

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

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| NOSHY HENEN, | | CASE NO. 11CVF11-14487 |
| Appellant, | | JUDGE SHEERAN |
| vs. | | |
| OHIO LIQUOR CONTROL COMM., | | |
| Appellee. | | |

**DECISION AND JUDGMENT ENTRY AFFIRMING ORDER
OF OHIO LIQUOR CONTROL COMMISSION**

SHEERAN, J.

This case is a Revised Code 119.12 administrative appeal, by Noshy Henen (Appellant), from an Order in which the Ohio Liquor Control Commission rejected Appellant’s applications for liquor permits at his convenience store. For the following reasons, the Court affirms the Commission’s Order.

Since 1990, Appellant has owned the Thomas Beverage convenience store, located at 4423 Detroit Avenue in Cleveland, at the intersection of Detroit Avenue and 45th Street. *Transcript (T.) 17, 27, 30, 40-41, 48.* The store has been at the same location since 1964 and was previously owned by a Mr. Thomas. *T. 17, 48-49.*

From 1990 until 2007, Appellant held liquor permits that allowed him to sell beer and wine at his store, and approximately half of Appellant’s sales during that seventeen-year period were from alcohol. *T.19, 40-41, 43-45.* In 2007, Appellant closed the store and allowed his liquor permits to expire. *T. 40-41, 46-47.* He did not deliver his permits to the Ohio Division of Liquor Control for safekeeping, as permitted by R.C. 4303.272. *T. 46.*

For four years, Appellant's store remained empty.

In May 2011, Appellant re-opened Thomas Beverage, this time without liquor permits. *T. 35, 44, 56.* He remodeled the store and installed security cameras and flood lights. *T. 40-43, 56-57, 61.* Appellant hired Nasser Mustafa to manage the store, and Mr. Mustafa agreed to buy the store from Appellant if Appellant could obtain liquor permits. *T. 46-47, 49, 55-58.* Since May 2011, Mr. Mustafa has managed the store, where he sells groceries, convenience items, and non-alcoholic beverages. *T. 10, 17-18, 35, 43, 57.* There are no security guards, but if Appellant is able to obtain liquor permits, Mr. Mustafa has said that he will hire security guards. *T. 61-64.*

Appellant's store is located in Ward 3, in the center of Cleveland; Ward 3 is the largest of the city's wards, geographically speaking, and it contains approximately half of all the liquor permits in Cleveland. *T. 9.* The surrounding neighborhood is a historic one, a very dense, very compact urban neighborhood containing both residential and commercial areas. *T. 11-14.*

The streets that run off of Detroit Avenue are populated entirely with residential housing. *T. 13.* The foreclosure rate in that part of the city is very low. *T. 13.* There are apartment buildings, senior housing, single-family homes, and churches, with many young and elderly residents. *T. 11-13.* There is new housing under construction, and families are moving into the neighborhood and staying, resulting in a population gain. *T. 13-14.* People like the "walkability" of the community and are concerned about safety. *T. 13.*

There is also a significant amount of commercial development and activity in the area. *T. 11, 13-14.* The historic West Side Market is located in the Ohio City neighborhood, which is located in Ward 3. *T. 11.* There is a noodle shop that is expanding its manufacturing facilities. *T. 13-14.* The Cleveland Museum of Art is installing a \$10 million development, the "Bidwell

Project,” at West 29th Street and Church Avenue, only a five-minute walk from Appellant’s store. *T. 14.*

Appellant’s store is located across the street from a Cleveland public school, the Max Hayes Vocational High School, which conducts classes during the day and in the evening. *T. 10-11, 16, 25, 27.*

There are many liquor-permit premises in Appellant’s neighborhood. *T. 11-12, 25, 29, 38.* The Harp restaurant, which sells food and alcohol for consumption on the premises, is across the street from Appellant’s store and next to the Max Hayes Vocational High School. *T. 16-19, 27-29.* There are several liquor-permit premises at Detroit Avenue and 28th Street. *T. 12-13, 25, 29-30.* There is a liquor-permit store at Detroit Avenue and West 20th Street, a five-minute walk from Appellant’s store. *T. 13.* Detroit Beverage, a liquor-permit carryout store, is located at Detroit Avenue and 50th Street, approximately four blocks from Appellant’s store. *T. 16, 27, 58, 67-68.* Appellant’s brother owns a liquor-permit convenience store at 5009 Detroit Avenue, and Appellant’s sister owns a liquor-permit convenience store at 5910 Detroit Avenue. *T. 51.*

Appellant (in 2011) and Mr. Mustafa (in 2001) have both been convicted of selling alcohol to underage persons. *T. 49, 64, 67.* In 1998, When Mr. Mustafa owned a convenience store at another location in Cleveland, he was convicted of health code violations. *T. 65-67.*

In 2011, Appellant applied to the Ohio Division of Liquor Control for a Class C-1 liquor permit and a Class C-2 liquor permit for his store at 4423 Detroit Avenue. *T. 40-41.* A Class C-1 permit allows a retail establishment to sell beer, for carryout only, until 1:00 a.m. A Class C-2 liquor permit allows a retail establishment to sell wine and mixed beverages, for carryout only, until 1:00 a.m.

The City of Cleveland objected to Appellant's applications. In Orders issued on March 18, 2011 and September 19, 2011, the Division overruled the City's objections. The City then appealed the Division's Orders to the Ohio Liquor Control Commission.

On November 1, 2011, the Commission conducted a *de novo* hearing on the City's appeals. At the hearing, individuals testified in favor of and against Appellant's applications for liquor permits. Joseph Cimperman, Julie Kurtock, Andrew Thomas, and Cynthia Connolly testified against the permits. Appellant and his manager, Mr. Mustafa, testified in favor of the permits.

Joseph Cimperman, the Cleveland City Councilman who represents Ward 3, testified against the liquor permits. *T. 8-23.* He testified that, during the four-year period when Appellant's store was closed, there was no activity there, and the neighborhood residents and business owners were comfortable when the store was closed, and felt that there was a significant decrease in the kind of traffic that was occurring at that location. *T. 10, 12.* Mr. Cimperman testified that, since Appellant re-opened the store in May 2011, it has become a very active corner, with an increase in the amount of activity at that location, and heavy traffic around the store. *T. 10-11.* He testified that the neighborhood residents are concerned that, if Appellant receives liquor permits, there will be an undesirable increase in traffic and activity surrounding the store. *T. 11, 18.* Mr. Cimperman testified that the neighborhood residents have many other liquor-permit stores where they may purchase alcohol. *T. 12.* He testified that representatives of the Franklin/Clinton Block Club and the Max Hayes Vocational High School asked him to object to Appellant's applications for liquor permits. *T. 10, 14-15, 21-22, 59-60.*

Julie Kurtock, a member of the Franklin/Clinton Block Club, who has lived near Appellant's store for approximately eleven years, testified that she adamantly opposes

Appellant's applications for liquor permits. *T. 23-24, 26-27.* She testified that, during the four years when Appellant's store was closed, the block was quiet and there was less traffic in the alley that separates her home from the store. *T. 24-25.* Ms. Kurtock testified that there are two liquor-permit premises on either side of Appellant's store, that the neighborhood is already oversaturated with liquor permits, and that the neighborhood does not need any more liquor permits. *T. 24-27, 29.* Ms. Kurtock testified that the Franklin/Clinton Block Club circulated a petition objecting to Appellant's applications for liquor permits, and that she signed the petition. *T. 25-26; City's Ex. G; City's Ex. H.*

Andrew Thomas, who lives in the neighborhood, is familiar with Appellant's store, and observes its operations on a regular basis, is also the Neighborhood Safety Coordinator for Ohio City, Inc., a community development corporation for the Ohio City neighborhood. *T. 32-35.* Mr. Thomas testified that, in his position with Ohio City, Inc., he fields concerns from local residents and businesses, and he seeks proactive measures to improve the quality of life in the neighborhood, by coordinating activities among residents, businesses, and police. *T. 32-34.* He testified that Ohio City, Inc., opposes the issuance of the liquor permits to Appellant, because the neighborhood is already oversaturated with convenience stores that have carryout liquor permits, and because the quality of life in the neighborhood has improved dramatically in the four years that Appellant's store has been without liquor permits. *T. 33-34.*

Cynthia Connolly, a resident who lives near Appellant's store, testified that she objects to the issuance of the liquor permits to Appellant, because the store is not a good addition to the neighborhood. *T. 36-37.* She testified that, when she waits for her bus in the morning, at the corner of Detroit Avenue and 45th Street, where Appellant's store is located, she observes a significant amount of prostitution and drug dealing at that location. *T. 38.* Ms. Connolly

testified that there are already several convenience stores, with liquor permits, within a five-block radius of Appellant's store, and she lives next door to one of them. *T. 38.* She testified that Detroit Avenue is an area in crisis and in the midst of a transition. *T. 38.* Ms. Connolly testified that Detroit Avenue has the potential to move in a positive direction, and that a liquor permit at Appellant's convenience store would not contribute to that potential. *T. 37-38.*

In an Order issued on November 1, 2011, the Commission sustained the City's appeals and rejected Appellant's applications for the liquor permits. The Commission did not issue findings of fact or conclusions of law.

On November 21, 2011, Appellant appealed the Commission's Order to this Court. Revised Code 119.12, which governs this appeal, provides in pertinent part:

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, 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 Ohio Supreme Court has defined "reliable, probative, and substantial evidence" 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. Ohio Liquor Control Comm.*, 63 Ohio St. 3d 570, 571 (1992).

In an administrative appeal pursuant to R.C. 119.12, a trial court reviews an administrative order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with law. *Douglas v. Ohio Liquor Control Comm.*, 10th Dist. No. 11AP-133, 2012-Ohio-2218, ¶19. A reviewing court will not substitute its judgment for the

agency's judgment when there is "some evidence" supporting the agency's order. *Harris v. Lewis*, 69 Ohio St. 2d 577, 578 (1982).

Revised Code 4303.292(A)(2)(c) provides that the Ohio Division of Liquor Control may refuse to issue a retail permit if it finds "[t]hat 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 under it by the applicant." Where the basis for rejecting a liquor permit is R.C.

4303.292(A)(2)(c), the focus of this basis is the location of the permit business, not the person who operates the business. *K & M Deli, Inc. v. Liquor Control Comm.*, 10th Dist. No. 10AP-896, 2011-Ohio-6170, ¶22; *D.L. Lack Corp. v. Liquor Control Comm.*, 191 Ohio App. 3d 20, 2010-Ohio-6172, ¶30. Thus, rejection of a permit application "is appropriate under R.C.

4303.292(A)(2)(c) even if the permit holder's actions (or inaction) did not cause the deterioration of the neighborhood's public decency, sobriety, peace, or good order." *D.L. Lack Corp., supra*.

In support of this appeal, Appellant has argued that the Commission's November 1, 2011 Order is not supported by reliable, probative, and substantial evidence. Specifically, Appellant contends that the City failed to prove, by the requisite quantum of evidence, that Appellant's selling alcohol at his convenience store would result in "substantial interference with public decency, sobriety, peace, or good order[.]"

The Court must disagree with Appellant's contention. The testimony of Mr. Cimperman, Ms. Kurtock, Mr. Thomas, and Ms. Connolly provides "some evidence" to support the following facts:

- During the four-year period when Appellant's store was closed, the quality of life in the neighborhood improved dramatically: the block was quiet; there was less activity around the store and less traffic in the alley behind the store; and the residents felt more comfortable.

- Since Appellant re-opened the store, it has become a very active corner, with heavy traffic around the store, including illegal activities such as prostitution and drug trafficking. The residents fear that, if Appellant receives liquor permits, there will be an increase in the undesirable activities at that corner.
- The neighborhood is oversaturated with liquor-permit convenience stores, and the neighborhood does not need any more such stores.
- The local civic organization and the high school across the street from Appellant's store object to Appellant's applications for liquor permits.
- The neighborhood is in transition and has the potential to improve. Liquor permits at Appellant's store would not contribute to that improvement.

Accordingly, there is "some evidence" in the record to support the Commission's November 1, 2011 Order, rejecting Appellant's applications for liquor permits pursuant to R.C. 4303.292(A)(2)(c).

Upon consideration of the entire record, the Court finds that the Commission's November 1, 2011 Order is supported by reliable, probative, and substantial evidence and is in accordance with law. The Order is therefore **AFFIRMED**.

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Franklin County Court of Common Pleas

Date: 01-04-2013
Case Title: NOSHY HENEN -VS- OHIO STATE LIQUOR CONTROL COMMISSION
Case Number: 11CV014487
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in black ink, reading "Patrick E. Sheeran", is written over a circular, textured seal or stamp.

/s/ Judge Patrick E. Sheeran

Court Disposition

Case Number: 11CV014487

Case Style: NOSHY HENEN -VS- OHIO STATE LIQUOR CONTROL
COMMISSION

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes