

In June 2010, Applicant filed an application with the PLCB for the double transfer² of Restaurant Liquor License No. R-12636, for premises located at 220 South Highland Avenue, City of Pittsburgh, Pennsylvania. The PLCB's Bureau of Licensing (Bureau) advised Applicant it objected to Applicant's transfer application. The Bureau ordered a hearing to take evidence on the objections.

Objector and Regis Donovan filed timely protests to the application. The Bureau notified Objector and Donovan that, because they were not persons or entities that could file a protest under 40 Pa. Code § 17.11, they were required to file petitions to intervene, which they did.

A PLCB hearing examiner subsequently held a hearing. Based on a review of the record, the PLCB approved Applicant's application and denied intervenor status to Objector and Donovan.

Thereafter, the PLCB issued an opinion in support of its order in which it made the following findings. The Bureau initially informed Applicant that a hearing would be held for the purpose of taking evidence regarding the following objections:

1. The proposed licensed premises will be located within 200 feet of other establishments licensed by [the PLCB].
2. [A]pplicant has failed to submit an Individual Questionnaire, Form PLCB-196, for Joshua Klein.

² Double transfer refers to a person-to-person and place-to-place transfer.

3. [A]pplicant has failed to submit the Application Addendum, PLCB-1975, amending questions on the PLCB-26 form.

4. [A]pplicant failed to submit criminal history record checks for Cary Klein, Richard Baron, Gloria Sciarappa, Tausha Adams, John Docherty, Kathryn Klein, Robert Frost, David Berk, William Fuller and Andrew Klein.

5. [A]pplicant has failed to submit approval from the City of Pittsburgh for use of the sidewalk café.

6. The [PLCB] shall take evidence to determine if ... Donovan and [Objector] would be directly aggrieved by the granting of this application, which would qualify them as intervenors in this matter.

7. The [PLCB] shall take evidence to determine that the approval of this application will not adversely affect the health, welfare, peace and morals of the neighborhood within a radius of 500 feet of the proposed licensed premises.

PLCB Op. at 2-3.

Applicant is a limited partnership, comprised of Highland Mad Mex, LLC as a general partner and Mad Mex Holding Company, LLC as a limited partner. Cary Klein is Applicant's chief executive officer and a stockholder. Richard Baron is Applicant's president and a stockholder. Gloria Sciarappa is Applicant's vice president and treasurer, and she is also a stockholder. Applicant's other stockholders are Joshua Klein, Robert Frost, David Berk, William Fuller, and Andrew Klein.

The proposed licensed premises is located in a one-story commercial building with a basement. Applicant will offer a full-service menu of Mexican-style cuisine. Applicant's first floor will have four interior serving areas, which

will accommodate 132 patrons. Applicant's kitchen will also be located on the first floor. Applicant will have a serving area on its mezzanine for 20 patrons.

Initially, Applicant also proposed four outdoor serving areas: three areas on its rooftop and one area on its sidewalk. By letter dated August 24, 2010, however, Applicant's counsel notified the PLCB that it sought to withdraw its proposal for the outdoor serving areas from its liquor license transfer application. Additionally, Applicant filed an application addendum that removed the four outdoor serving areas from its proposed licensed areas.

The area within 500 feet of the proposed premises is 50% residential and 50% commercial. The proposed licensed premises will be located within 200 feet of the following four licensees: Buffalo Blues, Inc., which abuts the proposed premises; El Grande, Inc., located 54 feet from the proposed licensed premises; Robson Entertainment, LLC, located 61 feet from the proposed licensed premises; and, Typhoon Entertainment, Inc. located 128 feet from the proposed licensed premises. None of these licensees filed a protest to Applicant's transfer application. Additionally, there are no restrictive institutions within 300 feet of the proposed licensed premises.

Objector owns properties at 224 and 244 South Highland Avenue, but he does not reside at either location. Objector has seven single-bedroom units at his 224 South Highland Avenue building and eight single-bedroom units at his 244 South Highland Avenue building. Objector has one commercial tenant at his 224

South Highland Avenue building and three commercial tenants at his 244 South Highland Avenue building.

Objector's residence is more than 500 feet from the proposed licensed premises. Objector is concerned that he may experience problems with the rental of his residential units near the proposed licensed premises because of noise and music emanating from the proposed licensed premises. Objector believes Applicant is planning to utilize a garage-type door that would allow noise and music to emanate from the proposed licensed premises.

Objector is also concerned that Applicant's patrons will place a strain on parking for customers of his commercial tenants. Objector indicated there are a few large parking lots that serve the South Highland Avenue business district, and the parking lot on the east side is not available to customers in that area. According to Objector, there is only one large parking lot available for customers in the South Highland Avenue business district, and it appears it may be lost to a new retail and office building. Objector indicated he has six parking spaces allocated for his commercial and residential tenants in his two buildings, but at the time of the hearing here, one of the spaces was under repair.

Donovan's residence is not within 500 feet of the proposed licensed premises. Donovan manages Objector's buildings near the proposed licensed premises, and he believes noise and parking issues generated by Applicant's restaurant may impact the desirability of the rental units, which may in turn impact his ability to rent the units.

Richard Baron, Applicant's president, is involved with 14 other restaurants that possess liquor licenses. Baron is president and director of El Grande, Inc., t/a Casbah, a licensee located within 200 feet of the proposed licensed premises. Baron was unaware of any noise complaints or unruly behavior at El Grande. Baron indicated Applicant's closing times for its restaurant and kitchen will be 12:00 a.m. on Sunday through Thursday and 1:00 a.m. on Friday and Saturday, but these times were not final as of the date of the hearing.

Applicant has a 35-year lease for its proposed licensed premises. Baron indicated Applicant plans on capital investments of over \$1.5 million in the proposed premises. Baron testified that Applicant leased two garages behind the Rubicon building, next to Ellsworth Avenue. Applicant's leased garage hours will be on weekdays from 5:30 p.m. until Applicant closes and on weekends from 11:00 a.m. until Applicant closes. Baron estimated the distance from the proposed licensed premises to Applicant's leased garages is between 200 and 250 feet. According to Baron, Applicant also has nine parking spaces behind its building. Baron further indicated Applicant's landlord also offered Applicant parking spaces in a private parking area owned by Applicant's landlord.

In addition, Baron testified Applicant is aware of the PLCB regulation regarding amplified music, and it plans on complying with the regulation. Baron further indicated Applicant is not planning on having a garage door-type opening, but a "folding up and down door," which may span the width of the building.

Also testifying was Peter Gordon, one of the partners in Applicant's landlord's company, South Highland Limited Partnership. Gordon's partnership has other commercial tenants in the area of the proposed licensed premises. Given his familiarity with the area of the proposed licensed premises, Gordon believes Applicant's restaurant will have a positive effect.

Based on these findings, the PLCB authored an analysis regarding the Bureau's objections to Applicant's license transfer application. As to the first objection, concerning location of the proposed licensed premises within 200 feet of other licensed establishments, the PLCB noted that although it had discretion to deny the application based on the proposed licensed premises' proximity to four other licensed establishments, it declined to do so. In so doing, the PLCB noted none of the four nearby licensees objected to the application. Thus, the PLCB found no compelling reason to deny the application on this basis.

The PLCB further observed the Bureau's second, third and fourth objections, which related to various documents Applicant did not submit to the PLCB, were moot because Applicant later supplied the missing information. Additionally, the PLCB stated the Bureau's fifth objection, regarding the City's approval of Applicant's sidewalk café, was moot because Applicant filed an application addendum in which it removed its previously proposed outdoor seating areas including the sidewalk café.

As to the Bureau's sixth objection, regarding whether Objector and Donovan would be aggrieved by the PLCB's approval of the license, the PLCB

determined neither Objector nor Donovan would be aggrieved. The PLCB stated neither Objector nor Donovan resided in the neighborhood of the proposed licensed premises. Further, the speculative concerns over noise and perceived parking issues raised by Objector and Donovan were insufficient to show aggrievment; therefore, they lacked standing to challenge the application.

Finally, as to the Bureau's seventh objection regarding impact of the proposed licensed premises on the health, safety and welfare of the neighborhood, the PLCB determined there was no evidence that the grant of Applicant's license transfer request would harm the surrounding neighborhood.

Based on these findings and determinations, the PLCB approved the application for double transfer of Restaurant Liquor License No. R-12636. Objector appealed to the Court of Common Pleas of Allegheny County, which ultimately transferred his appeal to this Court.

On appeal,³ Objector raises four issues. Specifically, he argues the PLCB erred in: determining he lacked standing to challenge the transfer of the liquor license; granting Applicant's request for transfer of the liquor license; and, determining the grant of the license would not harm the welfare, health, peace and morals of residents within 500 feet of the proposed licensed premises. Objector

³ Our review of a decision of the PLCB as an administrative agency is limited to determining whether there was a constitutional violation or an error of law, whether the practices and procedures of the PLCB were followed and whether necessary findings of fact were supported by substantial evidence. Malt Beverage Distribs. Ass'n v. Pa. Liquor Control Bd., 918 A.2d 171 (Pa. Cmwlth. 2007), aff'd, 601 Pa. 449, 974 A.2d 1144 (2009).

also contends res judicata attaches to Applicant's previously proposed outdoor seating areas so that Applicant may not later renew the portion of its liquor license application that it withdrew at the outset of the hearing here.

Objector first asserts the PLCB erred in determining he lacked standing to intervene here. He sets forth three bases in support of this claim. First, he qualifies as a "protestant" under Section 17.11(b) of the PLCB's regulations, 40 Pa. Code §17.11(b). Next, he has standing as an intervenor pursuant to Sections 17.11(a) and 17.12 of the PLCB's regulations, 40 Pa. Code §§17.11(a) and 17.12. Finally, he asserts he has standing pursuant to Section 702 of the Administrative Agency Law, 2 Pa. C.S. §702.

Granting or denying a petition to intervene is within the sound discretion of the agency involved. Malt Beverage Distribs. Ass'n v. Pa. Liquor Control Bd., 965 A.2d 1254 (Pa. Cmwlth. 2009) (*en banc*), aff'd, 607 Pa. 560, 8 A.3d 885 (2010). A decision on intervention will not be disturbed unless there has been a manifest abuse of discretion. Id.

With regard to Objector's asserted right to standing under Section 17.11(b) of the PLCB's regulations, entitled "License application protests," that section provides (with emphasis added):

(b) *When qualifications of an applicant are at issue.* A protest may be filed with the [PLCB] by a person having information regarding the qualifications of an applicant for a new retail liquor license, retail malt or brewed beverage license, importing distributor or distributor license, or for the transfer of these licenses to another person or when a corporation or club, as required by Chapter 5 Subchapter G (relating to change of

officers of corporations and clubs) submits a change of officers, directors or stockholders.

40 Pa. Code §17.11(b).

Objector asserts he is entitled to standing as a protestant under this regulatory provision because he has information regarding Applicant's qualifications. Objector's argument is as follows. The PLCB's decision indicates Applicant is a limited partnership, comprised of Highland Mex, LLC as general partner and Mad Mex Holding Company, LLC as limited partner. *After* hearing, however, Objector obtained certified documents from the State Bureau of Corporations that indicate Applicant's general partner is actually Highland Mex, L.P. Through a motion to supplement the record/motion to take judicial notice, Objector requests this Court take judicial notice of these documents, which are appended to his brief. He notes the same information is readily verifiable by telephone or on the Bureau of Corporations' website. Objector maintains the information he obtained contradicts the information the PLCB relied on in granting Applicant's transfer request as the PLCB granted the application on the basis the general partner was Highland Mad Mex, LLC, rather than Highland Mad Mex, L.P. He asserts that, because this information relates to Applicant's qualifications, he is entitled to "protestant" status under 40 Pa. Code §17.11(b).

Our review of the record reveals Objector did not raise an issue regarding Applicant's qualifications in his petition to intervene, see Original Record of Administrative Proceedings (O.R.) at Item #s 5, 9, or at hearing. See O.R. at Item #17; Notes of Testimony (N.T.), Hearing of 8/31/10, at 23-78 (testimony of Objector and Donovan). Thus, it is not surprising the PLCB did not

address this issue in its opinion. As a result, Objector did not preserve his right to assert standing under 40 Pa. Code §17.11(b) as a protestant having information regarding Applicant's qualifications. See Burns v. Rebels, Inc., 779 A.2d 1245 (Pa. Cmwlth. 2001) (protestants' failure to raise objection before PLCB that liquor license transfer applicants were not persons of good repute resulted in waiver of that issue).

Moreover, Objector's claim fails on its merits. Despite pointing out the discrepancy between the PLCB's finding that Applicant's general partner is Highland Mex, LLC, while a Bureau of Corporations search reveals Applicant's general partner is actually Highland Mex, L.P., Objector offers no explanation as to how this discrepancy reflects in any way on Applicant's qualifications to obtain a restaurant liquor license transfer or operate a licensed restaurant.⁴ In the absence of any such explanation, we do not believe Objector qualifies as a protestant under Section 17.11(b) of the PLCB's regulations. Additionally, while Objector

⁴ In his reply brief, Objector argues a limited partnership, which has as its general partner another limited partnership, violates Section 5.91 of the PLCB's regulations, 40 Pa. Code §5.91. He further contends the true identity of Highland Mex, L.P. is unclear and Highland Mex, L.P., is not an entity to whom a liquor license may be granted under Section 404 of the Liquor Code, Act of April 12, 1951, P.L. 90, as amended, 47 P.S. §4-404. Moreover, Objector maintains, this issue cannot be deemed waived because Section 5.91 of the PLCB's regulations imposes a continuing duty on the transferee of a liquor license to update the PLCB as to who "controls" the corporation.

As discussed above, Objector did not raise any issue regarding Applicant's qualifications or composition at any time before the PLCB; as such this issue is waived. Further, this argument fails on its merits. Specifically, while Section 5.91 of the PLCB regulations requires a PLCB-licensed entity to update the PLCB as to certain changes in a licensed-entity's composition, the record properly before this Court lacks sufficient information to indicate that Applicant has not complied with this regulation. The record also lacks sufficient information to indicate that Applicant is in any way not compliant with Section 404 of the Liquor Code (relating to issuance of a restaurant liquor license), and Objector offers no explanation as to how Applicant is not in compliance with this provision.

characterizes the documents he obtained from the Bureau of Corporations as “newly discovered evidence,” it is far from clear that these documents were unavailable prior to or at the time of the PLCB hearing here. Objector’s attempt to submit these documents long after the close of the record is improper, and we decline to take judicial notice of them.

Alternatively, Objector contends he was entitled to intervenor status under Sections 17.11(a) and 17.12 of the PLCB’s regulations, which provide (with emphasis added):

§ 17.11. License application protests.

(a) *When location is at issue.* When an application has been filed for a new retail liquor license, retail malt or brewed beverage license, importing distributor or distributor license, or the transfer of these licenses to a premises not then licensed, or for the extension of premises of these licenses, a protest may be filed with the Board by the following:

- (1) A licensee whose licensed premises is located within 200 feet of the premises proposed to be licensed.
- (2) A church, hospital, charitable institution, school or public playground located within 300 feet of the premises proposed to be licensed.
- (3) A resident of the neighborhood within a radius of 500 feet of the premises proposed to be licensed.

* * * *

§ 17.12. Intervention in license application matters.

(a) A person who can demonstrate a direct interest in an application for a new retail liquor license, retail malt or brewed beverage license, importing distributor or distributor license, or the transfer of these licenses, whether person-to-person, place-

to-place, or both, or an extension of premises of these licenses, and who can further demonstrate that a Board decision contrary to the person's direct interest will cause the person to be aggrieved may file a petition to intervene.

(b) The petition to intervene may be granted at the discretion of the Board. The Board may grant or deny the petition in whole or in part or may authorize limited participation. In rendering its decision, the Board will consider whether the petitioner has a direct interest in the proceeding and will be aggrieved by a Board decision contrary to that direct interest.

40 Pa. Code §§17.11(a), 17.12.

Here, Objector concedes he does not fall within Section 17.11(a)(3) because he does not reside within 500 feet of the proposed licensed premises. See Pet'r's Br. at 17. Nevertheless, citing In re Application of Gismondi, 186 A.2d 448 (Pa. Super. 1962), he argues he is entitled to intervenor status because he participated at the PLCB hearing by testifying as a witness, cross-examining other witnesses and presenting evidence. In addition to his testimony and exhibits, Objector points out that he submitted a written statement regarding his interest when he filed his petition to intervene and initial protest letter.

Persons who do not have standing to intervene in a PLCB proceeding under Section 464 of the Liquor Code,⁵ 47 P.S. §4-464, but who will be aggrieved

⁵ This Section sets forth the specific classes of persons and institutions permitted to appeal the PLCB's determination to grant, refuse, renew or transfer a license:

Any applicant who has appeared at any hearing ... who is aggrieved by the refusal of the board to issue any such license or to renew or transfer any such license ... may appeal, or any church, hospital, charitable institution, school or public playground located within three hundred feet of the premises applied for, aggrieved by

(Footnote continued on next page...)

by an adverse PLCB decision, may nevertheless petition to intervene in the proceeding under 40 Pa. Code §§17.12-17.13, and may appeal an adverse PLCB decision directly to this Court under 2 Pa. C.S. §702. Burns. To satisfy the requirements of these sections, a party must show he is aggrieved; in other words, he must have a direct and substantial interest in the adjudication and must show a sufficiently close causal connection between the decision and his asserted injury to qualify his interest as immediate. Malt Beverage Distribs.; Burns (citing Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975)).

In order to establish he is aggrieved, a person must do more than merely express general concern for the welfare of the community. Tacony Civic Ass'n v. Pa. Liquor Control Bd., 668 A.2d 584 (Pa. Cmwlth. 1995). Instead, he must present evidence of the specific, harmful consequences that would immediately affect him, either personally or in his capacity as a community representative. Id. Thus, where a protestant asserts only the potentiality of harm,

(continued...)

the action of the board in granting the issuance of any such license or the transfer of any such license, may take an appeal limited to the question of such grievance, within twenty days from date of refusal or grant, to the court of common pleas of the county in which the premises or permit applied for is located.

47 P.S. §4-464. On the basis of section 404 of the Code, 47 P.S. §4-404, inhabitants of the neighborhood who reside within five hundred feet of an establishment which has successfully sought a license have standing to appeal as well. See In re Application of Gismondi, 186 A.2d 448 (Pa. Super. 1962). Section 404 states that the PLCB shall refuse any application for a new license or the transfer of any license to a new location if, in the board's opinion, such new license or transfer would be detrimental to the welfare, health, peace and morals of the inhabitants of the neighborhood within a radius of five hundred feet of the place proposed to be licensed.

he lacks standing to challenge the PLCB's grant of a liquor license transfer application. Id.

Applying these principles here, the PLCB explained:

[Objector] testified that Applicant's proposed licensed premises may negatively affect the well-being of his tenants because of the potential for problems with parking and noise, which may result in him not being able to rent his properties, and ... Donovan reiterated [Objector's] concerns. ...

[Objector] and ... Donovan's concern for their tenants' welfare regarding possible parking, loud noise, and music, is a perceived threat and demonstrates only the potentiality of harm and not the likelihood of immediate harm, especially given [Applicant's President's] extensive testimony regarding Applicant's efforts to provide parking for its patrons, which include valet parking, leasing two (2) parking garages, and utilizing its landlord's private parking. Also, the record shows that Applicant plans on complying with the Board's Regulation pertaining to amplified music. Therefore, because [Objector] and ... Donovan did not prove how they would be directly aggrieved by the grant of this application, [Objector] and ... Donovan were denied standing as intervenors in the instant matter.

PLCB Op. at 62, 63-64 (footnote omitted) (emphasis added). We discern no error in the PLCB's analysis, which is amply supported by the testimony presented. N.T. at 31-32, 42, 48, 51, 56-57 (Objector), 73-75 (Donovan), 84-87, 94-95 (Baron).

More particularly, before the PLCB, Objector testified regarding his speculative concerns over noise and parking issues associated with the proposed licensed premises and the potential effects these issues could have on Objector's

nearby residential and commercial tenants. Despite Objector's speculative concerns, no other resident within 500 feet of the proposed licensed premises filed a protest or a petition to intervene, including any of Objector's residential or commercial tenants. N.T. at 67.

Additionally, Objector offered no objective evidence such as expert testimony or traffic and parking studies to support his speculative concerns. Cf. Manayunk Dev. Corp. v. Pa. Liquor Control Bd., 715 A.2d 518 (Pa. Cmwlth. 1998) (lower court's finding that expansion of licensed premises would be detrimental to community was supported by expert engineering testimony and traffic and parking studies presented by protestants, including a resident within 500 feet of licensed premises). Based on Objector's speculative testimony, we discern no error in the PLCB's determination that Objector did not prove he would be aggrieved by Applicant's liquor license transfer request. See Tacony Civic Ass'n (testimony by protestants that grant of liquor license transfer application would increase already-existing traffic problem and would endanger health and welfare of community, was insufficient to confer standing to challenge application, particularly where no individual residents within 500 feet of proposed licensed premises testified before PLCB); see also SSEN, Inc. v. Borough Council of Borough of Eddystone, 810 A.2d 200 (Pa. Cmwlth. 2002) (testimony by protestants to inter-municipal liquor license transfer regarding increased traffic hazards and parking problems was general and speculative and was therefore insufficient to support a conclusion that transfer would adversely affect municipality or its residents); K&K Enters., Inc. v. Pa. Liquor Control Bd., 602 A.2d 476 (Pa. Cmwlth. 1992) (testimony of witnesses conveying general fears and

not providing specific details is not considered substantial evidence of alleged detrimental effect of transfer of liquor license).⁶

Moreover, this case is distinguishable from Gismondi, relied on by Objector, in which the protestants who appealed the PLCB's grant of a liquor license were "inhabitants of the neighborhood within a radius of five hundred feet of the place proposed to be licensed[,]” and, therefore, were considered “aggrieved” under Section 404 of the Liquor Code. Id. at 449. Here, unlike in Gismondi, Objector is not an inhabitant of the area within 500 feet of the proposed licensed premises. As such, he is not entitled to standing by virtue of Section 404 of the Liquor Code as interpreted in Gismondi. See Tacony Civic Ass'n (distinguishing Gismondi on similar grounds).

Further, as to Objector's citation to Section 702 of the Administrative Agency Law, that section states, “[a]ny person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure).” 2 Pa. C.S. §702 (emphasis added). Clearly, this provision does not provide Objector with standing to *intervene* before the PLCB.

⁶ Objector's concerns over noise and parking issues associated with Applicant's proposed restaurant are more properly addressed in the zoning context. Indeed, Objector raises these issues in his related zoning appeal concerning Applicant's requests for special exceptions. Thus, to the extent such issues are properly preserved, we address them in the related matter of Musgrave v. City of Pittsburgh Department of Planning (Pa. Cmwlth., Dkt. No. 118 C.D. 2011, filed September 12, 2011).

Additionally, in order to establish standing to appeal under Section 702, one must have “satisfied traditional concepts of standing by demonstrating that [he was] ‘aggrieved’ by the PLCB’s action ... and that [he] [had] a sufficient nexus to the controversy to afford [him] standing to challenge the PLCB’s adjudication.” Tacony Civic Ass’n, 668 A.2d at 589; see also Malt Beverage Distribs. As explained more fully above, however, Objector did not present sufficient evidence to establish he would be aggrieved by Applicant’s liquor license transfer request. For these same reasons, we conclude Objector is not “aggrieved” within the meaning of Section 702 of the Administrative Agency Law. Thus, he lacks standing to challenge the PLCB’s order granting Applicant’s application for transfer of the liquor license. Tacony Civic Ass’n. (where protestants to liquor license application did not show grant of application would directly affect their substantial interests and merely expressed general concern for welfare of community, they lacked standing to appeal PLCB decision under Section 702 of the Administrative Agency Law).

Based on our conclusion that Objector lacks standing to challenge the PLCB’s grant of Applicant’s liquor license transfer application, we need not address Objector’s remaining arguments, which challenge the merits of the PLCB’s decision. See Tacony Civic Ass’n (declining to address merits of liquor license appeal based on determination that protestants lacked standing). Accordingly, we affirm.

ROBERT SIMPSON, Judge

