

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

3620 GERMANTOWN PIKE, INC., :
Appellant, : CASE NO. 12-CV-01-1276
vs. : JUDGE CHARLES A. SCHNEIDER
LIQUOR CONTROL COMMISSION, :
Appellee. :

DECISION AND ENTRY

SCHNEIDER, J.

This case involves the R. C. 119.12 administrative appeal filed by Appellant 3620 Germantown Pike, Inc., from an Order issued January 11, 2012 by the Ohio Liquor Control Commission (“Commission”). The January 11, 2012 Order affirmed the November 1, 2012 Order of the Superintendent of the Ohio Division of Liquor Control (“Division”). The Commission rejected the appellant’s application for a new Class C-1 and C-2 liquor permit. A C-1 liquor permit allows the retail establishment to sell beer. A C-2 liquor permit allows for the sale of wine and mixed beverages. Both the C-1 and C-2 liquor permits are for carryout sales only.

The record certified by the Commission reflects the following:

The appellant, 3620 Germantown Pike, Inc. dba G & G Market, is a small grocery store located in Dayton Ohio. The appellant applied for new Class C-1 and C-2 liquor permits which allows for the carry-out sale of beer and wine. The City of Dayton objected to appellant’s new application. See R.C. 4303.26(A). The Division, in an order issued November 1, 2010, sustained the City of Dayton’s objection. On January 10, 2012, the Commission held an evidentiary hearing and

subsequently issued an order affirming the Division's Order. See January 11, 2012 Order; see R.C. 4303.292(A)(2)(c) and O.A.C. 4301:1-1-12(B).

STANDARD OF REVIEW

This Court must affirm the order of the Commission if the order is supported by reliable, probative and substantial evidence and is in accordance with law. R.C. 119.12; *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980). That quality of proof was defined by the Ohio Supreme Court in *Our Place v. Liquor Control Comm.*, 63 Ohio St.3d 570 (1992) 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.
- (2) "Substantial" evidence is evidence with some weight; it must have importance and value.

Appellant asserts the following on appeal:

The Order Of The Liquor Control Commission Is Not Supported By Reliable, Probative And Substantial Evidence And Is Not In Accordance With Law.

- 1) The City Of Dayton, the Objecting Party, And The Division of Liquor Control Failed To Submit Evidence Establishing That The Issuance Of A Beer And Wine Permit To G & G Market Would Substantially Interfere with The Community.

LAW AND ANALYSIS

There is reliable, probative and substantial evidence contained in the record which substantiates that G & G Market is located in an economically depressed area where drug activity occurs, where people consume alcohol from open containers while loitering nearby, and where there are nearby facilities dedicated towards assisting people with drug and alcohol abuse issues. Tr. 11-12, 14.

The testimony of Detective Michelle Moser, a 28-year veteran of the Dayton Police Department, demonstrated that she oversees the data collection and investigations of new and renewal liquor permits across the city. She testified that the area is a “high-crime area.” Tr. 11; see Exhibit E; R. 53-75 (Police Reports and Calls for Service). Detective Moser, who also works in the drug unit, noted that the police department does many drug busts in that area. Tr. 11-12; R.70-75. Detective Moser stated that the proposed permit location is surrounded by a large population of people who suffer from drug and alcohol dependency. Tr, 12-13. In the immediate area there is the Red Cross emergency housing, The Dayton Metropolitan Housing (which is located directly behind G & G Market), the gateway shelter for homeless men, and a correctional program known as the MonDay program. Tr. 12-13.

Detective Moser also related some of the drug-related incidents that have occurred in close proximity to the G & G Market, including a November 2011 drug paraphernalia arrest at a gas station located catty-corner to the appellant’s location at 3620 Germantown. Tr. 13-14. Detective Moser indicated that the trash receptacles outside of the applicant’s business were overflowing with garbage. Tr. 17; see Exhibit F. She provided the Commission with a list of calls for service in sector 380 from January 2010 to January 2012. The appellant’s business is located within sector 380. R. 53-61. The incidents reflected in the report ranged from vandalism and thefts, to burglaries, narcotic possession, armed robberies, arson and homicide. R. 53-61. Detective Moser highlighted four incidents, including drug activity in the parking lot at 3620 Germantown and an armed robbery wherein a clerk at 3620 Germantown was shot. R. 62-75.

James Goodwill is employed by the Greater Dayton Premier Management (formerly the Dayton Metropolitan Housing Authority), an entity that provides low income housing consisting of 37 units in the location near G & G Market. He testified that the neighborhood has been in

decline in recent years and that the housing facility is “almost directly behind the [proposed] permit location.” Tr. 24; see also Tr. 23-27. Mr. Goodwill identified photos depicting trash from the appellant’s business that was piled up on his organization’s property. See Exhibits G1-4; R. 80-83. He stated that some of the residents living in his organization’s housing battle drug and alcohol addictions and that his organization attempts to assist these residents in finding treatment. Tr. 24-25. Mr. Goodwill testified that if the Commission were to allow a liquor permit to be located so close to his organization’s housing, it would undermine his organization’s purpose and negatively impact the community. Tr. 25-26.

Ms. Patricia Rickman is a 40 year resident of the neighborhood and is the Chair of the Southwest Priority Board. She also pointed out the trash present behind the G & G Market. She testified that her organization is concerned with the rehabilitation facilities located in the neighborhood and the negative impact that a liquor license would have on the residents. Tr. 32. She emphasized that there is a school and a church near the G & G Market and that there was a concern regarding the people who roam the neighborhood openly consuming alcohol. Tr. 33.

Mr. Robert Kelly, Jr. is the director of the American Red Cross family living center having been with that organization for 29 years. He has been working near the G & G Market for the past three years. He noted that his organization works with families wherein someone in the family unit has been diagnosed with mental health or substance abuse problems. Tr. 29-40. He testified that his organization decided to operate the family living center where it is currently located in this neighborhood due to the area’s limited access to alcohol. Tr. 40. He stated that his organization operates a respite care facility, a permanent supportive housing facility, an after school program and also the supportive housing program. Tr. 39-41. He testified that issuing a liquor permit would be an “injustice.” Tr. 41.

Mr. Ril Beatty, Jr. testified that drugs and the vagrants' open use of alcohol are common in the area. Tr. 44-45. Mr. Beatty is involved with the Gettysburg Fishing Lake and Mountain Top ministries that do clean ups in the neighborhood and provide a youth mentoring program. He stated that his facility is constantly littered with trash and alcoholic beverage bottles and that another liquor permit will compound the problem. Tr. 46-47. Mr. Beatty noted that there is a lot of foot traffic with people going to and from the nearby homeless shelter. Tr. 49. He testified that he doesn't want to see the neighborhood revert back to what it once was.

Mr. Herbert Burton is an original homeowner in the Pineview Neighborhood Association and has lived in the house across the street from the appellant's business for 58 years. Tr. 50-51. He stated that when he bought his home 58 years ago it was the only neighborhood in the area where a black person could buy a home. He stated that he goes into the applicant's business almost every day. Tr. 53. He stressed his strong opposition to the issuance of the applicant's application for a liquor permit. Tr. 52-53; R. 84-88. He stated that the condition of the business is a disgrace to the neighborhood. See Exhibits H1-H5.

Ms. Bernadine Newman testified that she transports disabled people from the VA (Veterans' Administration) to the local stores and testified that she brings people to the appellant's store to purchase cigarettes and other items. Tr. 69-71. Ms. Newman testified that someone was shot and killed at a bar not far from the appellant's business about a week prior to the Commission hearing date. Tr. 75. Ms. Newman testified that she lives approximately three miles from the appellant's business and would not be impacted from problems at that location. Tr. 76-80.

Omar Abushqra, the owner of G & G Market, testified that he has eight or nine other businesses in the Dayton area and only visits G & G Market twice a week. Tr. 89. He stated that

he does not live in the neighborhood. Tr. 90-91. Moreover, the pictures submitted at the hearing, which were taken less than a week before the January 2012 hearing, depicted numerous crates, used tires, and an overflowing dumpster with trash spewing onto the public housing property, demonstrating the owner's lack of respect for the local residents and the neighbors residing in close proximity to his business. R. 76-85.

CONCLUSIONS OF LAW

There is a distinction to be made since the standard for denying an application for a new liquor license is different from the standard used in the rejection of a renewal for an existing license. *See In the Matter of Frank and Glenda Miller*, 1976 Ohio App. LEXIS 6408, unreported (10th Dist.). When considering the continuation of an existing permit, the actual effect that the operation of the business has on its surrounding environment can and should be factually presented. However, when considering whether to issue a new permit, it is the potential effect, rather than the actual effect, that is at issue.

The consideration of the potential effect requires inferences to be drawn from a combination of facts which are generally descriptive in nature and do not necessarily involve evidence that is demonstrative of any actual problem. *Id.* The appellant relies on the holding in *Meslat v. Liquor Control Commission*, 164 Ohio App.3d 13, 2005-Ohio-5491 (2005), in arguing that there is no reliable, substantial or probative evidence to support the Commission's Order. The *Meslat* court found that the testimony rendered generalized and speculative concerns. To the contrary, a review of the evidence in the case *sub judice*, provides this Court with very specific, concrete concerns regarding the potential effects.

The Commission promotes the responsible consumption of alcohol and must weigh the concerns of the residents and entities directly affected, and the impact that issuing the liquor

permit will have on the surrounding neighborhood. Again, an application for a new permit is evaluated differently from a renewal of a liquor permit. Clearly, the Commission determined that the testimony of the witnesses who live, provide social services, and work in the immediate area of G & G Market were more credible than the witnesses presented by the appellant.

DECISION

Based on the foregoing, and upon a review of the record, this Court concludes that there is reliable, probative and substantial evidence supporting the January 11, 2012 Order of the Ohio Liquor Control Commission. Moreover, this Court concludes that the Order of the Commission is in accordance with law. Accordingly, the January 11, 2012 Order of the Commission is hereby **AFFIRMED**.

IT IS SO ORDERED.

Copies to all parties registered for e-filing:

J. Richard Lumpe, Esq.
David A. Raber, Esq.
37 West Broad Street, Suite 730
Columbus, Ohio 43215
Counsel for Appellant

Michael DeWine, Esq.
Paul Kulwinski, Esq.
Attorney General Office
State Office Tower
30 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3428

Franklin County Court of Common Pleas

Date: 07-11-2012
Case Title: 3620 GERMANTOWN PIKE INC -VS- OHIO STATE LIQUOR
CONTROL COMMISSION
Case Number: 12CV001276
Type: ENTRY

It Is So Ordered.



/s/ Judge Charles A. Schneider

Court Disposition

Case Number: 12CV001276

Case Style: 3620 GERMANTOWN PIKE INC -VS- OHIO STATE LIQUOR
CONTROL COMMISSION

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes