

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Hong Kong Trading Center, Inc., :  
Appellant-Appellant, :  
v. : No. 09AP-293  
(C.P.C. No. 08CVF07-10043 )  
Ohio Liquor Control Commission et al., : (REGULAR CALENDAR)  
Appellees-Appellees. :

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D E C I S I O N

Rendered on March 11, 2010

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*Lumpe & Raber, J. Richard Lumpe and David A. Raber, for appellant.*

*Richard Cordray, Attorney General, and Scott A. Longo, for appellee Ohio Liquor Control Commission.*

*Robert J. Triozzi, Director of Law, and Susan M. Bunguard, for appellee City of Cleveland.*

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Appellant-appellant, Hong Kong Trading Center, Inc. dba The Baby Grand Restaurant & Lounge ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas affirming the order of the Ohio Liquor Control Commission ("Commission") rejecting the renewal of appellant's liquor permits for the 2007-2008 renewal period. For the following reasons, we reverse the decision of the common pleas court.

{¶2} Appellant is currently issued a Class D1-2-3-3A-6 liquor permit for a restaurant located in Cleveland, Ohio. This permit authorizes appellant to sell beer, wine, and spirituous liquor until 2:30 a.m.

{¶3} The Ohio Department of Commerce, Division of Liquor Control ("Division"), issued an order on March 21, 2008 rejecting the 2007-2008 renewal application of permit No. 3958802, Class D-1-2-3-3A-6 issued to appellant.

{¶4} The order of the Division was timely appealed to the Commission (case No. 58A-08) and a hearing was held, pursuant to R.C. 119.12, on June 25, 2008.

{¶5} After testimony of two witnesses and the admission of six exhibits (O, P, Q, M, N, and J) and after hearing the arguments of the assistant attorney general representing the Division and counsel for appellant, the Commission issued an order dated June 27, 2008, which held as follows:

After consideration of the evidence and arguments of counsel, the Commission finds said appeal is not well taken and affirms the order of the Superintendent of the Division of Liquor Control.

{¶6} The permit holder in accordance with the provisions of R.C. 119.12 on July 14, 2008, timely and properly filed its notice of appeal from the order of the Commission to the common pleas court.

{¶7} On February 24, 2007 (filed March 3, 2009), the common pleas court issued a decision and entry which states:

Upon consideration of the Commission's certified record, the court concludes that the Commission's June 27, 2008 order rejecting the renewal of appellant's liquor permits for the years 2007-2008 is supported by reliable, probative and substantial evidence and is in accordance with law. See R.C. 119.12. Accordingly, the June 27, 2008 Order of the Liquor Control Commission is hereby **AFFIRMED**.

{¶8} On March 24, 2009, the appellant timely perfected its appeal to this court.

{¶9} Appellant raises the following two assignments of error:

1. THE COMMON PLEAS COURT ABUSED ITS DISCRETION IN AFFIRMING THE ORDER OF THE COMMISSION, WHEN IT FAILED TO CONFINE ITS REVIEW TO THE RECORD AS PRESENTED TO THE COMMISSION AT THE JUNE 25, 2008 EVIDENTIARY HEARING.

2. THE EVIDENCE SUBMITTED AT THE JUNE 25, 2008, EVIDENTIARY HEARING BEFORE THE COMMISSION IS INSUFFICIENT TO MEET THE STATE'S BURDEN AND THEREFORE THE STATE HAS FAILED TO MEET ITS BURDEN OF PROOF AS REQUIRED TO SUPPORT THE REJECTION OF A LIQUOR PERMIT RENEWAL UNDER RC 4303.292(A)(2)(c) OR 4303.292(A)(1)(b).

{¶10} Under R.C. 119.12, a common pleas court in reviewing an order of an administrative agency must consider the entire record to determine whether reliable, probative, and substantial evidence supports the agency's order and the order is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-11. 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 a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, and probative character of the evidence, and the weight thereof.' " *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. The common pleas court must give due deference to the administrative agencies resolution of evidentiary conflicts, but "the findings of the agency are by no means conclusive." *Univ. of Cincinnati* at 111. The common pleas court conducts a *de novo* review of questions of law, exercising its independent judgment in determining whether the administrative order is "in accordance with law" *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 471.

{¶11} An appellate court's review of an administrative decision is more limited than that of the common pleas court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. The appellate court is to determine only whether the common pleas court abused its discretion. *Id. Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (defining abuse of discretion). Absent an abuse of discretion, a court of appeals may not substitute its judgment for that of an administrative agency or the common pleas court. *Pons*. An appellate court, however, has plenary review of purely legal questions. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶15.

{¶12} The Division in its order of March 21, 2008 rejected the 2007-2008 renewal of the appellant's liquor permits on grounds cited in R.C. 4303.292(A)(2)(c) and 4303.292(A)(1)(b). Basically, the Division alleged that the permit in question was located with respect to the neighborhood that substantial interference with public decency, sobriety, and good order would result if the permit were renewed.

{¶13} The Division also asserted in its order that the permit holder operated its business in a manner that demonstrated a disregard for the laws, regulations, or local ordinances of the state.

{¶14} To be more specific, the Division stated in its order that appellant's permit premises known as The Baby Grand Restaurant and Lounge ("Baby Grand") has received the most complaints from neighborhood residents and owners of businesses located in this neighborhood. The complaints include patron misconduct, loud and disruptive activity late at night, cars blocking driveways, fights in the street and parking lot, gunfire, trash and refuse thrown around the neighborhood.

{¶15} The Division further alleged in its order that the police have responded to incidents at the Baby Grand, including fights, underage sales, and assaults. In one

incident on July 5, 2007, according to the allegations in the Division order, two patrons after leaving the Baby Grand were engaged in an argument in the parking lot across the street and one patron shot the other which resulted in the demise of the other patron. Criminal charges against the patron were still pending at the time of the hearing before the Commission.

{¶16} The appellant's prior record before the Commission is not disputed. At the time of the hearing before the Commission, appellant had two cases that were still pending and not yet resolved. One violation on June 16, 2007, for a sale to a minor which resulted in either a ten-day suspension or if appellant chose it could pay a \$10,000 fine instead of a suspension. On December 16, 2006, appellant received a violation for an after-hour sale and was given a five-day suspension, but again was given the option of paying a \$400 fine instead of the suspension. Finally on March 3, 2007, appellant received two citations for having more than two fixed bars and after-hour sales for which appellant received two concurrent 30-day suspensions, but was given the option of paying a \$10,000 fine in lieu of the suspension.

{¶17} On June 25, 2008 a hearing was held before the Commission, and the Division called as its only witness, Jamie Baker, Executive Director of St. Clair Superior Development Corporation ("St. Clair") to support the allegations contained in its order. A resolution from the Cleveland City Council objecting to the renewal of appellant's liquor license was not offered nor introduced; no one appeared on behalf of Cleveland City Council; nor were any witnesses presented, nor testimony offered from the Cleveland Police Department; nor were records of any calls by the Cleveland Police Department to appellant's premises offered in evidence for the Commission's consideration.

{¶18} In her testimony before the Commission, Ms. Baker began by explaining the function of St. Clair. Specifically, they facilitate small grant programs through a program called Store Front Renovation Program and appellant, at one time, was aided in obtaining a renovation grant through the services of St. Clair.

{¶19} Apparently, according to Ms. Baker's testimony, the appellant began its operation as an Asian restaurant and sometime in 2005 obtained privileges to operate as a night club. While she never received calls personally, shortly after the premises started operation as a night club, someone on her staff began receiving calls from neighbors complaining about appellant's customers. When asked on direct whether she had a list of calls or complaints she stated: "Unfortunately, at this point in time we didn't keep a good log of those kinds of things." (R. at 10.) Ms. Baker continued to testify over the objection of counsel for appellant concerning the nature of the calls and what the neighbors would say about their concerns and fears. Ms. Baker testified that there are 20 other bars and clubs in the area. There is also an attempt to solicit testimony from Ms. Baker about a homicide that occurred in the area on July 5, 2007, but Ms. Baker's only knowledge of the circumstances was what she read in the newspapers or saw on TV. Counsel for appellant timely objected to the testimony. Ms. Baker testified that she had no records of any of these calls or who they came from. When questioned by Chairman Shaheen about such records, the following exchange took place:

Chairman Shaheen: In this document you have that they report the calls, the neighbors' calls, not just this place, about any place, is that a normal business record that you keep in your office?

The Witness: At the time we were going through this, we didn't keep records like that, so we don't have a good log of every complaint.

Ms. Bungard: Is your question about the police log?

Chairman Shaheen: My question is, if she is going to testify on her information about the permit premises, I want to know if it is in the normal course of business for them to take those complaints.

Commissioner Gardner: And one of the questions I was going to ask you, you said you received a lot of complaints from the neighborhood and they come in to your office. You say you don't necessarily get them. Your staff gets them; is that correct?

The Witness: It's either myself or my staff.

Commissioner Gardner: When those calls come in to your staff or yourself -- -- maybe they come in on an answering machine -- -- do you respond back? Do you call those people back?

The Witness: Yes

Commissioner Gardner: Do you have a log of those?

The Witness: Unfortunately, we didn't at that point in time maintain a log of those things.

(R. at 16-18.)

{¶20} Ms. Baker also testified that, as a result of these calls and the way the appellant promoted the club (as providing hip hop music and entertainment), her organization contacted the Cleveland Police Department on multiple occasions.<sup>1</sup>

{¶21} Finally, two letters from residents were offered that were addressed to James Bally, Ohio Division of Liquor Control. These letters were apparently sent to Ms. Baker's organization, but not delivered to Mr. Bally and the letters were sent anonymously. They were timely objected to and never accepted into evidence.

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<sup>1</sup> The Cleveland Police Department did not object to the renewal of appellant's liquor permit nor were any records of police calls to the permit premises offered into evidence for the Commission's consideration.

{¶22} The Division, at the conclusion of Ms. Baker's testimony, presented no other evidence except for exhibits O, P, and Q, which were exhibits referred to as flyers or handouts for marketing purposes.

{¶23} The only other testimony was that of the majority stockholder in the corporation. She was called on cross-examination by the assistant city attorney for the city of Cleveland. There was an objection made by counsel for appellant arguing that the assistant city attorney had no authority under law to represent the Division and since the proceedings are based on the rejection order of the Division, the city of Cleveland can only be made a party for purposes of appeal, but has no authority under law to participate as counsel.<sup>2</sup> There was obvious confusion on this issue not only by both counsel but also on the part of the chairman. It was finally decided to let the examination proceed and very little was produced from the cross-examination in terms of probative evidence. There was some testimony elicited from the witness concerning one incident of overcrowding for which no citation was issued, and an after-hours sale which was already stipulated for the record by counsel. The witness did testify that in two incidents the permit holder took the suspension instead of the fine and in the third incident she paid the fine. She also testified that due to the problem of one or two incidents of overcrowding, the night club operation either ceased entirely or was open for private parties with no alcohol consumption.

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<sup>2</sup> R.C. 119.10 provides: "At any adjudication hearing required by sections 119.01 to 119.13, inclusive, of the Revised Code, the record of which may be the basis of an appeal to court \* \* \* the attorney general or any of his assistants \* \* \* shall represent the agency." R.C. 4303.271(B), provides that the legislative authority upon passing a resolution of objection properly filed with the Division shall have the right to be present; be represented by counsel; and offer evidence at the hearing before the Division not only the Commission. The Division is a party before the Commission and shall only be represented by the attorney general or an assistant attorney general. The provisions of R.C. 119.10 are mandatory and cannot be waived.

{¶24} On June 27, 2008, the Commission issued its order finding: "After consideration of the evidence and arguments of counsel, the Commission finds said appeal is not well taken and affirms the order of the Superintendent of the Division of Liquor Control." Pursuant to R.C. 119.12, an appeal was timely filed to the Franklin County Court of Common Pleas and on February 24, 2009 (filed March 3, 2009), the court affirmed the order of the Commission. It is from this order that an appeal was taken to this court for review on the basis of appellant's two previous cited assignments of error.

{¶25} Appellant's first assignment of error is that the common pleas court abused its discretion in affirming the order of the Commission when it failed to confine its review to the record as presented to the Commission at the June 25, 2008 evidentiary hearing.

{¶26} According to appellant, the common pleas court, in affirming the Commission, relied on the document "Summary and Analysis Concerning Permit Hearing," which was never part of the record in the de novo hearing taken before the Commission on June 25, 2008. Appellant further argues that the attorneys for the Commission used said document in their argument for affirmance before the common pleas court.

{¶27} Counsel for the Commission does not deny that the document was used by the court and responds that the document in question was submitted to the Commission as part of Cleveland's brief in opposition to Baby Grand's motion for reconsideration of the Commission's denial of the stay of the Division's order of rejection of March 21, 2008. This opposition brief was filed May 2, 2008, 54 days prior to the Commission's June 25, 2008 hearing and was served on Baby Grand's counsel. (R. 124-34.) Counsel argues that the Commission relied upon the information attached to the brief in opposition to the motion for stay to deny the permit holder's request for reconsideration. (R. 137.)

{¶28} A review of the common pleas court's opinion clearly demonstrates that the court did rely on the document in question, as well as other information outside the record taken before the Commission on June 25, 2008. The court, in its February 24, 2008 decision, refers to: "See Record at 29; 124; 126; See Record 30; 126-134; and See Record at 122; 135-136."<sup>3</sup>

{¶29} Counsel for the Commission further argues that these were all matters considered by the Commission in denying the stay of the Division's order of March 21, 2008. Therefore, they were part of the original record before the Commission and can be considered by the common pleas court on appeal. We disagree.

{¶30} The original record in the case was taken before the Commission on June 25, 2008, and consisted of the testimony of Ms. Baker and Ms. Stuckart, the majority stockholder as on cross-examination. There were six exhibits introduced, O, P, and Q, which were handout cards advertising various night club activities at the premises; M, the notice of hearing, N, copies of two postal receipt cards showing notices of hearing were delivered and received by the permit holder, and J, which is a copy of the rejection order of the Division for purposes of showing the order which is the subject matter of the appeal. No other exhibits or testimony were offered or considered by the Commission. While, "the summary and analysis concerning permit hearing" and other matters outside the record and prior to June 25, 2008 may possibly have been considered by the Commission for purposes of denying a stay of the Division's order some 54 days before the hearing, they were not part of the "Record taken before the Commission."

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<sup>3</sup> There is no indication in the record taken before the Commission or in the Commission's order affirming the Division that it relied on any of this information which was used by the common pleas court to support its decision of affirmance.

{¶31} One additional argument made by appellant before the common pleas court was that the city of Cleveland had not complied with R.C 4303.271(B), which sets forth the legal procedure that a city must follow in order to object to the renewal of a liquor permit. Counsel argued that there was no evidence in the record that showed the city complied with the statute, therefore, the city's objection should be overruled.

{¶32} However, it is clear from the record before the Commission that the resolution of objection from the Cleveland City Council was never introduced into evidence; that no member of Cleveland City Council appeared to testify on behalf of any objection; that no one from the Cleveland Police Department appeared, nor did any neighbors or residents appear to testify in support of any resolution of objection by Cleveland City Council. So whether the proper legal procedures were followed according to R.C. 4303.271(B) is inconsequential. It is, however, obvious from the record that the Division proceeded under R.C. 4303.292(A)(1)(b) and 4303.292(A)(2)(c). Neither of these sections require a city council objection. In fact the order of the Division (Exhibit J) only mentions that the Cleveland City Council objected and that the Division held a hearing on January 25, 2008, "to determine whether the renewal should be denied for any of the reasons contained in division (A) of Section 4303.292 of the Revised Code. 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." (Division's March 21, 2008 Order, at 1.) There is no other information contained in the order about what evidence, reports or documents were considered and whether the Division found, based on those documents, that the city's objection should be sustained. Nor was any evidence offered in that regard before the Commission. No one appeared before the Commission as a witness on behalf of the

Cleveland City Council. There may have been appearances before a Division hearing officer on January 25, 2008, but the hearing before the Commission on June 25, 2008 is a trial de novo and none of that evidence can be considered by the Commission unless those witnesses appear before the Commission as part of the hearing on appeal. It is obvious from reading the decision of the trial court, that it relied on evidence presented before the hearing officer of the Division on January 25, 2008, as well as other documents that were certified as part of the entire proceedings beginning with the Division hearing but said evidence was clearly not part of the record considered by the Commission during its hearing de novo on June 25, 2008. The common pleas court in this instance acts as an appellate court and cannot consider evidence not considered by the Commission unless such evidence is *newly discovered* which is not an issue raised by either side in this appeal. See *Wassenaar v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 07AP-712, 2008-Ohio-1220, ¶20.<sup>4</sup> Therefore, appellant's first assignment of error is well-taken.

{¶33} Appellant's second assignment of error is that the evidence submitted before the Commission on June 25, 2008 was insufficient to meet the state's burden as required under R.C. 4303.292(A)(2)(c) or 4303.292(A)(1)(b) to support the rejection of a permit renewal.

{¶34} The Division on its own initiative can reject the renewal of a permit pursuant to R.C. 4303.292(A)(2)(c) and 4303.292(A)(1)(b). The additional paragraphs of the Division's order of rejection specifically state:

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<sup>4</sup>R.C. 119.09 provides: "At any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the record of which may be the basis of an appeal to court, a stenographic record of the testimony and other evidence submitted shall be taken at the expense of the agency. Such record shall include all of the testimony and other evidence, and rulings on the admissibility thereof *presented at the hearing.*" (Emphasis added.)

The Division denies and rejects the 2007-2008 renewal of the D-1-2-3-3A-6 permit based upon the following grounds and facts:

1) The place for which the permit is sought is so located with respect to the neighborhood that substantial interference with the public decency, sobriety, peace, or good order would result from the renewal of the permit and operation there under by the applicant. R.C. §4303.292(A)(2)(c).

2) The liquor permit holder has operated the business in a manner that demonstrates a disregard for the laws, regulations, or local ordinances of this state. R.C. §4303.292(A)(1)(b).

The permit premises, know as The Baby Grand Restaurant & Lounge (hereinafter "Baby Grand"), are located at the intersection of St. Clair Avenue and East 4th Street. The Baby Grand is part of the St. Clair-Superior neighborhood. The Baby Grand has received the most complaints from neighborhood residents and from owners of businesses located in this neighborhood. These complaints include, but are not limited to, the following patron misconduct: loud and disruptive activity late at night, cars blocking driveways, fights in the street and the parking lot, gunfire, and trash and refuse thrown around the neighborhood.

The police have responded to incidents at the Baby Grand, including fights, underage sales, and assaults. One incident, which occurred on July 5, 2007, involved two patrons of the Baby Grand; after leaving the Baby Grand they were at a parking lot across the street and one patron shot the other patron in the face, neck, and shoulder; the patron subsequently died as a result of the gunshot wounds and the shooter was indicted for the homicide and is currently awaiting trial.

(Division's March 21, 2008 Order, at 1-2.)

{¶35} It is clear from the record taken before the Commission on June 25, 2008, that the hearing was about the Division's rejection of the renewal pursuant to R.C. 4303.292 and not the Cleveland City Council's objection. It is also clear from the record that it is devoid of any evidence concerning a shooting incident on July 5, 2007. Further,

no one from the Cleveland Police Department testified nor were any police call records introduced with respect to specific incidents of fights, underage sales, or assaults, which required a police response. There is an allegation in the Division order pursuant to R.C. 4303.292(A)(2)(c) that:

The Baby Grand has received the most complaints from neighborhood residents and from owners of businesses located in this neighborhood. These complaints include, but are not limited to, the following patron misconduct: loud and disruptive activity late at night, cars blocking driveways, fights in the street and parking lot, gunfire, and trash and refuse thrown around the neighborhood.

(Division's March 21, 2008 Order, at 1-2.)

{¶36} The only evidence presented to the Commission by the Division to support this claim was the testimony of the Division's only witness, Ms. Baker. According to the testimony of Ms. Baker, the function of St. Clair is:

We have services to support businesses. We facilitate small grants and loans for businesses. We work with residents and their resident block clubs. We also work with industrial stakeholders and we just sort of deal with everything that's [sic] neighborhood in that district.

(R. 6.) When asked by Chairman Shaheen whether neighborhood calls are documented as part of the normal course of business of St. Clair, Ms. Baker testified:

THE WITNESS: At the time we were going through this we didn't keep records like that[.]

\* \* \*

CHAIRMAN SHAHEEN: My question is, if she's is going to testify on her information about the permit premises, I want to know if it's in the normal course of business for them to take those complaints.

(R. 17.) Commissioner Gardner asked in a follow-up question whether a log of those calls was kept. Ms. Baker responded that no log was maintained. When asked by

Chairman Shaheen who takes the calls, Ms. Baker answered "Someone on my staff takes the call." (R. 10.)

{¶37} It is obvious from the record taken before the Commission that Ms. Baker's testimony was totally based on hearsay evidence and that it was not the duty or the responsibility of St. Clair to keep records of calls or take incident reports concerning the various businesses in the neighborhood. They did work with the local businesses for purposes of obtaining grant loan money for local small business development and they did apparently receive calls incidental to that but they kept no records. Ms. Baker testified that there were 20 other restaurants and bars in the neighborhood and that no records were offered into evidence that would support her general conclusion or the general allegations in the Division's order how it determined that loud and disruptive activity late at night, cars blocking driveways, fights in the street and parking lot, gunfire, trash and refuse thrown around the neighborhood was somehow connected to this permit premises; no police calls; no testimony from even one neighbor and no one from the city representing the district. Ms. Baker's testimony was purely hearsay which was continually and properly objected to.

{¶38} It is well-settled that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (Evid.R. 801(C).) Unless a valid exception applies, hearsay is inadmissible. It is obvious from Commissioner Shaheen's inquiry of Ms. Baker on pages 10, 17 and 18 of the record that he was trying to see if a business record exception under Evid.R. 803(6) or (8) could be established. It is just as obvious from Ms. Baker's answers to his questioning that it could not. The testimony of Ms. Baker was entirely inadmissible hearsay and, other than the six exhibits admitted into evidence, was the sum of the

evidence the Commission had to consider to support the Division's allegations under R.C. 4303.292(A)(2)(c). See *In re McLemore*, 10th Dist. No. 03AP-714, 2004-Ohio-680.

{¶39} In an administrative appeal pursuant to R.C. 119.12, the trial court reviews an order to determine whether it 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.* (1992), 63 Ohio St.3d 570, 571 (Footnotes omitted.)

{¶40} R.C. 119.12, further provides: "The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to a civil action."

{¶41} The Ohio Rules of Evidence clearly apply in all civil actions and according to law appeals from the Commission to the court of common pleas *shall proceed as in the trial of a civil action*. However, administrative boards are permitted some leeway in permitting hearsay consistent with due process. As a general rule, even apart from specific statutes, administrative agencies are not bound by the strict rules of evidence applied in court. However, an administrative agency should not act upon evidence which is not admissible, competent, or probative of the facts which it is to determine. The hearsay rule is relaxed in administrative proceedings, but the discretion to consider hearsay evidence cannot be exercised in an arbitrary manner. *Haley v. Ohio State*

*Dental Bd.* (1982), 7 Ohio App.3d 1; *Felice's Main Street, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 01AP-1405, 2002-Ohio-5962 (wherein this court found that records considered by the commission were admissible even though hearsay, because they were not objected too; wherein the court opined that portions of police and investigative reports can be admissible as an exception to the hearsay rule pursuant to either Evid.R. 803(6) or 803(8). *Id.* at ¶18. The rational behind permitting such evidence is that such routine reports have a high indicia of reliability).

{¶42} In this case, the testimony of Ms. Baker was not only based upon hearsay, it was based upon hearsay upon hearsay. Calls that were picked up by unnamed staff and which were related to her. The callers were unnamed or anonymous. There were 20 other bars and restaurants in the neighborhood. There were no records kept of the calls. There was no testimony from neighbors, police, or anyone in the area who might have given some indicia of reliability to Ms. Baker's testimony. Chairman Shaheen and Commissioner Gardner did their best to try and give some indicia of reliability to the testimony by asking if these calls were part of the regularly kept business records of St. Clair, but to no avail because they clearly were not. (R. 10, 17-18.)

{¶43} The only other evidence presented to the Commission was the stipulated prior record of the permit holder which consisted of two pending citations, and a sale to a minor on June 16, 2007, for which the permit holder was given the option of a fine or suspension (the suspension was served); an after-hours violation on December 16, 2006 for which the permit holder was given the option of paying a \$400 fine or five-days suspension (suspension served); and two violations on March 3, 2007 for which the permit holder was given the option of a 30-day suspension or \$10,000 fine (suspension served). This record is not significant for a permit holder that has been in business since

1998 and in each case the permit holder was given the option of continuing this business by paying a monetary penalty.

{¶44} The common pleas court abused its discretion when it clearly and substantially relied on evidence outside the record taken before the Commission on June 25, 2008. In addition, the court abused its discretion in its finding that the evidence submitted before the Commission by the Division on June 25, 2008 was reliable, probative, and substantial and sufficient to sustain the affirmance of the Division's order.

{¶45} Therefore, appellant's assignments of error are sustained and the decision of the Franklin County Court of Common Pleas is reversed.

*Judgment reversed.*

TYACK, P.J., concurs.  
BRYANT, J., concurs separately.

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Bryant, J., concurring separately.

{¶46} I agree with the majority's conclusion that the trial court improperly failed to confine its review to the record of evidence presented to the Liquor Control Commission at the June 25, 2008 evidentiary hearing. I write separately because, unlike the majority, I would remand the matter to the common pleas court to review, pursuant to R.C. 119.12, the evidence the Commission received and to resolve the appeal.

{¶47} In addition to the testimony of Jamie Baker, with whose testimony the majority notes some concern regarding hearsay and reliability, the Commission received other evidence. Simmun (Jeannie) Chan Stuckart also testified at the Commission hearing. In her testimony, she admitted serving alcohol at times her permit did not allow and acknowledged her awareness of instances in which the premises did not follow occupancy limitations. Additionally, the parties stipulated to the record of citations against

the permit holder including, among others, after-hours violations, unsanitary conditions, failure to maintain alcoholic beverages in a potable condition, and sales to persons under the age of 21. See, e.g., *Appeal of Mendlowitz* (1967), 9 Ohio App.2d 83, 86 (concluding "[i]t is, therefore, entirely appropriate to admit evidence of violations of the criminal law or of the Liquor Control Act and Regulations" in assessing what constitutes " 'good cause' to reject a renewal"); *Tiger Investments of Columbus, Inc. v. Ohio Liquor Control Commission* (1982), 8 Ohio App.3d 316, 317-18 (noting a "record of six citations for violations of the Liquor Control Act" in a 15-month period and stating that "in determining whether 'good cause' exists for its refusal to renew a permit, the department is permitted to consider the cumulative effect of continuing violations.").

{¶48} The common pleas court should have the opportunity to review the evidence the Commission received, including the noted citations, and determine whether: 1) reliable, substantial and probative evidence supports the Commission's order, and 2) the Commission's order is in accordance with law. As result, I would reverse and remand the matter to the common pleas court for a proper review of the evidence before the commission.

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