

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Harrison Township Trustees, :
Appellant-Appellee, :
v. : No. 12AP-390
Ohio Liquor Control Commission et al., : (C.P.C. No. 11CVF-11-13764)
Appellees-Appellees, : (REGULAR CALENDAR)
(Younes Dayton, Inc., :
Appellee-Appellant). :

D E C I S I O N

Rendered on December 11, 2012

Mathias H. Heck, Jr., Montgomery County Prosecuting Attorney, and *Douglas M. Trout*, for appellee Harrison Township.

Berkman, Gordon, Murray & DeVan, J. Michael Murray, Steven D. Shafron and Raymond V. Vasvari, Jr., for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Younes Dayton, Inc., is appealing from the decision of the common pleas court to remand the objections of the Harrison Township Board of Trustees to the renewal of the liquor licenses held by Younes Dayton, Inc. to the Ohio Liquor Control Commission ("LCC"). The sole assignment of error presented reads:

The common pleas court erred in reversing the Ohio Liquor Control Commission's decision because the Commission acted well within its administrative discretion in deciding that

Harrison Township's resolution opposing the renewal of Younes Dayton's 2010-11 liquor license did not satisfy the requirements of Ohio Rev. Code §4303.271, and in choosing not hearing additional evidence at the hearing.

{¶ 2} The issue involves interpretation of R.C. 4303.271(B) which reads:

The legislative authority of the municipal corporation, the board of township trustees, or the board of county commissioners of the county in which a permit premises is located may object to the renewal of a permit issued under sections 4303.11 to 4303.183 of the Revised Code for any of the reasons contained in division (A) of section 4303.292 of the Revised Code. Any objection shall be made no later than thirty days prior to the expiration of the permit, and the division shall accept the objection if it is postmarked no later than thirty days prior to the expiration of the permit. The objection shall be made by a resolution specifying the reasons for objecting to the renewal and requesting a hearing, but no objection shall be based upon noncompliance of the permit premises with local zoning regulations that prohibit the sale of beer or intoxicating liquor in an area zoned for commercial or industrial uses, for a permit premises that would otherwise qualify for a proper permit issued by the division. The resolution shall be accompanied by a statement by the chief legal officer of the political subdivision that, in the chief legal officer's opinion, the objection is based upon substantial legal grounds within the meaning and intent of division (A) of section 4303.292 of the Revised Code.

Upon receipt of a resolution of a legislative authority or board objecting to the renewal of a permit and a statement from the chief legal officer, the division shall set a time for the hearing and send by certified mail to the permit holder, at the permit holder's usual place of business, a copy of the resolution and notice of the hearing. The division shall then hold a hearing in the central office of the division, except that, upon written request of the legislative authority or board, the hearing shall be held in the county seat of the county in which the permit premises is located, to determine whether the renewal shall be denied for any of the reasons contained in division (A) of section 4303.292 of the Revised Code. Only the reasons for refusal contained in division (A) of section 4303.292 of the Revised Code and specified in the resolution of objection shall be considered at the hearing.

The permit holder and the objecting legislative authority or board shall be parties to the proceedings under this section and shall have the right to be present, to be represented by counsel, to offer evidence, to require the attendance of witnesses, and to cross-examine witnesses at the hearing.

{¶ 3} The resolution passed by the Harrison Township Board of Trustees reads:

WHEREAS, the Harrison Township Board of Trustees met on April 19, 2010 to discuss the renewal of liquor permits, and

WHEREAS, the issuance, transfer or renewals for Club Juicy Harem Club and the Men's Club were discussed, and

WHEREAS, the Montgomery County sheriff's office submitted materials as to the suitability of each of these establishments to maintain a liquor permit, and

WHEREAS, after a review of said material the Board of Trustees voted on the question of objecting to the issuance, transfer or renewal for:

Club Juicy located at 120 Shoup Mill Road, Harrison Township, Ohio

Harem Club, located at 5825 N. Dixie Dr. Harrison Township, Ohio

Men's Club, located at 22123 Wagoner Ford Road, Harrison Township, Ohio

NOW THEREFORE, BE IT RESOLVED by the trustees of Harrison Township, Montgomery County Ohio to hereby object to the issuance transfer or renewal of liquor permits for Club Juicy, Harem Club and the Men's Club pursuant to Section 4303.292(A)(1)(b) and 4303.292 (A)(2)(c) of the Ohio Revised Code.

BE IT FURTHER RESOLVED that a copy of this resolution shall be forwarded to the Ohio Division of Liquor Control with a request for hearings to be held in Montgomery County.

{¶ 4} The resolution does not separately object to the individual permit holders. The resolution also does not specify what the problem or problems are involving the liquor permits held by Younes Dayton, Inc. Simply stated, the resolution does not put

Younes Dayton, Inc. on notice as to what changes should be made to improve the permit premises or what are the bases for objecting to the renewal. The bare bones resolution, which merely recites statutes, is insufficient to make the permit holder and even the LCC aware of the issues to be reviewed at an evidentiary hearing.

{¶ 5} Counsel for the Harrison Township Board of Trustees asserts that the references to R.C. 4303.292(A)(1)(b) and (2)(c) remedies this due process problem.

{¶ 6} R.C. 4303.292(A)(1)(b) reads: [The permit holder]

Has operated liquor permit businesses in a manner that demonstrates a disregard for the laws, regulations, or local ordinances of this state or any other state[.]

{¶ 7} R.C. 4303.292(A)(2)(c) states: [The permit premises]

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 under it by the applicant[.]

{¶ 8} Again, stating the statutes applicable to renewal of all liquor permits does not tell the permit holder what concerns are present in the minds of the township trustees. Has someone affiliated with Younes Dayton, Inc. disregarded the applicable laws in Ohio or somewhere else? Has the permit premises somehow damaged the local neighborhood? What is the problem and what can potentially be done to remedy it?

{¶ 9} The resolution was interpreted by the LCC as insufficient to inform it as to how to proceed. Because the LCC's decision is supported by substantial, reliable and probative evidence, its decision should be affirmed.

{¶ 10} The sole assignment of error is sustained. The contrary judgment of the common pleas court is reversed. The case is remanded to the common pleas court with instructions to affirm the judgment of the Ohio Liquor Control Commission.

*Judgment reversed and remanded
with instructions.*

SADLER, J., concurs.
FRENCH, J., dissents.

FRENCH, J., dissenting.

{¶ 11} I respectfully dissent. The majority concludes that the resolution issued by appellant-appellee, Harrison Township Trustees ("Harrison") was inadequate for purposes of submitting an objection to the Division of Liquor Control ("Division") regarding the renewal of liquor permits held by appellee-appellant, Younes Dayton, Inc. ("Younes"). The majority does not, however, address the basis of the trial court's opinion. The trial court held that, regardless of the adequacy of Harrison's resolution, the Division had independent authority to decide whether to renew the permits; therefore, the Ohio Liquor Control Commission ("Commission") should have held a hearing to review the Division's denial of the renewals. Because the trial court's decision is consistent with this court's longstanding precedent, I agree with the trial court.

{¶ 12} R.C. 4303.271(A) provides that, with certain limitations, the holder of a liquor permit, "who files an application for the renewal of the same class of permit for the same premises, shall be entitled to the renewal of the permit. The division of liquor control shall renew the permit unless the division rejects for good cause any renewal application, subject to the right of the applicant to appeal the rejection to the [Commission]."

{¶ 13} As relevant here, a board of township trustees may object to the renewal of a permit for any of the reasons contained in specified statutory provisions. *See* R.C. 4303.271(B). The objection must be made within 30 days prior to the permit's expiration, it must be made by a resolution specifying the reasons for the objection and requesting a hearing, and a supporting legal statement must accompany it. Upon receipt of the resolution, the Division must schedule and hold a hearing, at which it may only consider the reasons for refusal contained in R.C. 4303.292(A) and specified in the objection.

{¶ 14} R.C. 4303.292(A) prescribes grounds upon which the Division may refuse to renew a retail permit. The Division may deny a renewal if it finds either of the following: (1) that the applicant or one of its members or officers has been convicted of a crime or engaged in other specified behaviors; or (2) that the place for which the permit is sought fails to meet certain parameters, including that it "[i]s so located with respect to the neighborhood that substantial interference with public decency, sobriety, peace, or good

order would result from" the renewal. R.C. 4303.292(A)(2)(c). Other provisions prescribe additional grounds for denial. *See* R.C. 4303.292(D) and (F).

{¶ 15} The Ohio Administrative Code further expounds on the grounds for denial of a renewal. Ohio Adm.Code 4301:1-1-12(B) provides that, in determining whether to renew a permit, the Division "shall consider environmental factors affecting the maintenance of public decency, sobriety, and good order, including the number and location of permit premises in the immediate area." The Division may issue a permit if it "finds that no substantial prejudice to public decency, sobriety, and good order will result." Ohio Adm.Code 4301:1-1-12(B). For these purposes, however, the Division "shall presume, in the absence of affirmative evidence to the contrary," that the renewal "will not prejudice the maintenance of public decency, sobriety, and good order." Ohio Adm.Code 4301:1-1-12(B).

{¶ 16} R.C. 4301.28(A)(1) grants to "[a]ny person aggrieved" the right to appeal to the Commission from the Division's refusal to issue a permit. Where a board of township trustees has participated in a hearing before the Division pursuant to its filing of an objection under R.C. 4303.271, and the Division thereafter grants the renewal, the board may appeal the order and participate in the hearing before the Commission. *See* R.C. 4301.28(B). In the event of a renewal over an objection, the Commission may only consider the objection raised at the hearing. R.C. 4301.28(B). Where the Division denies a renewal, and the applicant appeals, the Commission must provide notice of the appeal to any governmental body that filed objections to the renewal. R.C. 4301.28(B). A decision by the Commission may then be appealed pursuant to R.C. 119.12.

{¶ 17} Here, Younes sought to renew its liquor permits with the Division. Pursuant to R.C. 4303.271(B), Harrison submitted a resolution to the Division, objecting to the renewals, and the Division held a hearing. Following the hearing, the Division issued an order that denied the renewals. The order stated the following: "An investigation was conducted which included a review of the renewal application, the evidence submitted at the objection hearing, and information gathered from various documents and reports." The Division denied the renewals on three separate grounds. First, it found that, pursuant to R.C. 4303.292(A)(2)(c), renewal could result in substantial interference with public decency, sobriety, peace or good order. Second, it

found that, pursuant to R.C. 4303.292(A)(1)(b), the applicant had operated its business in a manner that demonstrates a disregard for laws, regulations or local ordinances. In support, the order cited to records and testimony by the Montgomery County Sheriff's Office. And third, the Division denied the renewal "for good cause," pursuant to R.C. 4303.271(A), R.C. 4301.10(A)(2), and Ohio Adm.Code 4301:1-1-12(B).

{¶ 18} Younes appealed to the Commission, and the Commission held a hearing. At the hearing, Younes, for the first time, objected to the adequacy of Harrison's resolution. Younes asked the Commission for a ruling that, as a matter of law, the licenses should be renewed because the resolution was inadequate. This inadequacy, Younes argued, rendered the proceeding before the Division "void ab initio and the renewal should go forward on that ground alone." (Tr. 8.) After arguments by counsel and a break in the hearing, the chair of the Commission stated that the members unanimously agreed that, even with the documentation attached to the resolution, it was "insufficient to fulfill the requirements of the statute and your objection is sustained." (Tr. 21-22.)

{¶ 19} The Commission thereafter issued an order, which stated: "After consideration of the evidence and arguments of counsel, the Commission finds said appeal is well taken and reverses the order of the Superintendent of the Division of Liquor Control." The Commission ordered the Division to "continue to process" Younes' renewal applications.

{¶ 20} On appeal, the trial court reversed the Commission's order granting the renewals. As to the sufficiency of Harrison's resolution, the court held that it was not determinative. Instead, the court concluded that "it was error for the Commission to not hold a hearing even if it felt that there was an insufficiently specific resolution. It had its own authority to review the matter and could have acted on the evidence that was going to be presented." I agree, and this court has held so in prior cases.

{¶ 21} In *Asylum, Inc. v. Liquor Control Comm.*, 167 Ohio App.3d 498, 2006-Ohio-2679, ¶ 15 (10th Dist.), for example, the issue was whether a resolution was inadequate because it was untimely. We concluded the following:

Pursuant to R.C. 4303.271(A), the division can reject a renewal application for a reason independent of a legislative authority's objection to such renewal. Further, the commission could have conducted its own investigation and called for an evidentiary hearing without any objection from

the city. Therefore, we find that the trial court did not err in determining that it was not necessary to engage in day counting to determine whether or not the city's objections were timely because the division's authority to reject a renewal application is not dependent upon an adequate objection by a legislative authority.

Accord Sowders v. Ohio Liquor Control Comm., 2d Dist. No. 18173 (Aug. 4, 2000), *Ossie, Inc. v. Ohio State Liquor Control Comm.*, 10th Dist. No. 02AP-1209, 2003-Ohio-2729, ¶ 19-24, and *Marciano v. Ohio Liquor Control Comm.*, 10th Dist. No. 02AP-943, 2003-Ohio-2023, ¶ 18-20.

{¶ 22} Applying these same principles here, I conclude that the trial court did not err in determining that it need not consider whether the resolution was adequate because the Division's authority to reject a renewal application is not dependent on receiving an objection. Rather, the Division must decide whether to renew an application based on the applicable statutory and regulatory standards. Contrary to Younes' argument to the Commission, it was not entitled to the renewals "as a matter of law." (Tr. 7.) If that were true, then the statutory and regulatory standards for considering whether to renew a permit would be meaningless in any case where a governmental entity does not object. A plain reading of the applicable provisions shows that is not true, as there are many possible grounds for denial of a renewal, with or without an objection hearing.

{¶ 23} Nor is the Commission's authority to affirm or overturn a decision by the Division to deny a renewal dependent on the Division's receipt of an objection to support a hearing. Regardless of whether a governmental entity objects to a renewal, and regardless of whether there is a hearing before the Division, an aggrieved applicant may appeal to the Commission, and the Commission must hold a hearing. Here, without holding a hearing, and without considering any evidence, the Commission simply reversed the Division's denial of the renewals. Such a result is contrary to the statutory and regulatory framework for the renewal of liquor permits.

{¶ 24} In short, I agree with the trial court. I would affirm that court's judgment and remand the matter to the Commission to hold a hearing and decide the appeal before it. The majority having reached a different conclusion, I dissent.
