

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

K & M Deli, Inc., :
Appellant-Appellant, :
v. : No. 10AP-896
Liquor Control Commission, : (C.P.C. No. 10CVF-01-1283)
Appellee-Appellee. : (REGULAR CALENDAR)

D E C I S I O N

Rendered on December 1, 2011

Nathan Gordon, for appellant.

Mike DeWine, Attorney General, and *Charles E. Febus*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Appellant, K & M Deli, Inc., appeals from the judgment of the Franklin County Court of Common Pleas that affirmed an order of the Ohio Liquor Control Commission ("the commission") denying appellant's requests for liquor permits. Because we find the common pleas court did not abuse its discretion, we affirm.

{¶2} On January 9, 2008, appellant filed applications for C-1 and C-2 liquor permits for its grocery store and deli, operated on Kinsman Avenue in Cleveland, Ohio. A C-1 permit allows the retail sale of beer in containers not for consumption on the premises, while a C-2 permit allows the retail sale of wine and/or mixed beverages in

containers not for consumption on the premises. Objections were filed with the Division of Liquor Control by the city of Cleveland and St. Paul Missionary Baptist Church. Separate hearings were held on each application and two separate orders were issued by the superintendent of the Division of Liquor Control ("superintendent"), overruling the objections to each permit and granting the applications on the grounds the city of Cleveland had failed to present sufficient evidence to show the applicant was unfit to engage in the retail sale of alcohol or that the issuance of the permits would adversely impact the peace, sobriety and good order of the community.

{¶3} The city of Cleveland timely appealed these decisions to the commission and a consolidated hearing was held on January 12, 2010 as to both permits. By a vote of 2-1, the commission reversed the orders of the superintendent and denied the permit applications, without opinion. Appellant then filed an appeal in the common pleas court on January 27, 2010. On May 11, 2010, the common pleas court affirmed the orders of the commission, finding they were supported by reliable, probative, and substantial evidence and in accordance with law. This timely appeal now follows and raises a single assignment of error for our review:

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT AFFIRMED THE ORDERS OF THE LIQUOR CONTROL COMMISSION THAT WERE NOT SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE, AND WERE NOT IN ACCORDANCE WITH LAW.

{¶4} 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 the law. In applying this standard, the court must

"give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

{¶5} The Supreme Court of Ohio 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.)

{¶6} 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.' " *Lies v. Ohio Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. Due deference must be given to the administrative resolution of conflicting testimony. *Crumpler v. State Bd. of Edn.* (1991), 71 Ohio App.3d 526, 528. "However, the findings of the agency are by no means conclusive." *Univ. of Cincinnati* at 111. On questions of law, the common pleas court conducts a de novo review in determining whether the administrative order is "in accordance with law." *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471, 1993-Ohio-182.

{¶7} 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. (1992), 63 Ohio St.3d 705, 707. 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.* (1992), 80 Ohio App.3d 675, 680. 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 Medical Bd.*, 66 Ohio St. 3d 619, 621, 1993-Ohio-122. "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* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. 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* (1993), 82 Ohio App. 3d 301, 305, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶8} Appellant argues there was no testimony presented to establish that the issuance of the liquor permits would adversely affect the peace, sobriety and good order of the neighborhood. Appellant contends none of the witnesses provided specific testimony demonstrating the effect these new permits would have on the neighborhood. Appellant further submits that some witnesses testified about the positive impact this business had on the neighborhood. In addition, appellant argues the circumstances in the instant case are similar to those found in *Wells v. Ohio Liquor Control Comm.*, 10th

Dist. No. 10AP-889, 2011-Ohio-2875, and on those grounds urges us to reverse the denial of the permit applications.

{¶9} Finally, appellant argues there was no testimony to support the proposition that appellant was unfit to engage in the sale of alcohol. In fact, appellant submits several area residents testified that appellant/the permit applicant ran a safe and clean business and did not tolerate bad behavior.

{¶10} At the hearing before the commission, the following witnesses testified: (1) Phyllis Cleveland, councilwoman for Ward 5 for the city of Cleveland; (2) George Phillips, Chief Executive Officer of the Cleveland Metropolitan Housing Authority ("CMHA"); (3) Timothy Tramble, executive director for Burten, Bell Carr Development Corporation, the community development corporation for Ward 5; (4) Luther Roddy, a police detective in the vice squad for the city of Cleveland; (5) Kenneth McGuire, associate minister at St. Paul Missionary Baptist Church; (6) Zenobia Lane, area resident; (7) Carrie Randall, youth counselor at St. Paul Missionary Baptist Church; (8) Mary Nelson, a long-time resident; (9) Toni McKillip, an area resident; (10) Charles Harvey, an area resident; (11) Preston Holcomb, an area resident; (12) Anthony Williams, an area resident; (13) Brenda McGuire, an area resident; and (14) Abdelmunem Abuzahriah, the sole owner of K & M Deli, Inc., and the permit applicant.

{¶11} Eight witnesses testified against the permit applications.

{¶12} Councilwoman Cleveland testified the city of Cleveland was in the process of rebuilding the neighborhood where the proposed permit premises are located to improve public housing for hundreds of single mothers and children. She testified that in her experience, much of the crime that occurs in the neighborhood stems from stores that

sell alcohol. She is opposed to the issuance of additional permits in Ward 5. She expressed concerns regarding loitering and drug dealing and testified many area residents were afraid to enter some of the stores selling alcohol because of the individuals who hang out in front of those stores. She further testified she and the local development corporation, along with a group of area residents, met with Mr. Abuzahriah several years ago when he first purchased the land at issue, and at that time he indicated he was not interested in purchasing a liquor license.

{¶13} Mr. Phillips testified his organization was in the process of a total renovation of the housing authority property known as Garden Valley Estates, located at the corner of 79th and Kinsman. The total renovation costs were estimated at just over \$100 million. He further testified CMHA was in the midst of building a \$20 million campus for its central office down the street from Garden Valley Estates. He testified his agency strenuously objects to the issuance of any additional liquor licenses in the area and that the majority of the area residents also did not want additional beer and wine sold in the neighborhood.

{¶14} Mr. Tramble, whose community development corporation is located diagonally across the street from K & M Deli, Inc., testified he had a few meetings with Mr. Abuzahriah prior to the construction of K & M Deli, Inc. At that time, Mr. Tramble advised Mr. Abuzahriah the community felt there was enough access to alcohol in the area and additional permits were not needed. In response to that advisement, Mr. Abuzahriah indicated he would follow the desires of the community. Mr. Tramble also reiterated concerns regarding the excessive availability of alcohol in the neighborhood, as well as the high concentration of youth in the area and the higher than normal crime rate, adding

he believed another liquor permit in the neighborhood could create additional problems and jeopardize some of the planning and rebuilding in the neighborhood.

{¶15} Detective Roddy testified he had not received complaints about K & M Deli, Inc., but based upon his experience, beer and wine sales generally entice a different crowd to the area and cause problems with loitering, drugs, and robbery. On the other hand, stores without beer and wine sales typically do not experience those same problems. Detective Roddy also testified it would be in the best interests of the neighborhood to oppose and/or non-renew all liquor permit applications requested in the neighborhood.

{¶16} Reverend McGuire testified against the issuance of the permit on behalf of the church as well as himself. He testified he had grown up on the street corner at issue and had previously abused drugs and alcohol. He expressed concern that problems would return to that street corner if the store were granted a liquor permit and commented that many years ago there was a bar on that corner which made national news when eight people were shot as a result of drug and alcohol activity. He also expressed concern that addicts attending his church as part of their recovery process would be hindered by beer and wine sales across the street.

{¶17} Ms. Lane testified she has resided in Garden Valley Estates for several years and she objected to the granting of liquor permits for K & M Deli, Inc. Although she described the store as nice and quiet, she expressed concern that if the permits were granted, the store would experience loitering and robberies like the store on 75th Street, where beer and wine were sold. She also worried that beer and wine sales would attract alcoholics, drug dealers, and drug addicts and consequently promote trouble.

{¶18} Ms. Randall testified she works with approximately 32 children as part of the church youth program, which conducts plays and other programming to increase self-esteem and accountability. She testified she opposes the issuance of a liquor permit and noted that when the former establishment across the street sold alcohol, patrons of the establishment would loiter on the church steps and urinate behind the church sign. Some of the individuals even attempted to talk to the children and displayed inappropriate behavior.

{¶19} Finally, Ms. Nelson, a homeowner in the neighborhood for 60 years, testified she was concerned that beer and wine sales at the K & M Deli, Inc. would produce crowds like those she has witnessed at other stores in the neighborhood selling alcohol. She testified there was already enough alcohol in the neighborhood and that another permit would be a waste of money and would work against the rebuilding plans for the neighborhood.

{¶20} Area residents Toni McKillip, Charles Harvey, Preston Holcomb, Anthony Williams, and Brenda McGuire all testified in favor of granting the permit applications. Collectively, these witnesses testified that the proposed permit premises: (1) provided grocery and deli items; (2) were conveniently located; and (3) were clean, safe, and well-lit. These witnesses also testified Mr. Abuzahriah does not allow individuals to loiter or hang around outside, nor does he allow patrons to remain in the store if they are behaving inappropriately. Some of these witnesses also testified they believe it is not the selling of beer and wine itself that causes problems, but the way the owner of the store handles situations and whether he/she allows persons to loiter, hang out, or do drugs.

{¶21} Mr. Abuzahriah testified his store is well-lit and has security cameras all around the building. He testified he would not allow individuals to loiter or hang out in front of the store and he would take strong action if there were problems, including hiring a police officer if necessary. In addition, Mr. Abuzahriah disputed testimony presented by the commission inferring that he had previously represented he had no interest in obtaining a liquor license for his store.

{¶22} Pursuant to R.C. 4303.292(A)(2)(c), the division of liquor control may refuse to issue a retail permit if it finds "[t]hat the place for which the permit is sought * * * is so located with respect to the neighborhood that substantial interference with public decency, sobriety, peace, or good order would result from the issuance, renewal, transfer of location, or transfer of ownership of the permit and operation under it by the applicant." Furthermore, in *Our Place*, the Supreme Court of Ohio determined the statutory language in R.C. 4303.292 made it "clear that the location of proposed permit premises can be the only factor to be considered by the department in deciding not to issue a permit[.]" *Id.* at 573. See also R.C. 4303.292(A)(2)(c) and (B)(1). Also, where the basis for rejecting a renewal is R.C. 4303.292(A)(2)(c), the focus of this basis is the location of the permit business, not the person who operates the business. *Maggiore v. Ohio Liquor Control Comm.* (Mar. 29, 1996), 10th Dist. No. 95APE06-713.

{¶23} General, speculative evidence is insufficient to establish "substantial interference" with public decency, sobriety, peace or good order. See *Serv. Station Holdings, Inc. v. Liquor Control Comm.* (June 27, 1996), 10th Dist. No. 96APE01-22. However, in a neighborhood that is combating decline, public drinking and negative behavior linked to alcohol, including congregating to drink and routine incidents of public

urination, can be viewed as substantially interfering with the public decency, sobriety, peace or good order. See *Maggiore*. Also, the commission can consider the character and population of a neighborhood and the number of existing permits in a small area to conclude that another permit would seriously affect the community in its present state. See *Woodie v. State of Ohio Liquor Control Comm.* (Dec. 17, 1992), 10th Dist. No. 92AP-691 (finding there was reliable, probative, and substantial evidence to support the commission's determination that the area had reached the saturation point for liquor permits) and *18121 Euclid, Inc. v. Liquor Control Comm.*, 10th Dist. No. 05AP-354, 2005-Ohio-7025, ¶21 (in determining whether to grant an application, the division shall consider environmental factors, including the amount and location of permit premises in the immediate vicinity).

{¶24} Here, the testimony presented goes beyond unsubstantiated fears and beyond mere testimony against the issuance of all liquor permits; rather, there was testimony establishing the existence of numerous other permit holders within just a few blocks of the permit applicant, and testimony about a declining neighborhood struggling to combat problems with criminal activity and undergoing a major rebuilding project in which the city of Cleveland and others are investing millions of dollars. Councilwoman Cleveland and Mr. Tramble testified as to the adverse impact an additional permit holder would have upon the community and the redevelopment project. Additionally, there was testimony from Mr. Phillips that the majority of the community residents were against the issuance of the permits. Moreover, the permit premise is located across the street from a church. There was also testimony regarding previous problems at the church when an

establishment selling alcohol was located at that same corner, particularly problems directed at the high population of youths in the neighborhood.

{¶25} Although appellant believes this case to be similar to *Wells*, a case in which we affirmed the trial court's reversal of the commission's denial of the applicant's request for a liquor permit because the evidence on which the commission relied was speculative, we disagree.

{¶26} In *Wells*, the commission denied the permit based on speculation regarding an increase in traffic, accidents, and noise that may occur as the result of the issuance of a liquor permit, as well as general community opposition. In that case, we found there was no specific or quantifiable evidence regarding the expected increase in traffic or that alcohol sales would cause an increased need for additional parking or that accidents could be caused by the possible sale of beer. Here, on the other hand, there was testimony regarding the neighborhood having reached the saturation point for liquor permits, the ongoing problems with criminal activity in the neighborhood which were tied in some fashion to the sale of wine and beer, and the negative impact the issuance of additional permits would have upon a struggling community in the midst of a massive redevelopment project. For these reasons, we find the circumstances here to be different from those found in *Wells*.

{¶27} Absent an abuse of discretion on the part of the common pleas court, we cannot substitute our judgment for that of the common pleas court or the commission. *18121 Euclid, Inc.* at ¶33. Based upon the foregoing, we find the trial court did not abuse its discretion in finding there was reliable, probative, and substantial evidence to demonstrate the proposed permit location is so located with respect to the neighborhood

that substantial interference with public decency, sobriety, peace or good order would result from the issuance of a C-1 and C-2 permit.

{¶28} Accordingly, we overrule appellant's single assignment of error. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

FRENCH and TYACK, JJ., concur.
