COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

City of Cleveland,	:	
Appellant,	:	CASE NO. 14CVF06-6791
-vs-	:	**JUDGE FRENCH**
Fuad, LLC,	:	
Appellee.	:	

DECISION AND ENTRY AFFIRMING THE ORDER OF THE LIQUOR CONTROL COMMISSION

FRENCH, JUDGE

I. INTRODUCTION

This matter comes before the Court on appeal by the City of Cleveland (hereinafter "City" or "Appellant"), of an Order by the Ohio State Liquor Control Commission (hereinafter "Commission" or "Appellee"). Appellant seeks review of the issuance of Class C-1 liquor permit to Applicant Fuad, LLC, dba Miles Mini Mart (hereinafter "Applicant").

The instant action has been brought by the City by appeal pursuant to R.C. 119.12. The City objected to issuance of the new permit at Application's location. The Division of Liquor Control (hereinafter "Division") granted the permit over the City's objection, and after holding a hearing. Upon conducting a second hearing on June 4, 2014, the Commission affirmed the Division and issued the permit by its Order, mailed June 13, 2014.

On June 30, 2014, the City timely perfected this appeal from the Commission's Order.

II. FACTUAL AND PROCEDURAL BACKGROUND

Applicant Fuad, LLC acquired and began operating the permit premises, located at 11334 Miles Avenue in Cleveland, during May of 2012. The present appeal concerns an application for a new C-1 liquor permit, which authorizes beer only carry-out sales.

Upon filing the new permit application with the Division, the City objected after being notified, pursuant to the mechanism set forth in R.C. 4303.26. The primary basis for objection was the general assertion that operation of liquor sales will substantially interfere with the neighborhood and surrounding facilities. A Hearing Officer for the Division held a hearing, considered evidence and recommended issuance of the permit. After a June 4, 2014 hearing where further evidence was introduced, the Commission equally determined that the City failed to present sufficient evidence to deny the issuance of the C-1 permit, thereby affirming the decision of the Division. *Order*, dated June 13, 2014.

Said Order is the subject of this appeal, which was submitted by Appellant. The record has been filed and arguments have been timely submitted. For the reasons identified below, the Order from the Commission must be affirmed.

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*

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 agency. 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, and is not in accordance with law. It is asserted by the City that good cause exists for the Commission to deny the liquor permit. Reflecting on the two witnesses called by the City at the administrative hearing, Appellant argues that the testimonial accounts more than meet the standard of proof that the issuance of a permit at the premises substantially interferes with public decency, sobriety, peace, or good order of the neighborhood. The City maintains that there is a newly-built school and senior housing complex nearby, as well as a recreation center two doors down from the subject premises.

According to the City, there are at least three C permits within walking distance of the Applicant's location, along with three additional D permits. It is argued that there is simply no need for another carry-out permit, as the area is currently served with beer and wine permits. The City insists that the surrounding neighborhood is in the process of undergoing extensive upgrades and capital improvements over the next few years, and adding a carry-out permit will not support the overall development plan.

In response, Appellee insists that the City's evidence relies on the past, not the present, and requires the Commission to speculate about the future. According to Appellee, the witnesses called by the City failed to provide any concrete information as to how the liquor permit would burden the neighborhood. This testimony was characterized as being based on mere generalizations, as well as providing little material evidence that the current ownership is straining police resources. It is Appellant's contention that in spite of the City's suggestion that many businesses or neighbors would be adversely affected, no representatives from those entities

exercised their right to object. In closing, Appellee submits that if the City's vague concerns should pan out, it is fully able to invoke the statutory right to object to annual permit renewal, by offering more specific evidence in support.

While the Applicant was represented by counsel at the administrative level and cross-examined the City's witnesses at the June 4, 2014 hearing, no appearances have been made on behalf of Fuad, LLC in this case, and a brief has not been submitted on its behalf.

It is from these assignments of error and arguments that the Court reviews the decision issued by the Commission.

The Court is initially mindful that granting or denying an application for a new liquor permit will always involve some degree of speculation as to fitness to conduct the permit operations in a lawful manner. The legislature has specifically granted the Department of Public Safety through the liquor division, the right and the obligation to evaluate fitness for a permit. The legislature has likewise provided that criminal activity should be reviewed for its relationship to fitness. However, there must be more than general or speculative evidence for denial of a permit. *Serv. Station Holdings v. Liquor Control Comm'n*, 1996 Ohio App. LEXIS 2758 (Ohio Ct. App., Franklin County June 27, 1996).

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:

> The division of liquor control may refuse to [issue 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

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> would result from the [issuance] of the permit and operation under it by the applicant.

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. Ohio Liquor Control Comm'n*, 1996 Ohio App. LEXIS 1343 (Ohio Ct. App., Franklin County Mar. 29, 1996). There are additional code sections that focus on the fitness and character of a particular applicant to operate a liquor establishment, but no party has raised issues of that nature in this appeal. See R.C. 4303.292(A)(1).

In *Downtown Croton, Inc. v. Liquor Control Comm'n*, 2012-Ohio-6203 (Ohio Ct. App., Franklin County Dec. 28, 2012), the Court held that "the express terms of R.C. 4303.292(A)(2)(c) require a showing that 'a substantial interference with public decency, sobriety, peace or good order *would* result from the issuance of a permit,' meaning that 'in making the determination, the trier-of-fact must conclude that such an interference would likely result.'" *Id.* at ¶15. The Court of Appeals added that "general, speculative evidence is insufficient to establish 'substantial interference' with public decency, sobriety, peace or good order." *Id.*, ¶16.

Similarly, in *City of Cleveland v. Fast & Friendly, Inc.*, 2008-Ohio-2293 (Ohio Ct. App., Franklin County May 6, 2008), the Court held that the evidence was insufficient to show substantial interference with public decency, sobriety, peace, or good order under R.C. 4303.292(A)(2)(c) where evidence of any current or future problems at the facility was minimal and largely speculative. *Id.* at ¶12

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

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The first witness called was Zachary Reed, Cleveland City Councilman for Ward 2, which includes the permit premises. Councilman Reed described the area as somewhat distressed as a result of the housing crisis. (Tr. 8). It was summarized as "middle-class homeownership" and "a combination of residential and commercial." (Tr. 9). When asked about the street that the permit premises is location, Councilman Reed attested that it has been high crime for quite some time. (Tr. 13). In additional to general loitering problems, the witness recalled when going into the particular property about three years prior under former ownership, he was able to observe they had an unusual amount of "Baggies" in stock and for sale.

It was admitted by Councilman Reed that he has never met Mr. Farraj, the owner Applicant that has been operating the store since May of 2013. (Tr. 13). Nevertheless, he authenticated photographs that were stated to depict high grass, disrepaired boards and improper trash/refuse storage. (Tr. 19-21). The witness confirmed that based on a recent lottery, a surveillance camera is to be installed on the corner, which should deter crime and assist police monitoring. (Tr. 25-26). While it doesn't pertain to the permit premises, Councilman Reed offered that some time ago a person was shot and killed at a separate property across the street. (Tr. 27). In drawing on these accounts, the witness concluded by testifying "[t]he specifics of the objection is what I believe is a business owner and a business that clearly is allowing the illegal activity to go on on this particular street at this particular corner" (sic), and that it "is a haven for illegal activity." (Tr. 27-29). Councilman Reed did not deny that representatives on behalf of the nearby school, church, library, playground and hospital chose not to object to permit issuance. (Tr. 32).

The second witness called by the City at the hearing was Detective Luther Roddy. According to the witness, he has been a police officer for 17 years and is assigned to the Fourth District, which is situated in the Southeast side of Cleveland. (Tr. 49-50). In working with the vice unit, Detective Roddy attested to be familiar with the area and permit premises. While acknowledging numerous drug arrests in the past, the witness provided: "[w]e have made numerous drug arrest on that corner. **It's not as many now, but it used to be quite a few."** (Emphasis added). (Tr. 51). Like the previous witness, Detective Roddy denied knowing the people presently running the store or the Applicant. (Tr. 57).

In harmonizing this testimony with the aforementioned authority, the Court finds as a preliminary matter that the evidence relied upon by the City is very general and speculative in nature, and of the kind traditionally insufficient to establish substantial interference with public decency, sobriety, peace or good order. The record contains only anecdotal references to past crimes that appeared to occur during times of prior ownership. More importantly, the witness testimony signifies that crime at the adjacent intersection is lessoning, along with even better prospects for the future via implementation of camera monitoring. If Appellant sought to rebut these inferences adduced from the direct witness testimony from their own witnesses, at the very least they should have introduced police reports, statistics or firsthand testimony as a means for contradiction.

In this context, 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*, *supra*. In doing so, it appears that the Commission based their analysis on the fact that this area is undergoing improvement under current development plans, and much of the past difficulties have been

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mitigated. Despite opposition from Councilman Reed and Detective Roddy, their accounts were of the more general, speculative type that would be uniformly applicable as an argument against most permit applications in urban settings. 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 testimony specific to the current situation, as well as reliable indicators showing that existing problems are likely to be exacerbated by the granting of the requested permit transfer, that should be the focus of the Commission's review. Under these circumstances, decreasing crime, installation of cameras and lack of opposition from surrounding businesses taken together falls short of establishing a negative assessment of new ownership or the location of the permit premises.

Under Appellant's proposed standard, the Commission could routinely deny permits just be hearing general testimony that liquor sales are not harmonious with any laudable future vision for a neighborhood, along with the representation that crime used to be a serious problem at the location. Just as the Commission is entitled to deference in making credibility determinations, they are further expected to rely upon their expertise in considering a variety of factors and input from the community before granting liquor permits. *Aldi, Inc. v. Ohio Liquor Control Comm'n*, 2006-Ohio-1650, at ¶¶13-14 (Ohio Ct. App., Franklin County Mar. 31, 2006). Here, no actual businesses or witnesses came forward to oppose issuance, as is routinely encountered in this setting.

The controlling evidence before the Commission should not be based on mere hunches or utter speculation, and in this respect, it is quite clear from the record that the Commission found the recommendations from the City's hearing witnesses to be unpersuasive. Taken as a whole,

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there was competent and credible evidence for the Commission to rely upon in reaching the conclusion to approve the permit application.

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

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.

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:
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Paul Kulwinski, Esq., Counsel for Appellee Ohio Liquor Control Commission
Fuad, LLC, Appellee Applicant

Franklin County Court of Common Pleas

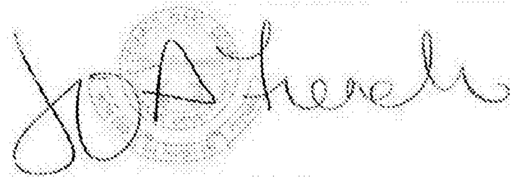
Date: 04-27-2015

Case Title: CLEVELAND CITY -VS- FUAD LLC ET AL

Case Number: 14CV006791

Type: DECISION/ENTRY

It Is So Ordered.



/s/ Judge Jenifer A. French

Court Disposition

Case Number: 14CV006791

Case Style: CLEVELAND CITY -VS- FUAD LLC ET AL

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes