

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA08-871

LARRY JOHNSON

APPELLANT

V.

ALCOHOLIC BEVERAGE CONTROL
DIVISION

APPELLEES

Opinion Delivered JUNE 24, 2009

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
[NO. CV-2007-2819]

HONORABLE WILLARD
PROCTOR, JR., JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Larry Johnson appeals the denial of an application to transfer an existing liquor permit to a new location.¹ On February 21, 2007, appellee Alcoholic Beverage Control Division Board (ABC Board) unanimously denied his application pursuant to Section 1.33(4) of its regulations, concluding that the transfer of his existing liquor store to a new location would not enhance or promote the public convenience and advantage. On April 4, 2008, the Pulaski County Circuit Court dismissed appellant's petition for appeal. On appeal, appellant argues that the circuit court erred in finding that the ABC Board's findings were

¹This is the second time this appeal has come before us. We sent it back for rebriefing on March 18, 2009 (*see Johnson v. Alcohol Beverage Control Div.* CA 08-871, slip op. at 3 (Ark. App. Mar. 18, 2009)), because appellant submitted a brief with an abstract that was insufficient under Ark. Sup. Ct. R. 4-2(a)(5).

supported by substantial evidence and in finding that the ABC Board's decision was neither arbitrary, capricious, nor an abuse of discretion. We affirm.

Appellant owns and operates Lake Street Liquor, which is currently located in a leased building on Lake Street in downtown Paragould, Greene County, Arkansas. Lake Street Liquor occupies 120 square feet of retail-floor space, shares ten parking spaces with another building tenant—a bar—has neither a drive-through window nor the capacity to install one, and has no floor space available for expansion. More than ninety-five percent of Lake Street Liquor's customers consist of private clubs located in neighboring Craighead County.

Sometime subsequent to appellant's purchase of Lake Street Liquor, the building in which Lake Street Liquor is located was severely damaged by a fire, which resulted in the City of Paragould condemning the building. The owner of the property would not allow appellant to rebuild Lake Street Liquor.

Appellant applied for a private-club permit with the ABC Director requesting permission to relocate Lake Street Liquor to a newly-constructed building to be located on Highway 49, halfway between Jonesboro and Paragould on the Greene County Line. The proposed location is at the corner of 117 acres appellant owns in that area. The application was denied on the aforementioned basis.

A hearing was held before the ABC Board on February 21, 2007, to review the denial of the application. Appellant testified in support of his application and produced evidence that included a traffic study, signed petitions, and photographs in support of his petition. A local attorney also testified on appellant's behalf, presenting evidence about the traffic study, support

from ten of the closest fifteen neighbors, and information regarding the current number of liquor stores operating in the county. A local legislator and county official, as well as a local resident, testified in opposition to appellant's application. Letters of opposition from a local school-district superintendent and a local pastor were also considered.

On the same day of the hearing, the ABC Board issued its letter ruling, concluding pursuant to Section 1.33(4) of its regulations that the director's decision that appellant's application to transfer the location of his existing liquor store would not enhance or promote the public convenience and advantage was correct, and that the application should be denied. The vote was unanimous among the four members of the ABC Board.

The formal decision of the ABC Board was received by counsel for appellant on March 1, 2007, and on March 2, 2007, appellant filed a petition for appeal with the Pulaski County Circuit Court. A hearing was held before the Pulaski County Circuit Court on November 21, 2007, and the Pulaski County Circuit Court's order dismissing appellant's petition for appeal was filed on April 4, 2008. Appellant filed a timely notice of appeal on May 2, 2008.

Appellant contends that the ABC Board's denial of his transfer application is not supported by substantial evidence and is arbitrary and capricious. On appeal from circuit court, our review of administrative decisions is directed to the decision of the administrative agency, rather than the decision of the circuit court. *Vallaroutto v. Alcoholic Beverage Control Bd.*, 81 Ark. App. 318, 101 S.W.3d 836 (2003). We rely heavily upon the principle that administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures, to determine and analyze underlying issues. *Id.*

Judicial review is limited in scope, and the administrative agency decision will be upheld if supported by substantial evidence and not arbitrary, capricious or an abuse of discretion. *Id.*; *see also Arkansas Alcoholic Beverage Control Div. v. Person*, 309 Ark. 588, 832 S.W.2d 249 (1992).

When reviewing administrative decisions, we review the entire record to determine whether there is any substantial evidence to support the agency's decision. *Vallaroutto, supra*. Substantial evidence is valid, legal, and persuasive evidence or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* An absence of substantial evidence is shown by demonstrating that the proof before the agency was so nearly undisputed that fair-minded persons could not reach its conclusions. *Id.* The credibility and the weight of the evidence is within the agency's discretion. *Id.*

We give the evidence its strongest probative force in favor of the Board's ruling. *See Chili's of Jonesboro, Inc. v. State*, 75 Ark. App. 239, 57 S.W.3d 228 (2001). The question on review is not whether the evidence would have supported a contrary finding but whether it supports the finding that was made. *Id.* The reviewing court cannot displace the ABC Board's choice between two fairly conflicting views even though the court might have made a different choice had the matter been before it de novo. *Id.* With these standards in mind, we now set out the evidence before the ABC Board.

The ABC Board issued its letter opinion denying appellant's application for a transfer of location of premises on the grounds that "the application filed by Doctor Larry Johnson

to transfer the location of his liquor store would not promote the public convenience and advantage,” stating the basis for its decision as follows:

- (1) testimony of a local legislator, county official and a resident, all of whom testified that there is already another liquor store, The Party Store, in close proximity to the site where Doctor Johnson wishes to transfer the liquor store. Based on their testimony, the Board finds that the area is already adequately served by an existing outlet in this area;
- (2) petitions in opposition to the transfer of the liquor store signed by three hundred forty-eight (348) area residents;
- (3) testimony from a local pastor indicating that his congregation and other people in the neighborhood are concerned because of litter on the road, cans and bottles on the church parking lot; and
- (4) testimony from a local school-district superintendent that he was concerned that the increased traffic associated with liquor stores would add to the endangerment of the students of the school district.

Appellant argues that the ABC Board’s first finding is arbitrary because evidence of the mere existence of a retail-liquor outlet within close proximity of a proposed site of a liquor store, on its own, does not support a finding that the existing liquor store sufficiently serves the area’s needs. *See Green v. Carder*, 282 Ark. 239, 667 S.W.2d 660 (1984). In *Green*, this court affirmed the ABC Board’s determination that two liquor stores which were to be located a block away from one another would promote the public convenience and advantage, thus the mere fact that two retail-liquor outlets exist within close proximity of one another in this case does not necessarily establish that the area is adequately served. He further underscores this point by noting that the record reflects that the ABC Board issued four retail-liquor permits in Greene County within a one-mile radius of one another.

Appellant addresses witnesses' conclusory remarks as to the inventory and service of the existing liquor store or stores, and urges that such testimony does not support a finding that the existing liquor store sufficiently serves the area's needs. *See Fouch v. State Alcoholic Bev. Cont. Div.*, 10 Ark. App. 139, 141, 662 S.W.2d 181, 183 (1983) (holding that a witness's testimony that three other liquor stores in the area were "pretty well supplied," "heavily stocked," and "medium, if even medium" was speculative and did not support a finding that existing outlets were sufficient to meet the needs of the area).

Regarding the case at hand, a local legislator, a county official, and a resident each testified that a liquor store currently exists approximately a quarter to a half mile from the proposed relocation site. Appellant notes that none of these witnesses testified as to whether this store was sufficiently serving the area's needs, with the local legislator merely asserting that appellant's store was "not needed," and the resident testifying that "there is lots of liquor out there." He argues that those broad assertions fail to provide a factual basis for whether or not the area in question is being adequately served. Appellant offered evidence on this specific issue, testifying that he proposed to stock wines that area residents could not buy in the other liquor-store outlets in Greene County; however, his assertion that the other liquor stores in the area would not have the wine selection that his new store would have was not supported by any factual testimony. Additionally, appellant presented no proof of the area's demand for the unnamed wine products he alleged that he would sell nor did he submit any proof that the other liquor stores in the area did not carry particular wine products. *See Vallaroutto, supra.*

Appellant introduced an economic study, which he claims demonstrated that consumers' needs are not being met by existing Greene County retail-liquor outlets in that existing liquor stores, as well as the county as a whole, are losing approximately thirty-seven percent of the potential market. However, appellant acknowledged that he had no marketing breakdown for wine, that he did not have much experience, and that he had no marketing plan. While appellant maintains that the record demonstrates that the proposed relocation would improve existing service and provide added convenience to Greene County patrons, the ABC Board has the authority to choose between two fairly conflicting views. Our standard of review requires us to give the evidence its strongest probative force in favor of the Board's ruling, *see Chili's supra*, and this court cannot displace the ABC Board's choice between those conflicting views even though the court might have made a different choice had the matter been before it de novo.

Appellant asserts that the ABC Board's second finding is misleading and erroneous, as well as irrelevant as a matter of law. He claims the ABC Board's alleged 348 signatures in opposition to his application do not accurately reflect the number of signatures in the record, which indicates the number was actually 245 area residents. This number is less than his 272 signatures in support of the relocation, making the majority of those polled in favor of the requested transfer. Additionally, as to relevance, appellant submits that Arkansas courts have repeatedly held that the mere number of residents for or against the issuance of a retail-liquor permit is not relevant to whether or not the public convenience and advantage would be served. *See Stringfellow v. ABC Board*, 3 Ark. App. 124, 623 S.W.2d 213 (1981); *see Snyder*

v. Alcoholic Bev. Control Bd., 1 Ark. App. 92, 613 S.W.2d 126 (1981). Consequently, appellant contends that the ABC Board's finding was in error and may not be properly considered.

Appellant acknowledges that the reason for a party's opposition may be significant if it clearly shows whether the public convenience or advantage is served, *see Snyder, supra*; however, the ABC Board did not make a specific finding that the reasons stated on the opposition's petitions were significant in this case. He contends that this is probably because the petitions in opposition that actually stated a reason were "grossly inaccurate and misleading." Specifically, those petitions state that "the proposed location for the retail liquor store is currently utilized as a bus stop where children are picked up in the morning and returned in the afternoon from their campus locations." He asserts the record clearly demonstrates the referenced bus stop is located approximately 250 yards south of the proposed relocation site and on the *opposite* side of State Highway 49, a four-lane highway. (Emphasis added.) Although appellant claims that the reason advanced on the opposition's petitions is neither sound nor compelling, he has failed to demonstrate that the proof before the ABC Board on this issue was so nearly undisputed that fair-minded persons could not reach its conclusions. *See Vallaroutto, supra*. Evidence of concern regarding the proximity of the proposed location to the school-bus stop was presented from witnesses, as well as by way of the signed petitions. The credibility and the weight of the evidence are within the ABC Board's discretion. *Id.*

As to the ABC Board's third finding—regarding a local pastor's statement that his congregation and other people in the neighborhood are concerned because of litter on the road, cans and bottles on the church parking lot—appellant urges that it was based on conjecture “without a scintilla of evidence to substantiate it.” He claims that the church's hypothetical that transferring his existing liquor store to a 117-acre tract of land located over a mile from the church might somehow result in a litter problem on church grounds fails to provide any evidence demonstrating either that there is currently a litter problem in the area or how the proposed relocation of his liquor store would negatively impact litter on the church's property. Again, appellant questions the weight to be afforded the evidence presented to the ABC Board on this issue; however, under our limited scope of review, we decline to hold that there is a complete lack of substantial evidence to support the ABC Board's decision.

Appellant contends that the ABC Board's fourth finding—regarding a local school-district superintendent's concern that the increased traffic associated with a liquor store would add to the endangerment of the students of his school district—was also based on speculation without corroborating facts. Appellant introduced a traffic-safety report, conducted by a recognized traffic-accident reconstructionist, that indicated that the specific entrances and exits at the proposed relocation site would not pose a traffic hazard to motorists traveling on State Highway 49 under normal driving conditions. He notes that the opposition could not identify one traffic accident occurring on State Highway 49 as a result of a driver's failure to yield to a school bus. Appellant claims that no rebuttal data was introduced to question the

figures he introduced in the traffic-safety study and urges that the conclusory remarks by the opposition witnesses are “speculative and unconvincing” and do not constitute substantial evidence. *See Fouch, supra; see also Vallaroutto, supra.*

The instant case is similar to *Arkansas Alcoholic Beverage Control Board v. Muncrief*, 308 Ark. 373, 825 S.W.2d 816 (1992), which also involved an application to transfer the location of a retail-liquor-store permit. After hearing testimony in favor of and in opposition to the transfer of Ms. Muncrief’s liquor store, the ABC Board denied her application, concluding that “at the present time there is no greater public convenience and advantage to be served by moving Ms. Muncrief’s store.” *Muncrief*, 308 Ark. at 375, 825 S.W.2d. at 817. The Arkansas Supreme Court reversed the Garland County Circuit Court’s decision to overturn the ABC Board’s denial of the application and upheld the ABC Board’s original decision to deny the transfer of location of Ms. Muncrief’s liquor store. There are numerous factual similarities to the *Muncrief* case, as well as competing testimony from the applicant and opposition—including the make-up of the applicant’s customer base and a traffic-safety study in support of the application to transfer. In *Muncrief*, our supreme court stated that the express concerns of increased traffic and accidents along the stretch of highway on which the new store would be located are legitimate concerns to be considered. *Id.*

Appellant attempts to distinguish the holding in *Muncrief, supra*, regarding the legitimacy of concerns about traffic, based upon subsequent qualifications in *Vallaroutto, supra*. In *Vallaroutto*, the court expressly recognized that speculation as to how a new liquor store could adversely affect traffic problems was not substantial evidence, especially when an expert

report discredits such testimony with factual data. Here, he submits that against his unrefuted report, the conclusory remarks of three opposition witnesses will not sustain a finding that the relocation of appellant's store would create a traffic problem on State Highway 49.

Second, in *Muncrief*, the court based its opinion on a finding that petitioner did not present evidence indicating a transfer of her store would be economically advantageous to the county where the store was located. In contrast, here, appellant claims that he introduced data to show that Greene County was losing approximately \$1.8 million in potential revenue annually. By doing so, he points out that he would be generating taxable revenue, which would inure to the benefit of Greene County. While appellant's projections are admirable, there is no way to accurately predict how economically advantageous the transfer would be to the county without engaging in speculation. We, as the reviewing court, cannot displace the ABC Board's choice between two fairly conflicting views even though we might have made a different choice had the matter been before us de novo.

Appellant also points out that the record in *Muncrief* does not reflect that there were any structural deficiencies to the proprietor's current location. Here, unlike *Muncrief*, it is undisputed that the Paragould Police Department has inspected the building currently housing appellant's store. A determination was made that, because of the state of disrepair, the building was in violation of city ordinance 83-10, and the building was condemned. While this evidence certainly supports the proposition that a transfer of the location would be to appellant's advantage, the question before the ABC Board was whether "public convenience and advantage" would be promoted by granting the transfer.

It is undisputed that, in the instant case, the ABC Board heard testimony from a local legislator, a county official, and an area resident that there is an existing liquor store, The Party Store, in close proximity to the site where appellant seeks to transfer his liquor store, and that the area is already presently being served by The Party Store. There was conflicting testimony of the exact proximity of The Party Store to the proposed location for appellant's store, ranging from a few hundred feet to more than 900 feet.

There was also testimony and documentary evidence presented by numerous witnesses regarding possible traffic hazards should appellant's application to transfer his liquor store be granted. Much of this evidence related to a public-safety concern regarding the school buses that travel along Highway 49, upon which highway appellant's proposed liquor store was to be constructed. Letters from two school districts, a church pastor, and area residents also expressed concerns over the proposed location of appellant's liquor store because of school buses turning around near the proposed site, recent accidents involving Greene County Tech school buses near the proposed location, the dangerous intersection of Highway 49 with County Line Road 237, and because of increased litter adding to the already existing litter created by patrons of the "already existing liquor store a few hundred feet up the highway from the proposed new site."

Courts may take judicial notice of regulations of state agencies that are duly published. *Webb v. Bishop*, 242 Ark. 320, 413 S.W.2d 862 (1967). Arkansas Code Annotated section 3-4-201(b)&(c), and section 1.33(4) of the ABC Regulations provide that the ABC Board is vested with the authority to determine whether "public convenience and advantage" will be

promoted by granting and determining the location of liquor-store permits. “Public convenience and advantage” means that the interest of the general public is to be considered, not merely that of the applicant. Public convenience and advantage should be construed in that sense which connotes suitable and fitting to supply the public needs to the public advantage. *Vallaroutto, supra*. Further, section 1.21 of the ABC Regulations provides that the ABC Board may consider certain factors in determining whether a particular application for a permit would promote the public convenience and advantage or interest.

The ABC Board has much discretionary leeway in determining whether public convenience and advantage will be promoted by issuing retail-liquor permits and the location thereof. *Muncrief, supra*. We hold that appellant failed to produce sufficient evidence to meet his burden to establish that there was any greater public convenience and advantage to be served by moving his liquor store to his proposed location. There were no witnesses that testified that they were unable to purchase any variety of wine in any of the other liquor stores in the area or that the other liquor stores in the area were poorly stocked, as was offered in *Fouch, supra*.

We recognize the significant amount of evidence presented at the hearing both in support of and in opposition to the application to transfer the location of the liquor store. However, as we stated in *ABC Board v. Blevins*, 5 Ark. App. 107, 633 S.W.2d 380 (1982):

Much of the evidence was in conflict and required the Board to weigh and decide which testimony and proof it chose to believe. In considering all the evidence we conclude that the Board had sufficient proof on which to base its decision to grant White a permit. If we were to hold otherwise, we would doubtless be substituting our judgment for that of the Board’s, an exercise in discretion we are clearly not afforded under the rules established in *Gordon v. Cummings, supra* [262 Ark. 737, 561 S.W.2d 285 (1978)]. Thus, even though we may have reached a different decision than that rendered by the Board, it was the Board’s decision to make and not ours.

Blevins, 5 Ark. App. at 108, 633 S.W.2d at 381. Under our standard of review, we hold that the ABC Board had sufficient proof upon which to base its decision to deny the application. Accordingly, we affirm.

Affirmed.

VAUGHT, C.J., and PITTMAN, J., agree.