

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

Echelon on the Water, Inc., :
Appellant, : CASE NO. 12CVF04-4252
-vs- : **JUDGE DAVID W. FAIS**
Ohio Liquor Control Commission, :
Appellee. :

**DECISION AND ENTRY AFFIRMING THE ORDER OF THE LIQUOR
CONTROL COMMISSION**

FAIS, JUDGE

I. INTRODUCTION

This matter comes before the Court on appeal by the Appellant, Echelon on Water, Inc., (hereinafter “Appellant”), of an Order by the Ohio State Liquor Control Commission (hereinafter “Commission”), issued June 17, 2011. Appellant seeks review pursuant to R.C. 119.12 of the denial of transfer of ownership and location of Class D-5 and D-6 liquor permits.

II. FACTUAL AND PROCEDURAL BACKGROUND

Appellant purchased the business and assets of SNM Entertainment, Inc. That company formerly operated a bar call Mirage located at 2000 Sycamore Street in Cleveland, by way of the aforementioned liquor permits. Ultimately, Mirage was closed down after the City objected, and the site gave way to the Greater Cleveland Aquarium.

The present appeal concerns Appellant’s application for transfer of the associated liquor license. The proposed location is nearby the previous in the Flats of Cleveland and consists of a large hall equipped to accommodate about seven hundred and fifty (750) people. In response to the submission of Appellant’s application, the City of Cleveland (hereinafter “the City”) objected

to the transfer of Appellant's D-5 and D-6 permit. The basis for objection set forth by the City was the large number of police runs, as well as the general disturbance the prior premises had on the surrounding neighborhood. Additionally, it was represented that the area has recently undergone a renaissance with family-focused development, and because the new iteration proposed by Appellant offers comparable management and ownership as the doomed bar, a substantial interference with the surrounding neighborhood can be anticipated.

Appellant was initially approved a liquor permit transfer based upon its application and the Division's Order was subsequently appealed by the City, thereby requiring a hearing. On March 13, 2012, the Commission held an administrative hearing addressing the merits of the appeal. Shortly thereafter, on March 14, 2012, the Commission issued an Order stating that after consideration of the evidence, the objection by the City was well-taken. Consequently, the Commission reversed the previous order of the Superintendent of the Division of Liquor Control and ordered that Appellant's liquor permit transfer not be issued.¹ Said Order is the subject of this appeal, which was timely submitted by Appellant.

III. STANDARD OF REVIEW

Pursuant to R.C. 119.12, a reviewing trial court must affirm the order of the Board if it is supported by reliable, probative and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 111; *Henry's Cafe, Inc. v. Board of Liquor Control* (1959), 170 Ohio St. 233; *Insight Enterprises, Inc. v. Liquor Control Comm.* (1993), 87 Ohio App.3d 692.

The quality of the required evidence was defined by the Ohio Supreme Court in *Our Place*

¹ The Commission did not state the grounds upon which it relied to deny Appellant's permit transfer application.

v. Liquor Control Comm. (1992), 63 Ohio St. 3d 570 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. *Id.* at 571.

The common pleas court’s review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but consists of “a hybrid review in which the court must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence and the weight thereof.” *Marciano v. Liquor Control Comm.* (Apr. 22, 2003), Franklin App. No. 02AP-943, unreported, citing *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207. In undertaking such a review, the court must give due deference to the administrative agency’s resolution of evidentiary conflicts, but the findings of the agency are not conclusive. *Id.* Once a violation is established, the penalty, if legal, is entirely within the province of the Commission. Even if the reviewing trial court were inclined to be more lenient, it is powerless to do so given the long-settled rule of *Henry’s Cafe v. Board of Liquor Control* (1959), 170 Ohio St. 233, found at paragraph three of the syllabus:

On such appeal, the Court of Common Pleas has no authority to modify a penalty that the agency was authorized to and did impose, on the ground that the agency abused its discretion.

See also *Hale v. Ohio State Veterinary Medical Board* (1988), 47 Ohio App. 3d 167; *Evans v. Board of Liquor Control* (1960), 112 Ohio App. 264; *Ganson v. Board of Liquor Control* (1953), 70 Ohio L. Abs. 242.

IV. ANALYSIS AND FINDINGS OF THE COURT

Appellant claims that the order of the Commission is not supported by reliable, probative and substantial evidence, as the City did not present any facts to support its objection. It is asserted that the City only introduced fear and speculation, without specifying how opening a business in a currently vacant building is not consistent with the goal of improving and revitalizing the Flats in Cleveland. According to Appellant, there is no evidence how operation of the bar would adversely affect the nearby Aquarium or surrounding neighborhood. Additionally, it is argued that a number of the proposed area projects discussed at the hearing are merely speculative. Appellant insists that the so-called opposition and calls received by the City or Aquarium never were specific to Appellant or the proposed permit premises, general to the area. With respect to testimony as to previous homicides or fights emanating from the former Mirage, Appellant states that no police reports were submitted and firsthand knowledge of these incidents is lacking. Finally, as to the principal of Appellant's misdemeanor conviction for selling liquor after hours, it is suggested that this is not sufficient for the Commission to deny a potential permit holder.

Appellee maintains that the proposed location in the flats of Cleveland has undergone a rebuilding from its recent troubled past. It is Appellee's contention that the applicant's previous liquor experience consists of managing the bar Mirage that lost its liquor license and during which, he was convicted of selling after hours at that location. According to Appellee, the former owner of the Mirage currently owns the subject real estate in this application and paid for renovations to the property. It is emphasized that the hearing evidence shows that the proposed location sits in a developing mixed-use neighborhood and the impact the proposed nightclub

would be a negative one. Appellee asks that the Court focus on the testimony of the three hearing witnesses that oppose issuance of permit transfer, as they illustrate the hard work that has been accomplished to improve the area, the concerns regarding Appellant's proposed operational structure, and the applicant's unfitness to operate a liquor permit establishment.

R.C. 4303.292 contains the exclusive grounds for refusal to issue, transfer or renew a liquor permit. The pertinent section in this action is contained in R.C. 4303.292(A)(2)(c) which provides as follows:

- (A) The division of liquor control may refuse to [renew any retail permit] 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 [renewal] of the permit and operation thereunder by the applicant.

Although not specified, the Commission may have also considered R.C. 4303.292(A)(1)(a), which states the following in relevant part:

- (A) The division of liquor control may refuse to issue, transfer the ownership of, or renew, and shall refuse to transfer the location of, any retail permit issued under this chapter if it finds either of 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:
 - (a) Has been convicted at any time of a crime that relates to fitness to operate a liquor establishment;

The focus of R.C. 4303.292(A)(2)(c) is the location of the liquor permit business, not the person who operates the business. *Maggiore v. Liquor Control Comm.* (Mar. 29, 1996), Franklin

App. No. 95APE06-713, unreported. Moreover, the Supreme Court of Ohio has indicated that under the statute, the location of a permit premises can be the only factor considered in deciding not to issue or renew a permit. *Our Place v. Liquor Control Comm.* (1992), 63 Ohio St. 3d 570, 573.

Previously, several appellate courts established that a necessary causal link or direct connection must exist between the permit holder and the complained-of environmental problems. See *Leo G. Keffalas, Inc. v. Liquor Control Comm.* (1991), 74 Ohio App.3d 650; *Quaranta v. Liquor Control Comm.* (1983), 17 Ohio App.3d 156. However, the fact that the permit holder is not directly responsible for resulting environmental problems is not the controlling issue in the causal inquiry. *Kamm's Korner Tavern v. Liquor Control Comm'n*, 2001 Ohio App. LEXIS 2307 (Ohio Ct. App., Franklin County May 24, 2001). When the inaction of the permit owner is a contributing factor to the complained-of activity, it alone may form a basis for non-renewal. *TBBTR, Inc. v. Liquor Control Comm.* (Oct. 19, 1993), Franklin App. No. 93AP-158.

As stated by the Tenth District Court of Appeals, “the right of [an] appellant to continue to sell intoxicating liquors must yield to the more basic right of the public, acting through [the division of] liquor control to eliminate a condition which prejudices public decency, sobriety and good order.” *Buckeye Bar v. Liquor Control Comm.* (1972), 32 Ohio App. 2d 89, 94. In recognizing this basic right, Ohio courts have not hesitated to affirm a Commission’s decision denying a liquor permit based on environmental factors even without any fault of the permit holder. *Nasser v. Ohio Liquor Control Comm.*, Franklin App. No. 04AP-1329, 2005 Ohio 4638; *Elbireh Empire, Inc. v. Ohio Liquor Control Comm.*, Franklin App. No. 02AP-1124, 2003 Ohio

2484; *Nijmeh, Inc. v. Ohio Liquor Control Comm.*, Franklin App. No. 03AP-78, 2003 Ohio 4761.

After a complete review of the record, this Court determines that competent and credible evidence exists to support the conclusion that the Commission's Order is supported by reliable, probative and substantial evidence and is in accordance with law.

During the hearing before the Commission, the City presented several witnesses that provided testimony as to the relationship between Appellant's prospective sale of alcohol and the high degree of traffic, crime and general disturbance associated with the area immediately surrounding Appellant's proposed venue.

The first witness called was Joe Cimperman, Cleveland City Councilman for Ward 3, which includes the Flats. Councilman Cimperman attested to being very aware of the history of the nightclub Mirage that caused the area "a lot of heartache and headache over the years." (Tr. 7). This was summarized as multiple incidents of people getting shot, crowd control problems, and traffic that blocked city streets. (Tr. 9). The witness represented that on any given night, the Second District had to take police officers from catching criminals and post them throughout the area near the Mirage. (Tr. 12). When confronted with these ongoing problems, Councilman Cimperman recalled that the previous ownership and management refused to hire off-duty officers, work with the City or address the ingress/egress situation. (Tr. 13). He noted that both Mr. Bica and Mr. Salivaras were present at the hearing. According to this witness, if the Commission allowed another liquor license to this group, "we would be reading a headline of someone getting shot." (Tr. 14). This would be a considerable setback in his opinion, as the Flats have undergone "a real renaissance", with considerable support from the City. (Tr. 12).

Councilman Cimperman highlighted the immediate success of the Aquarium, revitalized condominiums nearby, a vibrant bike trail and a planned Children's Museum. (Tr. 12). On cross-examination, the witness admitted that the Flats remains a multi-use district, and although the number of bars has declined, several remain including an adult entertainment club. (Tr. 18). When asked about homicides, Councilman Cimperman stated that he was aware of at least one shooting that occurred inside the Mirage, along with a number of others that police believed emanated from that building. (Tr. 24). After being asked if he had firsthand knowledge of these shootings, the witness represented that he relied upon Police Commanders: Morrow, Cuevas, and Boeppler. (Tr. 25).

The second witness called by the City at the hearing was Tammy Brown. Ms. Brown represented that she is the General Manager of the Greater Cleveland Aquarium, which opened in the Flats on the same side of the river after the Mirage was shut down. According to the witness, her business is very family-focused and she specifically came to the hearing to formally object to transfer of the subject liquor permit. (Tr. 26). This was based in part on receiving phone calls from concerned patrons. (Tr. 27). On cross-examination, Ms. Brown indicated that the traditional hours for the Aquarium are ten to six, but they also offer evening programming, along with scheduled sleepovers for Girl Scout and Boy Scout troops. (Tr. 28). The witness admitted that there are other nightclubs in the vicinity. Moreover, the calls she fielded were of a more general variety consistent with the makeover of the area, as it is not widely known that Appellant is looking to open again. (Tr. 30).

The City's final witness was John Graves, a Detective with the City of Cleveland Police Department (hereinafter "Detective Graves"). Detective Graves explained that his duties include

working in the Vice Unit of the Second District. (Tr. 34). He has been on the force since 1995, and is familiar with the bar know as Mirage that was previously in his district. Detective Graves testified that the police activity associated with the former Mirage was uncharacteristically high for a single location in the area. The witness authenticated a certified copy of a criminal conviction from July of 2007 for after-hours sales for the Applicant, Mr. Bica, along with the corresponding police report. (Tr. 36-37). Detective Graves corroborated that there was a shooting inside the Mirage and four homicides in front of that establishment. (Tr. 39). He provided a similar account as to the fights, loitering and traffic associated with the former permit premises, as well as the negative effect on the residents in the area. (Tr. 39-41). With respect to the Mirage, the detective added that security and management were ill equipped to respond to the developing problems and “really didn’t cooperate too much with us.” *Id.* It was Detective Graves’ opinion that the location is a burden on the vice unit and the CSU unit, and the department would prefer that the permit not be renewed. (Tr. 49). On cross-examination, the witness denied having copies of the police reports from the homicides, which occurred more than five years ago. (Tr. 45). It was further conceded that Mr. Bica himself was generally cooperative with responding police officers during these disturbances (Tr. 48).

In support of the transfer application, Ioan Bica testified that he is the purchaser and permit transfer applicant. (Tr. 53-56). It was his contention that the former principal of the Mirage, Dean Salivaras, will be passive in this proposed enterprise and “is just going to be doing the building.” (Tr. 53). According to Mr. Bica, the business needs a liquor license to be successful. In addition, the witness claimed that the environmental or social problems that surrounding Mirage will be mitigated, as the new venture will attract an older crowd and

different music format. (Tr. 58-60). On cross-examination, Mr. Bica admitted that the target customer at the Mirage was twenty-five and over, and the new nightclub would be the same. (Tr. 60). As to music, he explained that it wouldn't be all hip-hop, but a mixture of music and clientele. *Id.* No additional witnesses were called at the hearing.

Upon review, this Court concludes that the evidence before the Commission supports a finding that renewal of the permit in question would substantially interfere with public decency, sobriety, peace, or good order of the neighborhood surrounding the proposed permit premises. As an additional basis, the Commission may also have been persuaded by the fitness of the applicant to operate a liquor establishment. In performing its role, the Commission can rightfully rely upon a combination of these subsections setting forth grounds for refusal of permit issuance.

A veteran member of the City of Cleveland's law enforcement testified as to the numerous calls and incident reports for the former permit premises, which involved fights, murders, large numbers of cruising/loitering. Moreover, there was substantial testimony about the detrimental impact of the bar on the neighborhood and the surrounding community. As stated in Appellee's brief, this application is more analogous to a new permit than renewal, with the passage of over five years. Accordingly, the Commission is inherently forced to speculate to certain degree, unlike in the context of a permit renewal. See *SM & AM, Inc. v. Ohio Liquor Control Comm'n*, 2001 Ohio App. LEXIS 2271 (Ohio Ct. App., Franklin County May 22, 2001). In doing so, it appears to have relied upon the fact that Appellant's management/ownership team is not an unknown risk, but rather, the same combination that had a dubious track record that led to the demise of the Mirage establishment. Such evidence is not of the general, speculative type that would be uniformly applicable as an argument against most permit applications. See *Serv. Station Holdings v. State*

Liquor Control Comm'n, 1997 Ohio App. LEXIS 588 (Ohio Ct. App., Franklin County Feb. 20, 1997); *Wells v. Ohio Liquor Control Comm'n*, 2011-Ohio-2875 (Ohio Ct. App., Franklin County June 14, 2011). It is specific testimony of the current situation, past accidents at the same location, and the significant interference with the public order that has already occurred and is reasonably likely to be exacerbated by the granting of the requested permit transfer.

Given the circumstances, all attesting witnesses must be expected to take the facts surrounding Appellant's last management venture and make reasonable inferences as to possible repetition at the new nightclub venture. Under Appellant's proposed standard, the Commission could not deny permit transfer without hard data regarding resulting crimes, traffic, loitering and deleterious effect on the neighborhood. Just as the Commission is entitled to deference in making credibility determinations, the attesting police officer and ward councilman should be given heightened importance in assessing such an adverse impact, after considering a variety of factors and input from the community. *Aldi, Inc. v. Ohio Liquor Control Comm'n*, 2006-Ohio-1650, at ¶¶13-14 (Ohio Ct. App., Franklin County Mar. 31, 2006). In further support of their objectivity, these witnesses conceded that Applicant Bica was generally approachable and cooperative as the manager of the Mirage. Their testimony focused on the substantial interference associated with the proposed location, rather than expressing an animus directed at the character of Mr. Bica.

While the controlling evidence should not be based on mere hunches or utter speculation, the record in this instance contains a sufficient basis to find the City's objection meritorious; particularly if the Commission found Appellant's sole witness less credible than those called by the City. It should be noted that the testimony related to the shooting inside the Mirage, the three other murders in the surrounding area, the cruising youths loitering in the area, and traffic

problems is uncontroverted in the record. When balancing Appellant's proposed change in music format (from hip hop to mixed), increased security (if the budget allows), age restrictions (the same as the Mirage), and operating hours (comparable to the Mirage), the Commission could reasonably find that this constitutes too great a risk. As the finder of fact, the Commission was entitled to believe the testimony in opposition to renewal of the permit that the problems associated with the former bar would likely resurface or that security and traffic measures would be inadequate to mitigate these legitimate concerns, thereby straining law enforcement. Finally, an additional factor that could influence the likelihood of repetition of these adverse conditions is the fact that the very same two individuals are involved in ownership and management of the new ventures, notwithstanding their negotiated payment plan.² Taken as a whole, there was competent and credible evidence for the Commission to rely in denying the application for transfer.

Even if this Court might have reached a different conclusion regarding Appellant's application, the Court is not to substitute its judgment for that of the Commission. Given the specific evidence supporting the City's objection, the Commission was within its discretion in denying Appellant's application for permit transfer.

Based on the foregoing, this Court finds that that the Order of the Commission is supported by reliable, probative and substantial evidence and is in accordance with law. Accordingly, the Court hereby **AFFIRMS** the Order of the Commission.

² It is unclear from the hearing evidence whether Mr. Salivaras maintains a security interest in the property and business assets.

Rule 58(B) of the Ohio Rules of Civil Procedure provides the following:

(B) Notice of filing. When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment on the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).

The Court finds that there is no just reason for delay. This is a final appealable order.

The Clerk is instructed to serve the parties in accordance with Civ. R. 58(B) as set forth above.

COPIES TO:

Kevin J. Brennan, Esq. & Terry Gilbert, Esq., Counsel for Appellant
Paul Kulwinski, Esq., Counsel for Appellee

Franklin County Court of Common Pleas

Date: 10-30-2013

Case Title: ECHELON ON WATER INC -VS- OHIO STATE LIQUOR
CONTROL COMMISSION

Case Number: 12CV004252

Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in black ink, appearing to read "D. W. Fais", is written over a blue circular seal. The seal contains the text "COMMON PLEAS COURT" at the top, "FRANKLIN COUNTY, OHIO" around the perimeter, and "ALL THINGS ARE POSSIBLE" at the bottom.

/s/ Judge David W. Fais

Court Disposition

Case Number: 12CV004252

Case Style: ECHELON ON WATER INC -VS- OHIO STATE LIQUOR
CONTROL COMMISSION

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes