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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Marilyn Shafer PART 8
Justice

Soho Alliance

-v-

NYC Liquor Authority

INDEX NO. 106402/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5, 6

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accord with the attached ~~decision~~ decision.

FILED
MAY 01 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/21/08

HON. MARILYN SHAFER, JSC
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER PART 8
Justice

In the Matter of the Application of,
SOHO ALLIANCE, et al

Petitioners,

-against-

THE NEW YORK STATE LIQUOUR AUTHORITY, DANIEL B. BOYLE, In his capacity as Chairman of the New York State Liquor Authority; LAWRENCE J. GEDDA, as a Commissioner of the New York State Liquor Authority; and NOREEN HEALEY, as a Commissioner of the New York State Liquor Authority; and GINX, Inc. d/b/a Lola,

Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

INDEX NO. 106400/07

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 6, were read on this petition under Article 78 of the Civil Practice Law and Rules:

	PAPERS NUMBERED
Order to Show Cause/ Verified Petition – Exhibits –	1, 2
Verified Answers — Exhibits	3, 4
Affirmation in Reply to Opposition — Memorandum of Law	5, 6,

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this petition is granted.

This is the second Article 78 petition by a coalition of community organizations and individual Soho residents challenging the approval, by respondent New York State Liquor

Authority, of the application for a liquor license, by respondent Ginx, Inc., d/b/a Lola, for premises located at 5-15 Watts Street in Soho.

Background

In 2004, Lola filed an application for a liquor license for the premises located at 5-15 Watts Street. This location was within 500 feet of over 30 other existing premises licensed to serve liquor. Since the intent of the Alcohol Beverage Control Law is to prevent local communities from becoming oversaturated with licensed liquor establishments, Alcohol Beverage Control Law § 64(7) prohibits the issuance of a license to any location within 500 feet of 3 other licensed premises unless it is in the public interest to do so. The determination that approval is in the public interest must be made at a hearing and on notice to the community. The Authority held a hearing on Lola's application on November 30, 2004. The application was approved over objections from the Community Board and various community residents and organizations.

Petitioners filed an Article 78 proceeding challenging the Authority's approval of Lola's application. The petition was granted by this Court, on Nov. 17, 2005, which found that the Authority acted in an arbitrary and capricious manner granting an on-premises liquor license without detailing its reasons why and how it would be in the public interest to do so.

Lola appealed. During the pendency of the appeal, Lola moved to enlarge the Record to include its discovery that some of the named petitioners had not consented to be named as petitioners. Petitioners conceded that some of the hundreds of petitioners were wrongly included but alleged that Lola had attempted to intimidate petitioners. The motion was denied.

The First Department reversed on August 31, 2006, finding that, although the Authority

had failed to comply with its statutory obligation to articulate its reasons, this was an insufficient basis for annulling the determination. The matter was remanded to the Authority to properly state its reasons, without prejudice to further article 78 litigation challenging those reasons.

On October 2, 2006, the Authority, which had not appealed, moved the First Department to modify its decision and direct a *de novo* review of Lola's application. The Authority stated that two of the three Commissioners who had voted to approve Lola's application and the Chairman had been replaced. The Authority as it was presently constituted was unable to articulate the reasons the former members had in mind. In addition, the Authority stated it now had a better understanding of the standard required for approval and might reach a different result. The motion was denied without opinion.[1]

The Authority issued its report on April 12, 2007, reiterating its change in membership and statutory interpretation:

> It is the interpretation of the current Full Board that the 500 foot rule creates a presumption that an application should not be approved. To overcome that presumption, the record must support a finding that issuance of the license is in the public interest. The Members of the Authority concede that prior determinations by this agency could be read as providing for the issuance of a license unless it was against public interest.

The report concluded:

> While there are a significant number of licensed establishments in the area, this establishment, unlike the nightclubs which were the subject of complaints by those in opposition, will be a bona fide restaurant with no live music or dancing.

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[1] The Authority's motion was procedurally curious since the law is clear that public officers or agents who exercise judgment and discretion in the performance of their duties may not revoke their determinations nor review their own orders. (*D & D Realty Corporation v Coster*, 277 AD 668 [1st Dept 1951]).

> Therefore, based upon the above, it appears that the Authority found that it would not be contrary to public interest to approve the application.

Petitioners filed the instant Article 78 petition, reiterating their opposition to the original application and seeking to vacate the approval based upon (1) the Authority's failure to properly state its reasons for granting the liquor license in accordance with the law and the direction of the First Department; (2) the Authority's failure to ascertain that applicant's planned method of operation differs from its representations in its original application; and (3) the Authority's failure to make findings of fact in support of its conclusions.

The Authority, in its answer, reiterated its inability to comply with the First Department Order based upon changes in personnel and statutory construction, but concluded that a reasonable basis existed for the approval which was neither arbitrary nor capricious and within the discretion vested in the Authority by §§ 2, 17, 55, and 64 of the Alcoholic Beverage Control Law.

Lola, in its answer, (1) reiterated its allegations regarding improperly included petitioners; (2) denied that Lola's planned use of the premises differed from its original application; and, (3) argued that the Authority complied with the First Department Order, notwithstanding having done so "in rather threadbare fashion" and "under its own cloud of protest."

Discussion

Judicial review of a Liquor Authority determination to grant a license is subject to the court's duty to make certain that the administrative official has not acted in disregard of the standard prescribed by the legislature. (*Matter of Guardian Life Ins Co v Bohlinger,* 308 NY 174 [1954]). Due to the proximity of other licensed premises, the Authority was subject to a statutory

mandate to deny Lola's application for a license (Alcoholic Beverage Control Law § [7][b]), unless it found that granting the license would be in the public interest (Alcoholic Beverage Control Law § [7][f]), in which event it "shall state and file in its office its reasons" for so finding.[*Id*]) (*Matter of Waldman v New York State Liquor Authority*, 281 AD2d 286 [1st Dept 2001]).

The single issue for review before this Court is whether the Authority has complied with the order of the First Department "to properly state its reasons for granting the liquor license," in accord with the standard prescribed by the legislature.

The Authority stated, on three separate occasions, that it was unable to comply with the First Department Order. Not unsurprisingly, it has not complied. It has offered a perfunctory, single sentence response which, despite its brevity, is not even wholly consistent with the original approval.[2] The Authority fails to discuss or to even define "public interest" and concludes, without explanation, that Lola's effect on traffic and noise will be minimal. Finally, the Authority does not conclude that approval is in the public interest, but rather that it "would not be contrary to public interest."

The courts have uniformly rejected *pro forma* responses such as this as failing, as a matter of law, to comply with the requirements of Alcoholic Beverage Control Law § [7][f]. The language echoes a response specifically rejected by the First Department:

> This perfunctory recitation ["applicant will operate these premises as a bona fide restaurant"] fails to comply with the requirement that the Authority state its reasons for concluding that it would be in the public interest. Obviously, something more is needed. (*Waldman, supra*)

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[2] While Lola is here described as a "bona fide restaurant with no live music or dancing," it was described in the original approval as a "restaurant/lounge featuring live music."

See also, *Soho Community Council et al v New York State Liquor Authority et al*, 173 Misc 2d 632 [NY Cty 1997]["Here, the one-sentence general conclusion that a liquor license will generate employment and tax revenues does not constitute "reasons" why *this* particular licence at *this* particular location is in the "public interest."] (Italics in original)); *Flatiron Community Association et al v New York State Liquor Authority et al*, 6 Misc 3d 267 [NY Cty 2004]["that [applicant] will try to disturb the neighborhood no more than is necessary ... is a far cry from determining that the creation of a fourth late-night club, and the 22nd establishment serving alcohol on the block, will be in the public interest. No effort was made in the determination to define public interest under the circumstances."].

The Court notes that this protracted dispute has generated considerable acrimony with both sides accusing the other of bad faith. While these accusations, even if they were significant, are irrelevant to the narrow inquiry before us, there appears to be here neither villains nor victims, but rather an irreconcilable land use disagreement inevitable in a densely populated urban environment.

The Court has considered the other arguments of the parties and finds them to be without merit.

Conclusion

The Court cannot conclude anything other than that the Authority has failed to comply with the First Department Order and statutory requirements. The Authority has acted in an arbitrary and capricious manner by granting an on-premises liquor license without detailing its reasons why and how it would be in the public interest to do so.

Accordingly, it is

ORDERED that the petition is granted, and it is further

ORDERED that the Authority's determination, dated March 2, 2005 is hereby annulled and vacated; it is further

ORDERED that the matter is remanded to the Authority for *de novo* review of Lola's application.

This reflects the decision and order of this Court.

Dated: 4/21/08

MARILYN SHAFER J.S.C. S.B.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

FILED
MAY 01 2008
COUNTY CLERK'S OFFICE
NEW YORK