

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Downtown Croton, Inc., :
Appellant-Appellant, :
v. : No. 12AP-352
Liquor Control Commission, : (C.P.C. No. 11CVF-11-13665)
Appellee-Appellee. : (REGULAR CALENDAR)

D E C I S I O N

Rendered on December 28, 2012

Darrell E. Fawley, Jr., for appellant.

Michael DeWine, Attorney General, and *Paul Kulwinski*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Appellant, Downtown Croton, Inc., appeals from a judgment of the Franklin County Court of Common Pleas affirming an order of appellee, Ohio Liquor Control Commission ("commission"), that denied appellant's application to transfer the ownership and location of class D-5 and D-6 liquor permits. For the reasons that follow, the judgment of the trial court is reversed.

I. BACKGROUND

{¶ 2} On March 12, 2010, appellant filed an application to transfer the ownership and location of its class D-5 and D-6 liquor permits from McCormack and Associates, Inc.,

at 1437 St. Clair Avenue to appellant at 3403 Croton Avenue in Cleveland, Ohio. Appellant's owner, Brenda Chesnik, seeks to open a restaurant and bar on the premises. The proposed permit premises is located in a heavily industrialized area of Cleveland and within one mile of a public housing development. Located near the premises is a women's pre-release center that has been in operation for 20 years. Also, directly across the street from the premises is a newly established community-based correction facility ("CBCF") that offers treatment and rehabilitation for low-level offenders.

{¶ 3} Truckers Tavern formally operated at the premises from the mid-1960s until 2007. Though operating successfully for the majority of those years, Truckers became a "very troubled spot" during the end of its operations. (Tr. 9.) Due to drug and gang-related activities, Truckers was a problem area for police and earned itself the nickname, "Bucket of Blood." Truckers ceased operations in 2007, and its closing coincided with a homicide that occurred on the premises.

{¶ 4} Based upon objections to appellant's application filed by Cleveland City Council, a hearing was held on June 11, 2010. After consideration, the superintendent of the Division of Liquor Control ("division") denied appellant's application pursuant to R.C. 4303.292(A)(2)(c) and (1)(b). Appellant sought further review, and, after a hearing on October 11, 2011, the commission affirmed the division's order. The commission did so without explanation or opinion.

{¶ 5} Pursuant to R.C. 119.12, appellant appealed the commission's decision to the Franklin County Court of Common Pleas. The trial court concluded the commission's order denying appellant's application pursuant to R.C. 4303.292(A)(2)(c) was supported by reliable, probative, and substantial evidence. Therefore, the trial court affirmed the commission's order without addressing the commission's denial pursuant to R.C. 4303.292(A)(1)(b).

II. ASSIGNMENTS OF ERROR

{¶ 6} This appeal followed, and appellant brings the following two assignments of error for our review:

[I.] THE COMMON PLEAS COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT THE DECISION OF THE LIQUOR CONTROL COMMISSION WAS SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL

EVIDENCE FOR THE REJECTION OF A LIQ[U]OR PERMIT
TRANSFER APPLICATION UNDER R C 4303.292(A)(2)(c)
OR 4303.29[2](A)(1)(b).

[II.] THE LOWER COURT ERRED IN RELYING ON
GENERALIZED FEARS AND SPECULATIONS IN FINDING
THAT THE COMMISSION'S ORDER WAS SUPPORTED BY
RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE
AND WAS IN ACCORDANCE WITH LAW.

III. DISCUSSION

{¶ 7} Because they are interrelated and together challenge the trial court's determination that the commission's order was supported by reliable, probative, and substantial evidence, we address appellant's two assignments of error as one.

{¶ 8} Under R.C. 119.12, when a common pleas court reviews an order of an administrative agency, it must consider the entire record and determine whether the agency's order is "supported by reliable, probative, and substantial evidence and is in accordance with law." "Reliable" evidence is evidence that is dependable and may be confidently trusted. *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992). In order to be reliable, there must be a reasonable probability that the evidence is true. *Id.* "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. *Id.* "Substantial" evidence is evidence with some weight; it must have importance and value. *Id.*

{¶ 9} 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, the probative character of the evidence, and the weight thereof." " *2216 SA, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 07AP-600, 2007-Ohio-7014, ¶ 7, quoting *Lies v. Veterinary Med. Bd.*, 2 Ohio App.3d 204, 207 (1st Dist.1981), quoting *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 280 (1955). Even though the common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, the findings of the agency are not conclusive. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980).

{¶ 10} On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.*, 63 Ohio St.3d 705, 707 (1992). In reviewing the court of common pleas' determination that the commission's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abused its discretion. *Roy v. Ohio State Med. Bd.*, 80 Ohio App.3d 675, 680 (10th Dist.1992). Absent an abuse of discretion on the part of the trial court, a court of appeals cannot substitute its judgment for that of the commission or the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). "The term "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*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). However, on the question of whether the commission's order was in accordance with the law, this court's review is plenary. *McGee v. Ohio State Bd. of Psychology*, 82 Ohio App.3d 301, 305 (10th Dist.1993), citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992).

{¶ 11} Of concern in the present matter is the commission's denial of appellant's application to transfer the ownership and location of its liquor permits based upon R.C. 4303.292(A)(1)(b) and (2)(c). Said provisions provide:

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:

(1) That the applicant, or any partner, member, officer, director, or manager of the applicant, or, if the applicant is a corporation or limited liability company, any shareholder owning five per cent or more of the applicant's capital stock in the corporation or any member owning five per cent or more of either the voting interests or membership interests in the limited liability company:

* * *

(b) 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;

* * *

(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.

{¶ 12} The commission denied appellant's application on two grounds, though only one ground listed under R.C. 4303.292(A) needs to be demonstrated in order to refuse a permit. *Our Place* at 572. We first address the commission's denial pursuant to R.C. 4303.292(A)(1)(b).

{¶ 13} To reject an application to transfer ownership and location of a liquor permit under R.C. 4303.292(A)(1)(b), it must be shown that the applicant's actions demonstrated a disregard for the laws, regulations or local ordinances. *Kamm's Korner Tavern, Inc. v. Liquor Control Comm.*, 10th Dist. No. 00AP-1423 (May 24, 2001), citing *Leo G. Keffalas, Inc. v. Ohio Liquor Control Comm.*, 74 Ohio App.3d 650, 653 (10th Dist.1991). Appellant contends the record contains no evidence that Chesnik has operated a liquor permit business in a manner proscribed by this section and, therefore, said provision cannot serve as a basis for denying its application. The commission does not address this ground.

{¶ 14} While this record contains evidence regarding the operation of Truckers and the problems associated therewith, it is undisputed that neither Chesnik nor appellant had any involvement with Truckers or its operations. Moreover, the evidence established Chesnik operates other businesses, including a gentleman's club, but there is no specific evidence indicating appellant or Chesnik 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." R.C. 4303.292(A)(1)(b). Accordingly, based on the lack of evidence that appellant demonstrated a disregard for the laws, regulations or local

ordinances, we conclude the commission's order denying appellant's application to transfer ownership and location of liquor permits based upon R.C. 4303.292(A)(1)(b) is not supported by reliable, probative, and substantial evidence.

{¶ 15} The commission also denied appellant's application based upon R.C. 4303.292(A)(2)(c), which allows the commission to refuse to issue a liquor permit if it finds that the 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" thereof. Where R.C. 4303.292(A)(2)(c) is the basis for rejecting the issuance of a liquor permit, the focus is on 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, citing *Maggiore v. Ohio Liquor Control Comm.*, 10th Dist. No. 95APE06-713 (Mar. 29, 1996). Further, while location alone may be the sole basis for denying an application regarding liquor permits, this court has held "the express terms of R.C. 4303.292(A)(2)(c) require a showing that 'a "substantial interference with public decency, sobriety, peace or good order *would* result" from the issuance of a permit,' meaning that 'in making the determination, the trier-of-fact must conclude that such an interference would likely result.' " (Emphasis sic.) *Beck v. Ohio Liquor Control Comm.*, 10th Dist. No. 98AP-1464 (Nov. 2, 1999), quoting *Monahan v. Liquor Control Comm.*, 10th Dist. No. 89AP-591 (Mar. 6, 1990).

{¶ 16} Appellant argues the evidence presented herein constitutes only speculative and generalized fears that the problems associated with Truckers would return if the requested permits were issued for the premises. It is well-established that general, speculative evidence is insufficient to establish " 'substantial interference' " with public decency, sobriety, peace or good order. *K & M Deli* at ¶ 23, citing *Serv. Station Holdings, Inc. v. Liquor Control Comm.*, 10th Dist. No. 96APE01-22 (June 27, 1996); *Wells v. Ohio Liquor Control Comm.*, 10th Dist. No. 10AP-889, 2011-Ohio-2875, ¶ 25.

{¶ 17} Testifying before the commission was (1) Chesnik, (2) Robert Modic, purchaser of the property at a foreclosure sale, (3) Phyllis Cleveland, councilwoman for Ward Five for the city of Cleveland, (4) Cleveland Police Detective Darrell Cornell, and (5) Tim Perotti, executive director of Maingate. Two witnesses, Dr. Russell Kaye, member of CBCF Board of Trustees, and Cleveland Police Lieutenant Jerome Barrow, testified

before the division. For purposes of the hearing before the commission, the parties stipulated to summaries of Lieutenant Barrow's and Dr. Kaye's testimony.

{¶ 18} Cleveland testified the proposed permit premises is within her ward and, when Truckers was operating, it was known as a "very troubled spot." (Tr. 9.) Near the proposed permit premises is the women's pre-release center and the CBCF that opened in January of 2011. According to Cleveland, the CBCF allows low-level offenders to serve their terms of incarceration in their home communities and offers the offenders opportunities for anger management and alcohol and substance abuse treatment. Cleveland testified the CBCF is designed to be a facility that allows offenders who have completed 30 days of incarceration to leave for work, school or treatment purposes and then return at night.

{¶ 19} When asked about her concerns regarding the proposed liquor permits, Cleveland testified:

It's a horrible location. It's a horrible message, I think. It sends -- the people who are in the Community-Based Correctional Facility, you know, many of them are there because of substance abuse or other types of issues or reasons. And to have a bar directly across the street from where they are, where they're being treated, I think, kind of laughs in the face of what the state intended that facility to be for. I think it poses a huge temptation for a lot of the inmates who are still fragile and in the early stages of their treatment or recovery or rehabilitation.

(Tr. 13-14.)

{¶ 20} Cleveland explained that the location has been a "very quiet area" since Truckers has closed, and her concern is that the area will "face some of the same issues we had with the previous establishment." (Tr. 14.)

{¶ 21} Detective Cornell testified before the commission that, since Truckers has ceased its operations, no police calls have been generated to that immediate area. According to Detective Cornell, one and one-half mile away from the premises is a carry-out with a liquor permit, and it generates over 100 runs per year.

{¶ 22} Perotti is the executive director of Maingate, a non-profit corporation involved in the business of revitalizing businesses and neighborhoods. Perotti shared

Cleveland's concerns about the proposed permit premises being in such close proximity to the CBCF that houses offenders, some of which are challenged with drug and alcohol addiction. However, Perotti provided no specific testimony regarding how the CBCF would be impacted if the permits were allowed.

{¶ 23} Chesnik testified her intention is to open a family restaurant at the proposed permit premises.¹ The premises is currently owned by her long-time friend, Modic. According to Chesnik, though currently living in southern Ohio, she is in Cleveland, "[f]our to five times a month more than likely. It just depends. Sometimes [she's] there for the whole month. It just really depends." (Tr. 61.) Chesnik testified she will have a bar manager and would be on site until things were "up and running" with the business. (Tr. 62.)

{¶ 24} Modic testified that he purchased the premises at a foreclosure sale and has since remodeled and cleaned up the property. According to Modic, he has invested several hundred thousand dollars into the premises and that 3,000 square feet of the building will be dedicated to dining and 500 to 700 square feet will be dedicated to a "bar area," plus the kitchen and restrooms. (Tr. 74.)

{¶ 25} According to the summary of Lieutenant Barrow's testimony presented before the division, Truckers was a "constant problem" for the police department. Lieutenant Barrow discussed the homicide that occurred at Truckers in May 2006 and testified that "he believes that opening another D-5 permit location at this address would create the same kinds of problems that existed at Trucker's Tavern." (Mutual exhibit No. 1a.) Lieutenant Barrow also testified the police department opposes "reopening a D-5 permit premise at this location given the reputation of this location as a place for violent activity." (Mutual exhibit No. 1b.)

{¶ 26} According to the summary of Dr. Kaye's testimony, the CBCF will house 100 low-level offenders, "70% of whom will have a prior history of drug and alcohol abuse, and they will be employed in the neighborhood." (Mutual exhibit No. 2.) Dr. Kaye testified

¹ Though the dissent insinuates that Chesnik plans to operate a gentleman's club at the proposed permit premises, when asked if such was her intention, Chesnik responded, "[a]bsolutely not." (Tr. 62.) Further, during Modic's cross-examination, appellant's counsel stated, "Ms. Chesnik is perfectly willing to commit that this is not going to be a gentleman's club, if that's the concern." (Tr. 77.)

that the facility's purpose is to help individuals overcome their criminal and alcohol and drug abuse backgrounds, and "[h]aving liquor so closely available is counter-productive to the purpose of this facility." (Mutual exhibit No. 2.) According to Dr. Kaye, it will be counterproductive because the offenders will be leaving and re-entering the CBCF as they go to and from work.

{¶ 27} The commission determined this evidence was sufficient to establish the applicability of R.C. 4303.292(A)(2)(c), and the trial court affirmed. We disagree as we conclude the evidence consists of general and speculative concerns that are neither based upon nor constitute reliable, probative, and substantial evidence.

{¶ 28} In *Meslat v. Ohio Liquor Control Comm.*, 164 Ohio App.3d 13, 2005-Ohio-5491 (10th Dist.), this court reviewed the commission's denial of an application for a new liquor permit. The commission denied the application after finding the issuance of a permit would substantially interfere with the peace, sobriety, and good order of the community. The trial court determined the commission's order was supported by reliable, probative, and substantial evidence and, therefore, affirmed the commission's order. This court concluded the evidence supporting the commission's order consisted of general and speculative concerns and reversed the judgment of the trial court.

{¶ 29} In *Meslat*, a city council member testified that a school, a daycare center, and a school currently under construction were all in the vicinity of the proposed permit premises. The council member also testified that, when the premises held a liquor permit five years earlier, it had been the subject of loitering problems, but since that business had closed, there had not been any problems in that area. Similarly, a Cleveland police detective testified that five years earlier, when operating with a liquor permit, there were habitual complaints about and a number of arrests made at the premises. In *Meslat*, none of the testimony concerned the current applicant and whether there was any indication that the current applicant would operate the premises in a manner similar to that of prior years.

{¶ 30} The court in *Meslat* concluded that, because the testimony presented therein related to problems that occurred at the location five years prior when the premises was operated under different ownership, and because the record contained no evidence regarding how the schools or the daycare may be impacted from the issuance of

a liquor permit at the desired location, the commission's denial of the application for liquor permits was not supported by reliable, probative, and substantial evidence. Therefore, this court reversed the judgment of the trial court that had affirmed the commission's order.

{¶ 31} This court's holding in *Meslat* was based primarily on *Serv. Station*, in which the commission denied an application for new liquor permits. In reversing the commission, the trial court in *Serv. Station* found the commission's order was not supported by reliable, probative, and substantial evidence. This court affirmed the trial court's reversal of the commission and concluded the record consisted only of general and speculative objections to the proposed permits and did not contain any specific evidence or testimony establishing a "substantial interference" with public decency, sobriety, peace or good order.

{¶ 32} In the present matter, there was much discussion of Truckers and the problems associated therewith toward the end of its operations. Modic testified Truckers operated successfully for a number of years until the original owners' children began running the business and essentially "ran it into the ground." (Tr. 69.) However, the current applicant had no involvement with the operations of Truckers, and the record contains no evidence that the problems associated with that business would return with the granting of the sought permits. The summary of Lieutenant Barrow's testimony given before the division indicates opposition to the requested permits because of the reputation for "violent activity" at this location. (Mutual exhibit No. 1b.) However, Lieutenant Barrow's testimony is referring to a reputation the premises held in 2007 when a liquor establishment was operated under management wholly unassociated with the current applicant, and thus constituted mere speculation that the granting of the application would resurrect the reputation of Truckers. Such speculation is not sufficient evidence to establish "substantial interference" with public decency, sobriety, peace or good order. *K & M Deli; Serv. Station; Wells*.

{¶ 33} Regarding the women's pre-release center, the evidence establishes that the pre-release center has been in operation for a number of years, including time periods in which Truckers was also in operation. Nonetheless, the record contains no evidence of

any ill effects resulting from the co-existence of the pre-release center and the liquor establishment operating on the proposed permit premises.

{¶ 34} The CBCF seemed to generate the most concern for those who testified in opposition to appellant's requested permits. The CBCF recently opened and is located across the street from the proposed permit premises. Cleveland and Perotti testified that they believed allowing a liquor permit at this location "poses a huge temptation" for those housed at the CBCF. (Tr. 13.) The summary of Dr. Kaye's testimony indicated that he testified before the division that having liquor so closely available to the CBCF is "counter-productive" to its purpose. (Mutual exhibit No. 2.) While Dr. Kaye may have given more detailed testimony before the division, this record contains only a summary of his testimony, and, as relevant to the CBCF, consists of seven sentences. Other than the general and conclusory statement that granting the permit would be counterproductive, the summary provides no specifics and gives no indication as to how the CBCF may be impacted.

{¶ 35} The evidence established in the record shows general concern for a potential effect on CBCF residents, however, does not demonstrate with specificity how the proposed permit premises is so located with respect to the neighborhood that *substantial interference* of public decency, sobriety, peace or good order *would* result from the issuance of appellant's application as is required under R.C. 4303.292(A)(2)(c). *Beck; Monahan*. Instead, this record contains evidence similar to that presented in *Meslat and Serv. Station*—evidence that is general and speculative in nature. As stated in *Perry v. Ohio State Liquor Control Comm.*, 10th Dist. No. 99AP-976 (June 8, 2000), "'while location is the paramount concern under R.C. 4303.292(A)(2)(c), the critical consideration when evaluating a location is whether liquor sales there would interfere with community life in the specified ways.'" *Id.*, quoting *Elayan Bros., Inc. v. Liquor Control Comm.*, 2d Dist. No. 16278 (Sept. 12, 1997); *see also Beck*.

{¶ 36} Based on the record before us, and for the reasons stated above, we conclude that, because the commission's order was not supported by reliable, probative, and substantial evidence, the trial court erred in affirming the order of the commission. Accordingly, appellant's two assignments of error are sustained.

IV. CONCLUSION

{¶ 37} Based upon the foregoing, appellant's two assignments of error are sustained, the judgment of the Franklin County Court of Common Pleas is reversed, and this matter is remanded to that court for further proceedings.

*Judgment reversed;
cause remanded.*

BROWN, P.J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶ 38} Since I believe the findings below were supported by reliable, probative and substantial evidence, I would affirm the findings of the Liquor Control Commission and the common pleas court. Since the majority does not, I respectfully dissent. I especially do so since we are governed by an abuse of discretion standard in this case.

{¶ 39} Brenda Chesnik does not live in the Cleveland area, but draws her livelihood at least in part from a "gentleman's club" in the area. A gentlemen's club is, as a rule, a restaurant which draws patrons by providing entertainment featuring women who take off all or part of their clothes and then dance or otherwise parade around for the patrons to view. Whether the entertainers are nude or only appear to be nude can be affected by whether the premises has a liquor license.

{¶ 40} Chesnik now wants to participate in opening a "restaurant" with a liquor license near the Northeast Ohio Women's Pre-Release Center and across the street from a newly opened community based correctional facility ("CBCF"). A significant portion of the population of a CBCF are males who are trying to recover from drug and/or alcohol problems. Such men do not need the temptation of a bar across the street from the facility where they are housed, especially if a bar is selling liquor until 2:30 a.m. and more especially if the bar is a gentlemen's club.

{¶ 41} A significant number of the women who are processed out of the prison system also have a history of drug and/or alcohol problems. Placing a bar near the place where they are released to free society also makes no sense.

{¶ 42} The presence of the CBCF and pre-release center is not speculation. It is a fact. The persons who populate a CBCF and a pre-release center are not speculations. They are facts. Their drug and alcohol histories are undisputed facts.

{¶ 43} Chesnik claims that she wants the premises to be a "family restaurant," but has not opened the premises as a restaurant. Family restaurants do not require liquor permits, especially liquor permits which allow the sale of alcohol until 2:30 a.m. and on Sunday. Few families are ordering a family meal after midnight. The permits being sought imply activity far different from mere family dining that will be the focus of the premises.

{¶ 44} Further, with permits which allow for the sale of liquor until 2:30 a.m. comes the noise at closing time, frequently from patrons who have been drinking for hours.

{¶ 45} The D-6 permit authorizes Sunday sales runs afoul of a local option for the area which bars Sunday sales. Unless Downtown Croton, Inc. can convince the local voters to change the local law, the D-6 permit is useless.

{¶ 46} I think the Liquor Control Commission and the common pleas court got it right. I think the majority of this panel is getting it wrong. I, therefore, respectfully dissent.
