

[Type text]

**IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION**

CITY OF HUBER HEIGHT, OHIO,	:	
	:	
Appellant,	:	
	:	
v.	:	CASE NO. 12CVF-12-15620
	:	Visiting Judge Travis
	:	
STATE OF OHIO	:	
LIQUOR CONTRO COMMISSION,	:	
	:	
and	:	
	:	
YAK ENTERTAINMENT, LLC.,	:	
Appellees,	:	

DECISION

Rendered this 1st day of April, 2013

Travis, J.

This is an appeal pursuant to Revised Code Section 119.12 from an order of the Ohio Liquor Control Commission which granted the application of permit holder Yak Entertainment, LLC, for renewal of its Class D-5 liquor permit located at 6115 Brandt Pike, Huber Heights, Ohio. The order of the Commission reversed an order of the Department of Commerce, Division of Liquor Control which had denied the renewal application. The appeal has been briefed by the parties and is ripe for determination.

Standard of Review

Section 119.12 provides for review by a common pleas court of an order of an administrative agency.

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable,

Case No. 12CVF-15620

probative and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

The standard has been defined further by the Ohio Supreme Court.

The evidence required by R.C. 119.12 can be defined as follows: (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. *** (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. *** (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

Our Place, Inc., v. Liquor Control Commission, 63 Ohio St. 3d 570, 571 (1992).

Thus, review of the determination of an administrative agency is limited to a review of the entire record on appeal to determine whether there is some reliable, probative and substantial evidence to support the decision of the agency and whether the order of the agency is in accordance with law.

In connection with this standard of review, "an agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest on improper inferences, or are otherwise unsupported." *Ohio Historical Soc. V. State Emp. Relations Bd.*, 66 Ohio St. 3d 466, 471 (1998). Therefore, as long as there is some reliable, probative and substantial evidence to support a lawful order, a reviewing court may not substitute its judgment for that of the administrative body.

If the findings of the commission are supported by some reliable, probative and substantial (albeit disputed) evidence, the courts are not free to set them aside even though the courts could have drawn different inferences.

Case No. 12CVF-15620

T. Marzetti Co. v. Doyle, 37 Ohio App. 3rd 25, 29, (10th District 1987), (emphasis supplied.)

Accord, *S & P Lebos, Inc., d/b/a Le Bos, v. Ohio Liquor Control Commission*, 163 Ohio App. 3d 803; 2005 Ohio 4552, (10th District 2005).

The Ohio Department of Commerce, Division of Liquor Control, is charged with the responsibility to consider and pass upon applications for the issuance and transfer of location and ownership of liquor permits. A Class D permit authorizes sale and consumption of beer, wine and spirituous liquor on the premises of the permit holder. The Among its various duties, the Liquor Control Commission reviews decisions of the Division of Liquor Control pertaining to the issuance, renewal, and transfer of location or ownership of permits for the sale of alcohol.

As relevant to the within appeal, R.C. §4303.292 provides as follows.

- (A) The division of liquor control may refuse to issue, transfer the ownership of, or renew any retail permit issued under this chapter if it finds:
 - (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 thereunder by the applicant.

As the objecting party before the Division of Liquor Control and the Liquor Control Commission, the City of Huber Heights bore the burden to prove the basis statutory basis for refusal to renew the license of Yak Entertainment, LLC as set out in R.C. §4303.292. *City of Cleveland v. Assad*, 2007 Ohio 4672 at ¶15, (10th District) citing *City of Euclid v. Liquor Control Commission*, 1991 Ohio App. LEXIS 3093, (10th District No. 92AP-153). Thus, as applicable herein, Huber Heights was required to prove that

Case No. 12CVF-15620

renewal of the permit would cause a substantial interference with public decency, sobriety and good order. §4303.292(A)(2)(c).

The record before the court consists of the transcript of proceedings before the commission together with exhibits. Several persons who lived in the area testified that noise emanating from the night club was their primary issue. While some voiced concern about personal safety, there is no testimony or evidence that any patrons of the night club came in contact with, accosted or committed any criminal acts against the property owners or their homes. The night club is located in a shopping center which is zoned for commercial properties. There is no indication that the permit holder's business is not in compliance with applicable zoning laws.

Several neighbors testified before the liquor commission. The night club is located approximately 1,000 feet away. Huber Heights City Council member Judy Blankenship lives in the nearby neighborhood. Ms. Blankenship had mostly noise concerns about the night club. Mayor Ron Fisher testified that the night club generated noise complaints and drained city resources in the form of police calls to the premises. Rosemary Atalla was concerned about safety, fast cars and said she had heard gunfire. Patty Howar voiced her concerns about noise and violence while Veronica Sexton felt the club generated excessive noise.

Brandon Sucher, a liaison officer with the Huber Heights police department, compiled a list of calls made to the department for service at the night club. The Heat night club is one of two liquor permit premises in a shopping center. Sucher testified that the calls for service involved the area of the parking lot in front of the Heat night club. Several calls were for fights in the parking lot and one occurred when a person was shot

Case No. 12CVF-15620

in the parking lot. Sucher did not know if any of the incidents resulted in convictions. Some of the calls were listed as “unfounded”, including claims made that the caller heard shots fired. Sucher agreed that there had been no citations of the permit holder for violations of the liquor laws. There is no evidence of record that the permit holder has ever been cited for any violation of the liquor control laws of Ohio.

Cory Siegrist, a police officer with Huber Heights testified that police were called to the Heat night club more than other liquor establishments. Siegrist recounted two incidents involving fights that broke out in the parking lot. In one incident, a gun fell out of someone’s pocket.

Conclusion

The standard of review of evidence in an appeal pursuant to R.C. 119.12 was set forth above. It is not for this court to substitute its judgment for that of the Liquor Control Commission as to the advisability of renewing the permit in question even though the court might have drawn different inferences from the evidence. *T. Marzetti Co. v. Doyle*, supra, 37 Ohio App. 3rd at 29, (10th District 1987). This court is limited to the determination of whether the evidence is sufficient to support the decision of the agency.

After a full review of the record, the court finds that there is some reliable, probative and substantial evidence to support the order of the commission and that the order is in accordance with law. Accordingly, the order of the Liquor Control Commission is affirmed. Costs are assessed against appellant Huber Heights.

Pursuant to Local Rule 25, the court has prepared and filed a journal entry of final judgment in this case.

Case No. 12CVF-15620

SO ORDERED.

Alan C. Travis, Visiting Judge

Appearances:

L. Michael Bly, Esq.
2700 Kettering Tower
Dayton, Ohio 45423
Counsel for Appellant,
City of Huber Heights, Ohio

Kurt O. Gearhiser, Esq.
520 E. Rich Street
Columbus, Ohio 43215
Counsel for Appellee,
Yak Entertainment, LLC.

Andromeda McGregor, Esq.
Assistant Attorney General
150 E. Gay Street, 23rd Floor
Columbus, Ohio 43215
Counsel for Appellee,
Liquor Control Commission

Franklin County Court of Common Pleas

Date: 04-03-2013
Case Title: HUBER HEIGHTS CITY OHIO -VS- OHIO STATE LIQUOR
CONTROL COMMISSION ET AL
Case Number: 12CV015620
Type: DECISION

It Is So Ordered.

A handwritten signature in cursive, "Alan C. Travis", is written over a blue circular seal. The seal contains the text "FRANKLIN COUNTY OHIO" and "COMMON PLEAS COURT" around the perimeter, with "ALL THINGS ARE" at the bottom. The signature is written in black ink.

/s/ Visiting Judge Alan C. Travis