SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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INDEX NO. 156323/2022

In the Matter of

MOTION DATE 09/26/2022

ELDRIDGE STREET BLOCK ASSOCIATION, ROBERT CROZIER, MARGARET CHO, MERAL BOZKURT, PABLO GARCIA, ADRIAN ABEY GINES, and ROBERT WEIGAND

MOTION SEQ. NO. 001

Petitioners,

- v -

DECISION, ORDER and JUDGMENT

NEW YORK STATE LIQUOR AUTHORITY and MONEYGOROUND, INC.,

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

In this CPLR article 78 proceeding, the petitioners seek judicial review of an August 16, 2022 New York State Liquor Authority (SLA) determination granting the application of the respondent Moneygoround, Inc. (the applicant), for an on-premises liquor license for premises located at 235 Eldridge Street in Manhattan, between Stanton Street and East Houston Street. The SLA answers the petition and files the administrative record. The petition is denied, and the proceeding is dismissed.

The applicant proposed to open a bar and tavern in the Lower East Side neighborhood of Manhattan. The proposed facility would have a maximum occupancy of 74 persons, with table seating for 42, and a customer bar with 7 seats. The premises were anticipated to close six times each month for private events, with entertainment consisting of recorded music, a juke box, and disc jockeys, but no dancing nor promoters. In its application, the applicant indicated that it would hire a security guard and an on-site manager.

In September 2021, and, thus, before the applicant submitted its application to the SLA, the petitioners provided the SLA with statements and affidavits of opposition to the anticipated application, asserting that the subject neighborhood was saturated with similar facilities and that they were concerned with pedestrian traffic, noise, and cleanliness. Specifically, they asserted that 17 other nearby facilities possessed liquor licenses, and that the establishment that previously occupied the site had been the subject of SLA discipline. On October 5, 2021, the applicant submitted its application for an on-premises liquor license to the SLA. On October 20, 2021, in accordance with the Alcoholic Beverage Control Law, the SLA sent a notice of an initial public hearing to Community Board No. 3 and the applicant. The SLA scheduled this hearing, known as a "500-foot hearing," to consider whether public convenience and advantage warranted the issuance of the license, despite the fact that there were at least three other facilities with SLA licenses within 500 feet of the proposed bar and tavern. The applicant posted notice of the filing of its application on the door of the subject premises.

On November 8, 2021, SLA administrative law judge (ALJ) Nancy Butler completed a 500-foot hearing report in advance of the SLA board of commissioners' final hearing, which included a recommendation that was not binding on the board of commissioners. The SLA conceded that the ALJ did not possess or consider the petitioner's affidavits. In her report, the ALJ wrote:

> "[t]o determine whether granting the license would be in the public interest, the Authority may consider the following factors: the number of licenses near the location; whether the necessary permits have been obtained; the effect that granting the license would have on vehicular traffic and parking near the location; the existing level of noise at the location and any increase in noise that would be generated by the premises; and the history of liquor violations and reported criminal activity at the premises. The Authority may also consider any other relevant facts to determine whether the public interest of the community would be served by granting the license."

As explained by ALJ Butler, "[p]ursuant to Advisory 2020-8, this hearing was conducted without appearances by any parties." That advisory statement, issued on June 1, 2020, provided, in relevant part, that

> "[a]s a result of restrictions placed on public gatherings as a result of the coronavirus (also known as COVID-19), the Authority had postponed all previously scheduled 500 Foot Law hearings and refrained from scheduling any new hearings. The suspension of hearings has resulted in a delay of the processing of applications subject to the 500 Foot Law. To address the issue, the Authority will resume the required hearings under the following conditions:
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> • Neither the applicant, the applicant's representative or anyone who wishes to be heard in support or opposition will be allowed to attend the hearing.
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> • All parties will be required to send written submissions.
>
> • The submissions must be sent by email to Secretarys.office@sla.ny.gov.
>
> • The applicant and the municipality in which the proposed licensed premises is located will receive notification by email that all submissions must be received within 15 days of the email notification.
>
> • Applicants must complete and return a public interest questionnaire to Secretarys.office@sla.ny.gov by the deadline noted above. This questionnaire will replace any public interest statement that has already been submitted and no other document will be accepted as a substitute. If needed, the applicant can attach supplemental pages to the questionnaire. The Administrative Law Judge will not be reviewing any documents in the application that are on file with the Authority.
>
> • After the deadline for submissions, the matter will be forwarded to an Administrative Law Judge for review and the issuance of a hearing report.
>
> • Submissions not sent to Secretary's Office using the above email address, or any submissions received after the above deadline, will not be forwarded to the Administrative Law Judge for his/her consideration."

ALJ Butler thus based her report on the Public Interest Questionnaire that the applicant had submitted, inasmuch as Community Board No. 3 did not make a submission.

In her report, the ALJ explained that the applicant intended to operate a tavern on the ground floor and basement of a six-story, mixed use building in a mixed residential and commercial neighborhood, and noted that there were residents in the building containing the proposed premises, and possibly in buildings adjacent to the proposed premises as well. According to the report, the applicant and several residents had previously met with Community Board No. 3, and that the applicant acknowledged that residents expressed both support for and opposition to the application. The report reflects that the ALJ had in her possession petitions

with approximately 120 signatures of residents who supported of the issuance of the license. The report described the proposed facility and its operations, as set forth above, noting that the hours of operation were to be from 2:00 p.m. to 2:00 a.m. daily, and that there were parking lots and on-street parking that patrons could employ.

The report noted that

> "[t]he record reveals the proposed premises has served as a tavern in the past. The previous licensee is referred to in the record as Jacob & Kelly, Serial # 1024131. The Applicant is aware of one disciplinary case, Case # 133908, related to the prior licensee, however, the nature of the disciplinary matter is unknown. Applicant Principal Laura McCarthy holds numerous active licenses. There is some adverse license history associated with two of Ms. McCarthy's six licenses. The specific nature of the charges in the disciplinary matters is unknown."

It continued that

> "[t]he Applicant explains that it is aware that some nearby residents have concerns regarding the potential noise that could be generated by the proposed premises. The Applicant addresses the noise concerns and states that it will make certain that neighbors are not at all impacted by the proposed premises. The Applicant will only permit recorded music, DJs and a jukebox at volume levels that the Applicant asserts will never exceed ambient background music. Additionally, the Applicant will not operate an outdoor space. The tavern's windows and doors will be kept closed. The Applicant will not permit dancing in the premises and will not use promoters. The Applicant will employ one security personnel [sic] on the weekends. The Applicant anticipates that the proposed premises will draw patrons primarily from the neighborhood, but there are parking lots and street parking for those patrons who arrive by a vehicle."

In light of the fact that the local Community Board did not submit opposition to the application, as well as the apparent support in the community for the issuance of the license, and the applicant's acquiescence to conditions requested by the Community Board that would be incorporated into the license, the ALJ concluded that the applicant met its statutory burden of demonstrating that public convenience and advantage would be served by the issuance of the license.

The individual petitioners appeared in person at the final SLA hearing held before a board of three SLA commissioners on April 27, 2022, at which they voiced their opposition to the issuance of the license. According to the SLA, its commissioners considered the petitioners'

September 2021 affidavits prior to the hearing, with one of three commissioners who heard the application attesting that the petitioner's attorney independently and publicly acknowledged, at the hearing, that all three commissioners possessed those affidavits before voting on the application. The commissioners also heard oral statements that the petitioners made in opposition to the issuance of the license.

By decision dated August 16, 2022, the SLA board of commissioners, by a vote of two to one, granted the application and issued the license to the applicant. In its decision, the SLA reiterated the description of the applicant's proposal, along with a description of the premises and the proposed operations, as well as the license restrictions and operational features to which the applicant had agreed with Community Board No. 3. The SLA wrote that

> "[w]e take the opposing residents' complaints very seriously, which is why we implore them to report to the Authority any issues they have with licensed establishments, including the applicant. With that said, we find that the various factors under the Five Hundred Foot law weigh in favor of the applicant. First, although several Eldridge Street Block residents appeared in opposition, two block residents appeared in support on April 27th and the Community Board recommends approval. The applicant also submitted petitions and letters reportedly with '123 . . . signatures in support of application, 37 of which are residents of Eldridge Street." This shows us that the opposition's viewpoint as to whether the issuance of the applied-for license will be in the public interest is not the only viewpoint in the neighborhood for us to consider and there may actually be more support."

With respect to the substance of the opposition, the decision characterized the issues as "general, geared towards two existing licensees on the block, and not specific to the proposed premises or applicant." The SLA noted that, from 2007 to 2019, the prior licensee's adverse history "was limited to minor and clerical violations," and the cancellation of its license was due to unpaid taxes, as opposed to violence, crowds, or noise. It explained that, if there were any 311 or 911 calls or complaints that had been made in connection with the prior establishment, they either never were forwarded to the SLA or "did not rise to the seriousness [of] requiring disciplinary action."

As set forth in the decision, when asked by the commissioners about the anticipated involvement of the applicant's principal, Laura McCarthy, in the proposed establishment, the applicant's attorney "stated that she has taken a 'step back' from her businesses due to health issues and that she is merely taking on a financial role." Two of McCarthy's licensed establishments---Patty McCarthy's, Inc., and Tozzer, Ltd., both on Avenue A---had been the subject of adverse SLA disciplinary history on a total of six occasions. The SLA explained that the applicant had assured it that Maria Devitt "will be the principal actively managing the premises," noting that, since August 2021, she had managed 162-4 B Bar, Inc., doing business as Dream Baby, that this establishment had a clean record, and that patrons and supporters of Dream Baby appeared at the April 27, 2022 public hearing in support of the instant application. According to the SLA, this support demonstrated that "the applicant will be a good operator/neighbor and will make every effort to ensure that the establishment will not lead to an increase or traffic, noise, or any other quality of life issues for area residents." Inasmuch as the applicant evinced its willingness to work with the local Community Board, agreed to restrict its method of operation to address the Community Board's concerns, and agreed to include several restrictions in its SLA license, while the Community Board did not oppose the application, the SLA concluded that these restrictions "adequately address[ed] the quality-of-life concerns of the opposition."

Where, as here, an administrative determination is made, and there is no statutory requirement of a trial-type hearing, that determination must be confirmed unless it is arbitrary and capricious, affected by an error of law, or made in violation of lawful procedure (*see* CPLR 7803[3]; *Matter of Madison County Indus. Dev. Agency v State of N.Y. Auths. Budget Off.*, 33 NY3d 131, 135 [2019]; *Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523 [2018]; *Matter of McClave v Port Auth. of N.Y. & N.J.*, 134 AD3d 435, 435 [1st Dept 2015]; *Matter of Batyreva v New York City Dept. of Educ.*, 50 AD3d 283 [1st Dept 2008]; *Matter of Rumors Disco v New York State Liquor Auth.*, 232 AD2d 421 [2d Dept 1996]; *Matter of Capizzi*

v New York State Div. of Alcoholic Beverage Control, 231 AD2d 881 [4th Dept 1996]; *Matter of Ban The Bar Coalition v New York State Liquor Auth*., 12 Misc 3d 1192[A], 2006 NY Slip Op 51544[U], *8 [Sup Ct, N.Y. County, Aug. 9, 2006]; *see also Matter of Graca v State Liquor Auth*., 32 AD2d 879 [4th Dept 1969]; *Matter of Soho Alliance v New York State Liquor Auth*., 10 Misc 3d 1078[A}, 2005 NY Slip Op 52253[U] [Sup Ct, N.Y. County, Nov. 17, 2005], *revd other grounds*, 32 AD3d 363 [1st Dept 2006]; *Matter of Flatiron Community Assn. v New York State Liquor Auth*., 6 Misc 3d 267 [Sup Ct, N.Y. County 2004]).

Inasmuch as the petitioner made no allegations that the SLA committed an error of law, the SLA's determination to approve the subject application for an on-premises license must be confirmed unless it was made in violation of lawful procedure (*see Matter of Exclusive Ambulette Serv., Inc. v New York State Dept. of Health*, 170 AD3d 721, 722-723 [2d Dept 2019]) or was arbitrary and capricious (*see Matter of Farina v State Liq. Auth*., 20 NY2d 484 [1967]; *Matter of Urbanite Wine Merchants, Inc. v New York State Liquor Auth*., 189 AD3d 593, 593-594 [1st Dept 2020]; *Matter of BarFreeBedford v New York State Liquor Auth*., 130 AD3d 71, 71 [1st Dept 2015]; *Matter of Pizzaguy Holdings, LLC v New York State Liquor Auth*., 39 AD3d 1072 [3d Dept 2007]), that is, it was not rationally based on facts in the record or was based on a consideration of impermissible factors.

The petitioners have not established that they were provided with insufficient notice or deprived of a meaningful opportunity to be heard prior to the April 27, 2022 public hearing and, hence, there is no basis for their contention that the SLA's determination was made in violation of lawful procedure (*see Matter of Exclusive Ambulette Serv., Inc. v New York State Dept. of Health*, 170 AD3d at 722-723; *Matter of Tully Constr. Co., Inc. v Hevesi,* 214 AD2d 465, 466 [1st Dept 1995]). Proper notice of the ALJ's initial consideration was provided to Community Board No. 3 and the applicant, and written notice physically was posted on the door of the subject premises. The SLA demonstrated that it fully considered the petitioners' September 2021 affidavits and opposition statements at the April 2022 hearing, as well as their oral arguments in

opposition to the issuance of the license. It is of no moment that ALJ Butler did not have those September 2021 affidavits and statements before her when she issued her report in November 2021, as her report was advisory only, and her recommendation did not constitute a final determination on the merits of the license application. Inasmuch as the actual decision makers did, in fact, consider those submissions, their determination may not be vacated for failure to adhere to lawful procedure.

Alcoholic Beverage Control Law § 64(7)(b) provides, in relevant part, that "[n]o retail license for on-premises consumption shall be granted for any premises which shall be . . .in a city . . . having a population of twenty thousand or more within five hundred feet of three or more existing premises licensed and operating pursuant to this section." Alcoholic Beverage Control Law § 64(7)(f) provides, however, that, "if, after consultation with the municipality or community board, [the SLA] determines that granting such license would be in the public interest," and conducts an appropriate hearing, the SLA may issue a license despite the presence of three or more licensed establishments within 500 feet of the applicant's proposed establishment.

With respect to this court's application of the "arbitrary and capricious" standard, the SLA, in granting the application for a new on-premises license, thus was required rationally to have determined, upon consideration of appropriate factors, that the proposed facility would promote the "public convenience and advantage" (*Matter of Cleveland Pl. Neighborhood Assn. v New York State Liquor Auth*., 268 AD2d at 9; Alcoholic Beverage Control Law § 64[6-a]). The concept of public convenience involves considerations such as the distance between licensed facilities and the issues of pricing, accessibility to certain products, and overcrowding at existing facilities, while the concept of public advantage involves considerations such as creating a "more open market and an increase in competition in the retail sale of liquor in the interest of the consumer" (*Matter of Forman v New York State Liquor Auth*., 17 NY2d 224, 230 [1966]; *see Matter of Circus Disco, Ltd. v New York State Liquor Auth*., 51 NY2d 24, 33 [1980] [public convenience and advantage requires "justice for the consumer"]).

In determining "whether public convenience and advantage and the public interest will be promoted" by the granting of a license, the SLA may consider any or all of the following factors:

> "(a) The number, classes and character of licenses in proximity to the location and in the particular municipality or subdivision thereof.
>
> "(b) Evidence that all necessary licenses and permits have been obtained from the state and all other governing bodies.
>
> "(c) Effect of the grant of the license on vehicular traffic and parking in proximity to the location.
>
> "(d) The existing noise level at the location and any increase in noise level that would be generated by the proposed premises.
>
> "(e) The history of liquor violations and reported criminal activity at the proposed premises.
>
> "(f) Any other factors specified by law or regulation that are relevant to determine the public convenience and advantage and public interest of the community"

(Alcoholic Beverage Control Law § 64 [6-a]).

> "These factors were enacted into law by amendment in 1993 as a result of the decision of the Court of Appeals in *Matter of Circus Disco v New York State Liq. Auth*. (51 NY2d 24). The Court held that the SLA could not deny a license on the ground that it believed community residents would be adversely affected by the noise, parking problems and traffic that would be generated by an establishment permitted by governing zoning regulations, because noise, parking and traffic were matters for the consideration of the zoning authorities (1993 NY Legis Ann, at 515). Section 64 (6-a) is intended to guide the SLA in assuring 'that appropriate factors are taken into consideration which relate to the business and the impact it has … [and] to assure that quality of life impacts are fully incorporated into the responsible state decision-making apparatus' (*ibid*.)"

(*Matter of Cleveland Place Neighborhood Assn. v New York State Liquor Auth*., 268 AD2d 6, 9-10 [4th Dept 2000]; *see Mater of BarFreeBedford v New York State Liquor Auth*., 130 AD3d at 77]).

Notwithstanding the State's "present legislative policy in favor of greater price competition in the sale of alcoholic beverages, toward licensing more package liquor stores" (*Matter of Sinacore v New York State Liquor Auth*., 21 NY2d 379, 384 [1968]; s*ee Matter of Hub Wine & Liquor Co v State Liquor Auth*., 16 NY2d 112, 117 [1965]), the saturation of a

neighborhood with liquor stores may warrant the denial of a license application (*see Matter of Forman v New York State Liquor Auth*., 17 NY2d at 230; *cf. Matter of K&C Liquors, Inc. v New York State Liquor Auth.,* 2018 NY Slip Op 51175[U] [Sup Ct, Bronx County, Jul. 18, 2018] [SLA's consideration of market saturation in denying license application was proper, but matter is remitted to SLA to consider the fact that it issued a license to another applicant in the neighborhood under similar circumstances, as well as the accuracy of existing stores' gross sales data]; *Matter of Chenango Wine & Liquor, Inc. v Johnson City Wine Partners, LLC*, 2014 NY Slip Op 50095[U], 42 Misc 3d 1219[A] [Sup Ct, Broome County, Jan. 30, 2014] [responding to potential market saturation by requiring license applicant to surrender another license to a nearby store that it also owned]).

Nonetheless, as explained by Justice Gische in *Matter of Rose Ancona, Inc. v New York State Liquor Auth*. (2010 NY Slip Op 31024[U] [Sup Ct, N.Y. County, Apr. 22, 2010]),

> "the NYSLA cannot blindly apply distance restrictions to protect existing liquor business in a particular area because such 'arbitrary and compulsory distances between package stores . . . have no present purpose except to restrict competition' (*In the Matter of Hub Wine & Liquor v State Liquor Authority*, 16 NY2d at 117). The NYSLA can, however, consider evidence that liquor sales in the immediately surrounding area where the applicant wants to open a new store are unlikely to sustain an additional store and that the existing liquor stores are adequately serving the public's needs, convenience and advantage (*In the Matter of George B. Hansen v New York State Liquor Authority*, 77 AD2d 703 [3rd Dept 1980])."

The record supports the SLA's determination that the market is not saturated in the Eldridge Street portion of the Lower East Side neighborhood (*see* In *Matter of BarFreeBedford v New York State Liquor Auth*., 130 AD3d at 75-78; *Matter of Hansen v State Liquor Auth*., 77 AD2d 703, 704 [3d Dept 1980]).

In *Matter of BarFreeBedford v New York State Liquor Auth*. (130 AD3d at 75-78), the Appellate Division, First Department, affirmed a judgment denying a neighborhood association's CPLR article 78 petition, pursuant to which it had sought to annul the SLA's issuance of an on-premises license to a retro-themed speakeasy on Bedford Street in Greenwich Village. The

petitioners there contended that there were already 21 SLA-licensed establishments within a 500-foot radius of the proposed location, and that the relevant statute recognized that even 3 such establishments constituted saturation. There, as here, the applicant had met with the relevant Community Board. There, as here,

> "[t]he Authority required [the applicant] to abide by its agreement with the Board, which supported the application, to reduce the likelihood of outside street noise by such measures as keeping windows and doors closed, maintaining security on the premises, and closing by 2:00 a.m. Moreover, the bar/restaurant would not have any outdoor space, live music, or dancing, as noted in the Authority's written reasons"

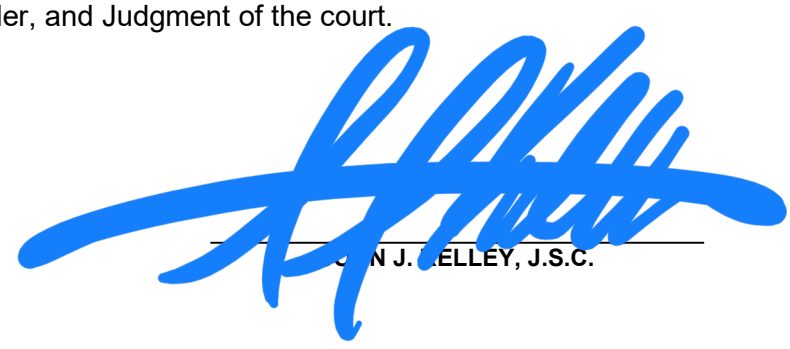
(*id.* at 78). There, as here, the issuance of the license would permit a previously vacant building to be put to a useful commercial purpose. Hence, the SLA has provided something more than a mere "perfunctory recitation" of the reasons supporting the rationality of its determination (*id.*; *see Matter of Waldman v New York State Liq. Auth.*, 281 AD2d 286, 286 [1st Dept 2001]), and the determination was supported by facts in the records. Consequently, its determination was not arbitrary and capricious, and the petition must be denied.

Accordingly, it is,

ORDERED that the petition is denied; and it is,

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.



12/12/2022
DATE

N J. KELLEY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE