer and Regulatory Affairs, 38 (Nov. 12, 1986); *see Panutat, LLC v. D.C. Alcoholic Beverage Control Bd.*, 75 A.3d 269, 277 n. 12 (D.C. 2013) (“However, in mandating consideration of the effect on peace, order, and quiet, § 25-313(b)(2) does not limit the Board’s consideration to the types of noises described in § 25-725.”). As part of its analysis, the Board should evaluate each “unique” location “according to the particular circumstances involved” and attempt to determine the “prospective” effect of the establishment on the neighborhood. *Le Jimmy, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 433 A.2d 1090, 1093 (D.C. 1981). Furthermore, the analysis may also include the Applicant’s efforts to mitigate or alleviate operational concerns, the “character of the neighborhood,” the character of the establishment, and the license holder’s future plans. *Donnelly v. District of Columbia Alcoholic Beverage Control Board*, 452 A.2d 364, 369 (D.C. 1982) (saying that the Board could rely on testimony related to the licensee’s “past and future efforts” to control negative impacts of the operation); *Upper Georgia Ave. Planning Comm. v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 992 (D.C. 1985) (saying the Board may consider an applicant’s efforts to “alleviate” operational concerns); *Citizens Ass’n of Georgetown, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 410 A.2d 197, 200 (D.C. 1979); *Gerber v. D.C. Alcoholic Beverage Control Bd.*, 499 A.2d 1193, 1196 (D.C. 1985); *Sophia’s Inc. v. Alcoholic Beverage Control Bd.*, 268 A.2d 799, 800-801 (D.C. 1970).

a. Safeway’s Operations are Impacting Peace, Order, and Quiet Based on the Failure to Control the Stealing of Single Containers of Alcohol From the Premises.

17. “In determining the appropriateness of an establishment, the Board shall consider . . . [t]he effect of the establishment on peace, order, and quiet, including the noise and litter provisions set forth in §§ 25-725 and 25-726.” D.C. Code § 25-313(b)(2); *see also* D.C. Code §§

25-101(35A), 25-314(a)(4). Among other considerations, the Board is instructed to consider “noise, rowdiness, loitering, litter, and criminal activity.” 23 DCMR § 400.1(a) (West Supp. 2018).

18. In this case, Safeway has an issue preventing the theft of single containers of alcoholic beverages from its shelves. *Supra*, at ¶¶ 5, 11. In light of Safeway’s prior history of sale to minor violations, the Board is concerned that this situation creates an opportunity for minors to obtain alcohol by stealing it from the store. *Supra*, at ¶ 9.

19. As to the littering issue, the Board is hard pressed to hold Safeway responsible for individuals stealing their shopping carts and leaving them throughout the neighborhood. *Supra*, at ¶¶ 2, 10. Safeway has no interest in losing its carts and has added a wheel locking system to deter theft. *Supra*, at ¶ 12. The Board is not inclined to ban shopping carts altogether because senior citizens, the disabled, and others with special needs require shopping carts to help them buy and carry items bought at the store. In light of Safeway’s current efforts, the Board would simply request that Safeway consider giving line employees and managers at the store the ability to summon a shopping cart retrieval service on an as needed basis and installing a Radio Frequency Identification device or other form of tracking device onto the carts.

20. Finally, the Board considered complaints regarding compliance with the settlement agreement, loitering, and selling single containers of alcoholic beverages; however, the Board was not persuaded that these nuisances were of such an ongoing nature to merit a negative finding. Nevertheless, it should be noted that the community still retains the right to file complaints with the agency and seek an enforcement action for any violation of the law, Board Order, or settlement agreement.

II. The Board Imposes Conditions on the License.

21. In light of the Board’s findings regarding appropriateness, the Board finds it necessary to impose conditions on the Applicant’s license. *See In re Dos Ventures, LLC, t/a Riverfront at the Ball Park*, Case No. 092040, Board Order No. 2014-512. ¶ 49 (D.C.A.B.C.B. Nov. 13, 2013) (saying “[i]n practice, the Board has imposed conditions when it is shown that there are valid concerns regarding appropriateness that may be fixed through the imposition of specific operational limits and requirements on the license”). Under § 25-104(e), the Board is granted the authority to impose conditions on a license when “. . . the inclusion of conditions will be in the best interest of the [neighborhood] . . .” D.C. Code § 25-104(e).

22. In this case, in order to ensure compliance with the establishment’s settlement agreement and Board Order, and to deter underage drinking, the Board requires that Safeway ensure that all cameras are operable at all times the business is in operation. Next, Safeway is required to have at least one employee inspect all alcohol aisles at least once every hour. Furthermore, any alcoholic beverage packages found to have missing containers shall be removed from the selling area immediately.

III. The Application Satisfies All Remaining Requirements Imposed by Title 25.

23. Finally, the Board is only required to produce findings of fact and conclusions of law related to those matters raised by the Protestants in their initial protest. *See Craig v. District of Columbia Alcoholic Beverage Control Bd.*, 721 A.2d 584, 590 (D.C. 1998) (“The Board's regulations require findings only on contested issues of fact.”); 23 DCMR § 1718.2 (West Supp. 2018). Accordingly, based on the Board’s review of the Application and the record, the Applicant has satisfied all remaining requirements imposed by Title 25 of the D.C. Official Code and Title 23 of the D.C. Municipal Regulations.

ORDER

Therefore, the Board, on this 9th day of May 2018, hereby **APPROVES** the Application to Renew a Retailer's Class B License at premises 2845 Alabama Avenue, S.E. filed by NAI Saturn Eastern, LLC, t/a Safeway. Safeway’s renewal is conditioned on compliance with the following terms:

1. The license holder shall ensure that all cameras are operable at all times the business is in operation.
2. The license holder shall have at least one employee inspect all alcohol aisles at least once every hour. Furthermore, any alcoholic beverage packages found to have missing containers shall be removed from the selling area immediately once Safeway’s management or staff become aware of the broken package.

IT IS FURTHER ORDERED that the Board’s findings of fact and conclusions of law contained in this Order shall be deemed severable. If any part of this determination is deemed invalid, the Board intends that its ruling remain in effect so long as sufficient facts and authority support the decision.

The parties are **ADVISED** that all prior conditions and settlement agreement terms remain in effect.

The ABRA shall deliver a copy of this order to the Parties.

District of Columbia
Alcoholic Beverage Control Board



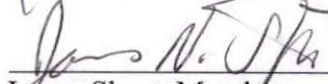
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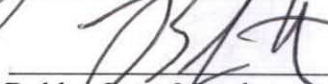
Nick Alberti, Member



Mike Silverstein, Member



James Short, Member



Bobby Cato, Member

Pursuant to D.C. Official Code § 25-433(d)(1), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, Reeves Center, 2000 14th Street, NW, 400S, Washington, D.C. 20009.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 430 E Street, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. *See* D.C. App. Rule 15(b) (2004).