

THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Moe's Stop One, Inc., :
Appellant-Appellant, :
v. : No. 11AP-143
Ohio Liquor Control Commission et al., : (C.P.C. No. 10CVF-08-12750)
Appellees-Appellees. : (REGULAR CALENDAR)

D E C I S I O N

Rendered on September 30, 2011

Kent R. Minshall, Jr., for appellant.

Michael DeWine, Attorney General, and *Charles E. Febus*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Appellant, Moe's Stop One, Inc. ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, affirming appellee Ohio State Liquor Control Commission's ("the Commission") August 10, 2010, order denying appellant's 2007-2008 and 2008-2009 renewal applications for class C-2-2X¹ liquor permits. For the following reasons, we affirm.

¹ Both the trial court, in its August 10, 2010, order, and the appellant, in its renewal application, refer to the class C-2-2X permits as class C2 and C2X permits. Our reference to C-2-2X permits is consistent with the reference of the superintendent of the Division in his order mailed May 12, 2009, denying the renewal of appellant's permit application and the Commission in its August 10, 2010, order affirming the superintendent's denial.

{¶2} On August 31, 2007, and September 4, 2008, the record indicates that Mohammed Widdi, president/owner of Moe's Stop One, Inc.² ("Moe's"), filed applications to renew appellant's C-2-2X liquor permits with the Ohio Department of Commerce, Division of Liquor Control ("the Division") for a business located at 625 East 140th Street, Cleveland, Ohio 44110. The Cleveland City Council objected to the renewal of appellant's permit for 2008-2009, and, subsequent to a hearing on March 6, 2009, the Division denied and rejected the renewal of appellant's 2007-2008 and 2008-2009 C-2-2X permits.

{¶3} In its order, the superintendent of the Division denied the renewal of appellant's permits for several reasons, including:

- 1) 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 transfer of ownership of the permit and operation thereunder by the applicant. R.C. §4303.292(A)(2)(c).
- 2) The place for which the permit is sought does not conform to the building, safety or health requirements of the governing body of the municipal corporation in which the place is located. R.C. §4303.292(A)(2)(a).
- 3) The applicant has operated the liquor permit business in a manner that demonstrates a disregard for the laws, regulations, of local ordinances of this state since monies are owed to the Ohio Bureau of Workers' Compensation. R.C. §4303.292(A)(1)(b) and Chapter 4123. of the Ohio Revised Code.
- 4) The applicant has operated the liquor 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).

² Witnesses who testified at the Commission's May 10 and August 19, 2010, hearings also referred to Moe's Stop One, Inc. as "The Yellow Store."

5) The applicant has allowed others, not named on the permit, to be involved in the ownership and operation of the retail business and liquor permit business without consent of the Division and without compliance with the rules governing transfers of liquor permits as required and restricted by law. R.C. §4303.27, O.A.C. 4301:1-1-14(A)(1), R.C. §§4303.12 and 4303.121.

6) The applicant is not the owner and operator of the retail business and liquor permit business in order to be the holder of a Class C-2-2X liquor permit as required and restricted by law. R.C. §§4303.27, 4303.12, and 4303.121.

{¶4} On June 4, 2009, appellant sent its notice of appeal to the Commission. On May 10 and August 9, 2010, the Commission held evidentiary hearings, whereupon individuals testified both in favor of and against the renewal of appellant's liquor permits. During the May 10, 2010, hearing, Roosevelt Coats ("Coats"), Eugene R. Miller ("Miller"), and Shawn Patton ("Patton"), testified against the renewal of appellant's liquor permits.

{¶5} Coats, a retired Cleveland city councilman, testified that he served the area for 21-and-a-half years and that Moe's "is situated right in the heart of a community, right in front of an elementary school. There are people constantly hanging out. Drugs and alcohol is a common theme at this location, and it has been a nuisance for far too long." (May 10, 2010, Tr. 7-8.) Further, Coats testified that, during his tenure as city councilman, he received complaints from residents, the school principal, parents with children in the school, the adjacent city of Bratenahl, and a local daycare less than a block away, regarding loitering and open containers at Moe's. (Tr. 8.) Coats also stated that he personally witnessed loitering and open containers at this location. (Tr. 9.)

{¶6} Miller, a current Cleveland city councilman, testified that he drives past Moe's every day and that "people loiter around this store." (Tr. 16-18.) Miller indicated

that the city of Cleveland has objected to the renewal of appellant's C-2-2X permits for the past three years. (Tr. 20.) Miller also indicated that, although the school across the street might close, the children still have to walk past the store to get to another school. (Tr. 27.) In addition, Miller testified that his office contacted the owner of Moe's several times in order to try to work with him and give him "the benefit of the doubt," because he wanted Moe's to succeed. (Tr. 21-22.) In response to the owner's excuses that he could not control what happens outside the store, Miller suggested that the owner call the police in order to remedy the loitering problem. Finally, the chair noted that it made a difference to the Commission that City Council had consistently objected to the renewal of appellant's permit applications in 2007, 2008, and 2009. (Tr. 18.) With this in mind, the chair asked Miller if the loitering had improved. Miller replied that last spring and summer, "it was terrible", and there has been no change. (Tr. 20.)

{¶7} Patton, principal at Henry W. Longfellow Elementary School ("Longfellow"), testified that Longfellow has 260 students, 33 percent of which have special needs. (Tr. 55.) Further, approximately 170 of the students live in the neighborhood and walk past Moe's on their way to and from school. (Tr. 55.) Patton also testified that his office is directly across from Moe's and that, depending on the time of day, "there are three, four, five people, generally, loitering out front throughout the day." (Tr. 57.) According to the record, Patton indicated that, because Longfellow is closing, approximately 50 children will have to walk past Moe's every day on their way to a different school and that he is concerned for their safety. (Tr. 59-61.) Finally, Patton addressed the issue of trash, stating:

Every morning the custodian goes outside with either a 5 gallon bucket or two 5 gallon buckets, and cleans up what is left from the night before.

There's an RTA stop, there could be—the garbage that he picks up are chip wrappers, beer bottles, chicken boxes. It just varies. And it's littered every day in our front grass.

(Tr. 62.) Patton clarified that Moe's is the only store near Longfellow, and that the trash problem worsens as the weather gets warmer. (Tr. 62-63.)

{¶8} In an order mailed August 10, 2010, the Commission, after consideration of the evidence and arguments of counsel, affirmed the order of the Division's superintendent denying appellant's C-2-2X permits.

{¶9} On August 30, 2010, appellant filed a notice of appeal with the Franklin County Court of Common Pleas. In a decision journalized January 14, 2011, the trial court affirmed the Commission's August 10, 2010 order and dismissed the appeal. In its decision, the trial court found that the August 10, 2010, order of the Commission "is supported by reliable, probative and substantial evidence and is [in] accordance with law." (See Decision and Entry, at 8.)

{¶10} On February 15, 2011, appellant filed a timely notice of appeal, setting forth the following assignments of error for our consideration:

1. WHETHER THE EVIDENCE PRESENTED BY THE STATE WAS RELIABLE AND CREDIBLE IN VIEW OF THE FACT THAT ALL EVIDENCE PRESENTED WAS CONTRADICTED BY OTHER WITNESSES PRESENTED BY THE STATE OF OHIO AND WHETHER THE STATE WAS REQUIRED TO PROVIDE PROOF AND RECORDS DEMONSTRATING THE ALLEGATIONS MADE BY ITS WITNESSES.

2. WHETHER THE HONORABLE TRIAL COURT ERRED IN FINDING THAT "MR. WIDDI WAS NOT IN CONTROL OF THE STORE IN QUESTION" IN VIEW OF THE FACT THAT

MR. WIDDI HAD ATTEMPTED TO SELL THE STORE TO AN EMPLOYEE AND THAT SALE HAD BEEN UNSUCCESSFUL.

{¶11} Pursuant to R.C. 119.12, a trial 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." The Supreme Court of Ohio defined the evidentiary requirements set forth in R.C. 119.12, 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.

(Footnotes omitted.) *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571.

{¶12} Further, in *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, paragraph one of the syllabus, the Supreme Court of Ohio stated that "in an appeal from the Board of Liquor Control to the Court of Common Pleas of Franklin County, that court must give consideration to the entire record * * * and must appraise all such evidence as to the credibility of witnesses, the probative character of the evidence and the weight to be given it." However, "[i]n its review, the common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but the findings of the agency are not conclusive." *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶14.

{¶13} Finally, "[o]n an appeal from the court of common pleas' review of an agency's order, our review, as an appellate court, is more limited and is restricted to a determination of whether the trial court abused its discretion." *Enitnel, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 02AP-583, 2002-Ohio-7034, ¶13, citing *Lorain City Bd. of Edn. v. State Emp. Relations Bd.* (1998), 40 Ohio St.3d 257, 261. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶14} In its first assignment of error, appellant contends that the state's evidence lacked credibility and is unreliable because other witnesses contradicted it, and the state did not provide proof or records regarding the allegations made by its witnesses. (See appellant's brief at 1.) In response, the Commission contends that its order is supported by reliable, probative and substantial evidence based upon the direct eyewitness testimony of Coats, Miller and Patton. (See appellee's brief, at 7-9.)

{¶15} The record indicates that the Division denied the renewal of appellant's liquor permits based, in part, upon R.C. 4303.292(A)(2)(c), and that the Commission affirmed the Division's order. R.C. 4303.292(A)(2)(c) states, in relevant part, that:

(A) The division of liquor control may refuse to issue, transfer the ownership of, or renew, and shall refuse to transfer the location of, any retail permit issued under this chapter if it finds either of the following:

* * *

(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 would result from the issuance, renewal, transfer of location, or transfer of ownership of the permit and operation under it by the applicant[.]

In *D.L. Lack Corp. v. Liquor Control Comm.*, 191 Ohio App.3d 20, 2010-Ohio-6172, ¶30, quoting *Aysar, Inc. v. Ohio State Liquor Control Comm.*, 10th Dist. No. 06AP-958, 2007-Ohio-1470, ¶22, this court stated that "[i]n applying R.C. 4303.292(A)(2)(c), the focus must be 'on the location of the permit premises, and its effect on the surrounding neighborhood, not on whether the permit holder conducts satisfactory or unsatisfactory business operations.'" The "fact that the permit holder is not directly responsible for environmental problems complained of is not the issue. Rather, the focus under R.C. 4303.292(A)(2)(c) is the location of the permit business, not the person who operates that business." *Kamm's Korner Tavern, Inc. v. Liquor Control Comm.* (May 24, 2001), 10th Dist. No. 00AP-1423. Thus, R.C. 4303.292(A)(2)(c) "does not require that any control or fault be shown on the part of the permit holder." *Asylum v. Liquor Control Comm.*, 167 Ohio App.3d 498, 2006-Ohio-2679, ¶19.

{¶16} Additionally, this court has stated that "[t]he causation requirement for rejecting an application for renewal based on R.C. 4303.292(A)(2)(c) is 'some connection between the permit premises and adverse effects upon the surrounding area.'" *Asylum* at ¶20, quoting *Marciano v. Ohio Liquor Control Comm.*, 10th Dist. No. 02AP-943, 2003-Ohio-2023, ¶29. "Thus, the commission need not demonstrate that the permit holder's actions were directly related to the conduct of its patrons." *Id.* Therefore, "[e]ven if other influences have asserted a negative effect on the area, outside of appellant's control, this can only underline the importance to the city and the commission of maintaining strict

compliance with liquor control laws in the vicinity.' " Id., quoting *Harbi Abuzahrieh & Co., Inc. v. Liquor Control Comm.* (July 22, 1999), 8th Dist. No. 74556.

{¶17} Further, in *Our Place, Inc.*, at 572, the Supreme Court of Ohio held that, in cases where the Commission cites two grounds for denial of a permit, the Commission's order must be upheld if either of the grounds are supported by reliable, probative, and substantial evidence. Id. Therefore, in the present matter, if the grounds set forth in R.C. 4303.292(A)(2)(c) are supported by reliable, probative, and substantial evidence, we must uphold the Commission's order.

{¶18} Here, the testimony of Coats, Miller, and Patton suggests that there would likely be substantial interference with public decency, sobriety, peace, or good order if the Commission approved appellant's application for renewal of its liquor permits. Specifically, Coats testified that Moe's is located "right in the heart of a community, right in front of an elementary school," and that he personally witnessed loitering and open containers at this location. (Tr. 7.) Miller testified that he drives past Moe's every day and personally witnessed individuals loitering in front of the store. Further, Miller testified that there has been no change regarding the loitering problem in the past three years and that, last spring and summer, "it was terrible." (Tr. 20.) Patton testified that his office at Longfellow is located directly across the street from Moe's and that "there are three, four, five people, generally, loitering out front throughout the day." (Tr. 57.) Finally, regarding the trash problem, Patton testified that chip wrappers, beer bottles, and chicken boxes are littered in front of Longfellow every day and that it worsens as the weather gets warmer.

{¶19} Based upon the foregoing testimony, we find that the Commission's order denying the renewal of appellant's liquor permits, pursuant to R.C. 4303.292(A)(2)(c), is

supported by reliable, probative, and substantial evidence. First, the testimony is reliable because all three witnesses personally saw individuals loitering in front of Moe's, and, therefore, a reasonable probability exists that it is true. According to the record, Miller and Patton presented corroborating testimony regarding loitering, as Miller drives past Moe's every day, and Patton's office is located across the street from Moe's. Second, the testimony is probative because it directly addresses the issue regarding the location of the permit and its substantial interference with public decency, sobriety, peace, or good order. Finally, the testimony is substantial because it has weight, importance, and value in determining whether appellant's application for renewal of its liquor permits should be approved or denied. Therefore, the trial court did not abuse its discretion in affirming the Commission's order denying the renewal of appellant's liquor permits.

{¶20} Appellant's first assignment of error is overruled.

{¶21} Because the Commission had reliable, probative, and substantial evidence for denying appellant's application to renew its liquor permits pursuant to R.C. 4303.292(A)(2)(c), we need not address appellant's second assignment of error. See *D.L. Lack Corp.* at ¶18, citing *Our Place, Inc.* at 572.

{¶22} For the foregoing reasons, appellant's first assignment of error is overruled, and its second assignment of error is moot. The judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
