

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

DOWNTOWN CROTON, INC.,]	
]	CASE NO. 11CVF-11-13665
Appellant]	
]	JUDGE REECE
vs.]	
]	
LIQUOR CONTROL COMMISSION]	
]	
Appellee]	

DECISION AND JUDGMENT ENTRY
AFFIRMING THE ORDER OF THE LIQUOR CONTROL COMMISSION
AND
NOTICE OF FINAL APPEALABLE ORDER

REECE, JUDGE

This is an appeal under R.C. 119.12 from an Order of the Liquor Control Commission (the “Commission”).

I. FACTS

Appellant Downtown Croton, Inc. filed an application to transfer ownership and location of a liquor permit for premises located at 3403 Croton Avenue, Cleveland, Ohio (the “premises”). The City of Cleveland objected to the application and requested a hearing. On June 11, 2010, the Division of Liquor Control (the “Division”) held a hearing. On July 7, 2010, the Superintendent of the Division issued an order denying the application on grounds that include the following:

- (1) The place for which the permit is sought is so located with respect to the neighborhood that substantial interference with public decency, sobriety, peace or good order would result from the issuance of the permit and operation thereunder by the applicant. R.C. 4303.292(A)(2)(c).
- (2) A permit business at this location has been operated in a manner that demonstrates a disregard for the laws, regulations, or local ordinances of the State. The applicant will operate the proposed premises in a manner

that demonstrates a disregard for the laws, regulations, or local ordinances of the State. R.C. 4303.292(A)(1)(b).

Appellant appealed to the Commission, which held a hearing on October 11, 2011. The evidence at the hearing was as follows.

Cleveland City Council Member Phyllis Cleveland testified that she is familiar with the proposed permit premises, as she lives in the community. (T. 9). She stated that the proposed permit premises is in an industrial area, across the street from a Women's Pre-Release Center and Community-Based Correctional Facility. (T. 10-11). She stated that this facility offers treatment and rehabilitation, including substance abuse treatment, and that clients are allowed to leave the facility for purposes such as going to work, attending school, and obtaining treatment. (T. 12-13). She stated that given the purpose of the facility, it would be inappropriate to have a bar directly across the street, as it would pose a temptation for inmates who are fragile and in the early stages of treatment or rehabilitation. (T. 13-14). She stated that the premises is also within a mile of public housing developments. (T. 14). She identified photographs of the area showing gang graffiti, and said there are problems with dumping in the area. (T. 17-18). She stated that she is concerned about the clientele that would be attracted at the premises, as people would not want to go to a restaurant in an industrial area near public housing. (T. 15).

Cleveland Police Detective Darrell Cornell testified that he is assigned to the Vice Unit covering this area. (T. 29-30). He stated that the Vice Unit staff responsible for covering this area has been reduced to a bare minimum. (T. 30). He stated that there is already a permit premises nearby that is "nothing but trouble" and demands already scarce police resources. (T. 31-32).

Tim Perotti is the executive director of Maingate, a non-profit working to revitalize the neighborhood and businesses where the proposed premises is located. (T. 38-39). Mr. Perotti stated that it would be a “sad story” to put a bar across the street from the CBCF, as the residents are challenged with addiction and trying to get sober and rebuild their lives. (T. 41). He stated that Maingate is opposed to the application filed by Appellant because of the location of the premises. (T. 45). He stated that this is a “desolate area” that “is not a family restaurant location in any way, shape, or form.” (T. 48).

The parties stipulated to the admission of testimony of two witnesses from the Division hearing, Cleveland Police Lieutenant Jerome Barrow and Dr. Russell Kaye, a member of the board of trustees of the CBCF. (T. 51-52).

Lieutenant Barrow testified that the Cleveland Police Department strongly objects to a permit at this premises because the location has a reputation as a place for violent activity. (R. 44-45).

Dr. Kaye testified that the CBCF will house 100 patients with a history of alcohol and drug abuse. He stated that the purpose of the facility is to help individuals turn their lives around and overcome their alcohol and drug abuse backgrounds so that they can re-enter society. (R. 46). He stated that it would be counter-productive to have a permit premises so close to the rehabilitation treatment facility. (*Id.*).

On behalf of Appellant, Brenda Chesnik testified that she is seeking a permit to operate a family restaurant. (T. 54-55). She stated that Robert Modic, her friend, is to be the landlord and is remodeling the building. (T. 56). She stated that she lives in Ironton, Ohio, but comes to Cleveland four or five times a month. (T. 61). She stated that she

operates other businesses, including a gentleman's club. (T. 62). She stated that she has not spoken to Maingate or the City Council member about addressing their concerns. (T. 63). She stated that the premises has not opened as a restaurant even though no permit is required for a restaurant. (T. 58).

Robert Modic testified that the property was in terrible condition when he bought it. (T. 69). He identified photographs showing the construction and remodeling of the property, including remodeling of the kitchen and installation of new windows, doors and sidewalks. (T. 71-72). He stated that he put several hundred thousand dollars into the property. (T. 72).

After hearing the evidence, the Commission issued an Order dated October 11, 2011 affirming the decision of the Superintendent. On November 2, 2011, Appellant filed this appeal from the Commission's Order.

II. STANDARD OF REVIEW

This Court must affirm the Order of the Commission if it is supported by reliable, probative and substantial evidence and is in accordance with law. R.C. 119.12; *Univ. of Cincinnati v. Conrad*_(1980), 63 Ohio St.2d 108, 111.

III. THE COURT'S FINDINGS AND CONCLUSIONS

Appellant argues that the Commission's Order is not supported by reliable, probative, and substantial evidence.

R.C. 4303.292(A) provides that the Division may refuse to transfer ownership and location of a permit for any of a list of reasons including the following:

- (1) That the applicant, or any partner, member, officer, director, or manager of the applicant, or, if the applicant is a corporation or limited liability company, any shareholder owning five per cent or more of the applicant's capital stock in the corporation or any member owning five per

cent or more of either the voting interests or membership interests in the limited liability company:

...

(b) Has operated liquor permit businesses in a manner that demonstrates a disregard for the laws, regulations, or local ordinances of this state or any other state;

(2) That the place for which the permit is sought:

...

(c) Is so located with respect to the neighborhood that substantial interference with public decency, sobriety, peace, or good order would result from the issuance, renewal, transfer of location, or transfer of ownership of the permit and operation under it by the applicant.

The Commission's Order denying Appellant's application relies upon the statutory provisions referenced above.

In *Our Place, Inc. v. Liquor Control Comm.* (1992), 63 Ohio St.3d 570, the Ohio Supreme Court affirmed the Commission's rejection of a permit under R.C. 4303.292(A)(2)(c). In that case, the evidence consisted of testimony that a day care center was located next door to the permit premises and two schools were nearby, and that a bar could interfere with operation of the day care center and schools. Neighborhood residents also testified in opposition to the application. The Court concluded that the location of the proposed premises could be a valid basis for denial of the permit. The Court stated that the testimony of the witnesses was reliable, probative and substantial evidence that there could be substantial interference with public decency, sobriety, peace or good order in the neighborhood.

In *SM & AM, Inc. v. Liquor Control Comm.* (2001), Tenth Appellate District, No. 00AP-1298, 2001 Ohio App. LEXIS 2271, the Commission rejected a permit application pursuant to R.C. 4303.292(A)(2)(c). The Court affirmed the Commission's decision, noting that there was a daycare two blocks from the premises, there were churches and

schools nearby, and the area had a high volume of criminal activity. A Cleveland City Councilman testified in opposition to the permit, and neighborhood residents testified that an additional liquor permit would only contribute to the already declining condition of the area. The Court concluded that “Such evidence constitutes specific evidence supporting a finding that the issuance of the permit in question would substantially interfere with public decency, sobriety, peace, or good order” *Id.*, p. 10.

The Court concludes that the evidence before the Commission constitutes specific evidence supporting a finding that transfer of the permit in question would substantially interfere with public decency, sobriety, peace, or good order. Phyllis Cleveland, a City Council Member, Tim Perotti, executive director of Maingate, and Dr. Russell Kaye, a CBCF board member, testified that it would be counter-productive to have a bar directly across the street from a facility for treatment of individuals for drug and alcohol addiction. Maingate, a non-profit responsible for revitalizing the neighborhood, and the Cleveland Police Department are opposed to the application because of the location of the premises. While Appellant asserted that the permit would be for a family restaurant, Ms. Cleveland and Mr. Perotti testified that the premises is in a “desolate” industrial area near the CBCF and public housing projects and is not suited for a family restaurant.

The Court is to “give due deference to the administrative resolution of evidentiary conflicts” because the fact finder had the opportunity to observe the witnesses and weigh their credibility. *Univ. of Cincinnati v. Conrad, supra*, 63 Ohio St.2d at 111. The Court “will not substitute its judgment for the board’s where there is some evidence supporting the board’s order.” *Harris v. Lewis* (1982), 69 Ohio St.2d 577, 578.

As the finder of fact, the Commission was entitled to find credible, and rely upon, the evidence in opposition to the application. The Court is not to substitute its judgment for that of the Commission. Given the specific evidence supporting the objection to transfer of the permit, the Commission was within its discretion in denying Appellant's application pursuant to R.C. 4303.292(A)(2)(c). It is therefore unnecessary to address the additional bases for denial of the application.

For the foregoing reasons, the Court finds that the Order of the Commission is supported by reliable, probative, and substantial evidence and is in accordance with law. The Order of the Commission is AFFIRMED. This is a final, appealable Order. Costs to Appellant.

IT IS SO ORDERED.

Franklin County Court of Common Pleas

Date: 03-21-2012
Case Title: DOWNTOWN CROTON INC -VS- OHIO STATE LIQUOR
CONTROL COMMISSION
Case Number: 11CV013665
Type: DECISION/ENTRY

It Is So Ordered.



/s/ Judge Guy L. Reece, II

Court Disposition

Case Number: 11CV013665

Case Style: DOWNTOWN CROTON INC -VS- OHIO STATE LIQUOR CONTROL
COMMISSION

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes