

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

International & Middle East Foods, Inc., :  
Appellant-Appellee, :  
v. : No. 08AP-1121  
Ohio Liquor Control Commission, : (C.P.C. No. 07CVF-07-9686)  
Appellee-Appellee, : (REGULAR CALENDAR)  
(City of Cleveland, :  
Appellee-Appellant). :

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D E C I S I O N

Rendered on September 8, 2009

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*Lumpe & Raber, J. Richard Lumpe and David A. Raber, for appellee International & Middle East Foods, Inc.*

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

*Robert J. Triozzi, Director of Law, and Susan M. Bungard, for appellant City of Cleveland.*

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Appellant, City of Cleveland, appeals from a judgment of the Franklin County Court of Common Pleas reversing an order of the Ohio Liquor Control Commission ("commission") that denied the application of appellee, International &

Middle East Foods, Inc. ("IMEF") for new class C-1 and C-2 alcohol carryout permits.

Appellant assigns a single error:

The Common Pleas Court abused its discretion by substituting its judgment regarding the testimony offered before the Liquor Control Commission (LCC). The LCC is the fact-finder and had the opportunity to observe the demeanor of the witnesses and weigh their credibility. The Court must defer to these findings. Rather, the Court cherry-picked testimony in order to overturn the decision of the LCC. The LCC Order is supported by reliable, probative, and substantial evidence and is in accordance with the law and the decision of the Court of Common Pleas should be overturned.

Because the common pleas court did not abuse its discretion in reversing the commission's decision, we affirm.

### **I. Procedural History**

{¶2} IMEF purchased property at 1951-1957 West 25th Street ("the premises") in a part of Cleveland, Ohio known as "Ohio City" with the intent of operating a state liquor agency and carryout store at that location. After IMEF filed the necessary applications with the Division of Liquor Control ("division"), appellant objected to the carryout permit pursuant to R.C. 4303.26. The division held a hearing on the matter and determined appellant failed to prove either that IMEF was unfit to engage in the retail sale of alcoholic beverages or that issuance of the permit would adversely impact the peace, sobriety, and good order of the community. Accordingly, the division approved IMEF's application to operate a carryout. The application for the state liquor agency store was also approved separately and is not at issue here.

{¶3} Appellant appealed to the commission. Following a hearing, the commission, in a split decision, reversed the order approving the carryout application. The

commission did not issue findings of fact, conclusions of law, or any reasons for its decision reversing the superintendent's order, but instead simply stated that "[a]fter consideration of the evidence and arguments of counsel, the Commission finds said appeal is well taken and **reverses** the order of the Superintendent." (July 3, 2007 Order.)

{¶4} Pursuant to R.C. 119.12, IMEF appealed the commission's decision to the Franklin County Court of Common Pleas. Lacking guidance about the basis of the commission's decision, the common pleas court relied upon appellant's objections to the superintendent's original order and the evidence presented during the hearing before the commission. The common pleas court concluded appellant's evidence fell short of demonstrating the area is saturated with existing liquor permits, one of the grounds set forth in R.C. 4303.292(B)(2) for denying an application. The court additionally determined appellant failed to demonstrate that issuing a carryout permit would "substantially interfere" with public decency, sobriety, and good order, as required to deny an application pursuant to R.C. 4303.292(A)(2)(c). Because the evidence presented in opposition to the permit failed to support any of the grounds appellant cited for denying a permit, the common pleas court determined the commission's order is not "supported by reliable, probative and substantial evidence and is not in accordance with law." (Dec. 1, 2008 Decision, 16.) The common pleas court thus reversed the commission's order and remanded with instructions for the commission to affirm the superintendent's order approving the applications.

## **II. Assignment of Error**

{¶5} In its single assignment of error, appellant asserts not only that reliable, probative, and substantial evidence supports the commission's decision, but that the

decision is in accordance with law. Accordingly, appellant contends the common pleas court abused its discretion in reversing the commission's decision.

{¶6} Under R.C. 119.12, when a common pleas court reviews an order of the administrative agency, the common pleas court must consider the entire record to determine whether the agency's order is supported by reliable, probative, and substantial evidence and 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, the probative character of the evidence, and the weight thereof.' " *Provisions Plus, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 03AP-670, 2004-Ohio-592, ¶7, quoting *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207. In 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. *Conrad*, supra.

{¶7} By contrast, an appellate court's review is more limited. *Provisions Plus*, supra, ¶8, citing *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. The appellate court determines whether the common pleas court abused its discretion. *Id.* An abuse of discretion implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. *Aida Enterprises, Inc. v. Ohio State Liquor Control Comm.*, 10th Dist. No. 01AP-1178, 2002-Ohio-2764, ¶11, quoting *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. Absent an abuse of discretion, the appellate court may not substitute its judgment

for that of the common pleas court. *Provisions Plus*, supra. An appellate court, however, has plenary review of purely legal questions. *Id.*

{¶8} A retail permit application, such as the carryout permit at issue in this case, can be denied for the reasons listed in R.C. 4303.292. As relevant here, a permit application can be denied if 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." R.C. 4303.292(A)(2)(c). Additionally, denial of a permit is justified when "the number of permits already existent in the neighborhood is such that the issuance \* \* \* would be detrimental to and substantially interfere with the morals, safety, or welfare of the public." R.C. 4303.292(B)(2). Appellant bears the burden of establishing as a fact that one or more of the grounds specified in R.C. 4303.292(A)(2)(c) or (B)(2) applies in this case. See *Service Station Holdings, Inc. v. Liquor Control Comm.* (June 27, 1996), 10th Dist. No. 96APE01-22 ("*Service Station Holdings I*").

{¶9} Within those parameters, appellant raises three arguments suggesting the common pleas court abused its discretion. Initially appellant argues the common pleas court "completely discounted and mischaracterized the testimony" appellant offered, thereby improperly encroaching on the commission's role as fact-finder. (Appellant's brief, 23.) Next, appellant asserts that, while its evidence substantiates its claim that the area is already saturated with liquor permits, the common pleas court improperly failed to consider that evidence. Finally, appellant maintains the common pleas court's finding that appellant's evidence of "substantial interference" with "public decency, sobriety and good

order" was just "unsubstantiated speculation" conflicts with this court's past opinions. (Appellant's brief, 27.)

#### **A. Discounting and Mischaracterizing Appellant's Evidence**

{¶10} Appellant first contends the common pleas court overstepped its bounds in making factual determinations that conflicted with the conclusions the commission reached. In particular, appellant argues the common pleas court incorrectly concluded that the number of homeless persons loitering in the area had not diminished since a previous carryout and state liquor store at the location closed. Appellant points to evidence that, while homelessness and loitering in the park remain a problem even though the former permit premises closed, one witness testified the situation is "actually much improved." (Tr. 115.) The bulk of the testimony, however, indicated that the problem of loitering and homelessness continues unabated in the neighborhood. In the absence of findings of fact from the commission, we cannot conclude the common pleas court abused its discretion when it determined that loitering remains a problem in the area surrounding the proposed premises.

{¶11} Nor did the common pleas court abuse its discretion when it considered the permit applicant's background. R.C. 4303.292(A)(1) allows the commission to deny a liquor permit application based on misrepresentations in the application, the relevant criminal background, past misconduct in operating a liquor permit premises, or the applicant's personal drug or alcohol problems. Since the commission's decision does not indicate the basis for its decision, we cannot fault the common pleas court for ruling out the factors in R.C. 4303.292(A)(1). Moreover, because appellant does not directly argue that the R.C. 4303.292(A)(1) statutory factors support denying IMEF's application in this

case, any potential error in the common pleas court's considering the permit applicant's background is harmless.

{¶12} Finally, the common pleas court did not abuse its discretion in not giving much weight to community opinion. The attitude of the surrounding neighbors towards a liquor permit application is not one of the grounds appellant cited or R.C. 4303.292 references for denying the permit.

{¶13} Appellant's argument that the common pleas court abused its discretion in its treatment of the evidence in the record lacks merit.

### **B. Saturation of Liquor Permits**

{¶14} Appellant next asserts the common pleas court erred in concluding appellant failed to demonstrate the area surrounding the proposed premises already is saturated. In reaching its conclusion, the common pleas court noted appellant not only offered "no evidence" concerning how many people live in Ohio City, but also no documentation as to the specific type and location of the 19 other permits appellant claims are found within a two-block radius of the proposed location. The common pleas court held that, "[a]s with the element of population, evidence of the specific number, type and location of other permits must be considered in determining whether an area is 'saturated' with liquor permits." (Dec. 1, 2008 Decision, 11.)

{¶15} The parties acknowledge the commission may deny an application if an area is saturated with pre-existing permits. R.C. 4303.292(B)(2) mandates that, in determining whether an area is saturated, appropriate considerations include "the character and population of the neighborhood," the number, location, and type of all

similar and any other permits in the area, and the effect the requested permit would have on the neighborhood.

{¶16} Although appellant's argument relies on *Woodie v. Ohio Liquor Control Comm.* (Dec. 17, 1992), 10th Dist. No. 92AP-691, the evidence in *Woodie* revealed the area had 16 liquor establishments in an area of 120 homes, or about one permit holder for every 7.5 residences. To demonstrate that the area at issue here was saturated with pre-existing permits, appellant offered the testimony of Detective John Graves, a Cleveland Police Department Vice Squad member. Graves testified 19 permits could be found within a two-block radius of the location, with 13 of those contained within one block. With two exceptions, all these permits allowed only on-site consumption of alcohol. In the end, however, no evidence addressed the size of the community to determine whether the existing permits saturate the area.

{¶17} Mere recitation of the number of permits in a particular area fails to demonstrate saturation. *Meslat v. Ohio Liquor Control Comm.*, 164 Ohio App.3d 13, 2005-Ohio-5491, ¶22 (stating "the bare fact of the number of permits in a given area, without any indication as to whether this number is excessive and/or why the addition of another permit would be detrimental and substantially interfere with the morals, safety, or welfare of the public, does not constitute substantial or probative evidence"). *Meslat* found no grounds for denying an application for new C-1 and C-2 permits, even though the area in question contained 21 permits in a one-mile radius, including 11 carryout permits. Here, not only is the evidence as bare as in *Meslat*, but only two carryout permits are close to the proposed premises. Absent further specifics about the size of the impacted area, we,

as in *Meslat*, cannot say the common pleas court abused its discretion when it refused to find the surrounding area saturated with pre-existing carryout permits.

### **C. Substantial Interference**

{¶18} Finally, appellant argues the common pleas court diverged from this court's past decisions when it concluded appellant's evidence, submitted in an attempt to show that a new carryout would result in substantial interference with public decency, sobriety, and good order, was merely "unsubstantiated speculation."

{¶19} After summarizing the testimony appellant's witnesses presented, the common pleas court concluded that "[t]he cumulative effect of this testimony is general and speculative." (Decision, 15.) Noting the requested carryout permit will be located in an already-approved state liquor agency store, the common pleas court determined the speculative nature of appellant's evidence failed to establish substantial interference with public decency, sobriety, peace or good order. Appellant argues it did not rely on general fears of what might happen if the permit were issued, but "based the concerns of future problems on the past influence of liquor in the area, the present problem that liquor is creating, and likely continuation or worsening of that problem if a new permit is granted." (Appellant's brief, 28.)

{¶20} Unsubstantiated fears or speculation generally do not constitute sufficient evidence of substantial interference. *Service Station Holdings I*, supra. We nonetheless also recognize that "evidence presented in opposition to applications for new permits, is, by definition, more speculative than evidence in cases of permit renewal or transfer applications." *Bagley Interstate 71 Ent., Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No.

03AP-720, 2004-Ohio-1063, ¶10, citing *SM & AM, Inc. v. Ohio Liquor Control Comm.* (May 22, 2001), 10th Dist. No. 00AP-1298.

{¶21} To support its argument, appellant cites to *Service Station Holdings, Inc. v. Ohio Liquor Control Comm.* (Feb. 20, 1997), 10th Dist. No. 96APE08-1053 ("*Service Station Holdings II*"). In that case, we concluded the common pleas court did not abuse its discretion in affirming the commission's decision to deny a new carryout permit located across the street from a high school. The evidence offered against the permit showed the area was heavily trafficked, including a history of accidents involving persons exiting the high school. Opponents argued a new liquor permit at that location would likely lead to an increase in the number of accidents. We determined such evidence was not speculative, because "it is specific testimony of the current situation, past accidents at that location, and the significant interference with the public order that has already occurred and is reasonably likely to be exacerbated by the granting of the requested permit." *Id.*

{¶22} *Service Station Holdings II*, however, presented a significantly different fact scenario from the present case. Not only did that case involve a high school and young drivers, but the permit would have introduced alcohol sales into the school neighborhood where accidents already were a problem. By contrast, the present case would add a permit premises in an area already home to a number of liquor establishments. To suggest, without evidence, that one more permit premises would produce substantial interference is speculative. Were, however, such factual differences insufficient, we note the standard of review is whether the common pleas court abused its discretion. In *Service Station Holdings II* we determined the common pleas court's order was within its

discretion; here, appellant asks that we determine the court's decision exceeds the bounds of its discretion.

{¶23} Appellant also argues the evidence it presented is similar to the evidence determined to be substantial in *18121 Euclid, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 05AP-354, 2005-Ohio-7025. *18121 Euclid* involved an application for a new carryout permit in a neighborhood undergoing revitalization. The superintendent denied the application; the commission, the common pleas court, and this court all affirmed the decision. Our decision concluded that the specific testimony concerning the presence of loitering, drug dealing, and debris at the proposed premises, the reasonable likelihood that granting the permit would exacerbate the present problems, as well as testimony about significant interference with the public order that existed when in the recent past a liquor permit last operated at that location constituted reliable, probative, and substantial evidence supporting the denial order.

{¶24} Appellant's reliance on *18121 Euclid* does not advance its argument, because the requested permit in that case was for an existing business seeking to add carryout sales of alcohol and liquor. The evidence there demonstrated serious problems because of the then current operations of that business. By contrast, nothing in the present case indicated the permit premises is a current source of problems for the neighborhood, and no evidence suggested the superintendent's decision to grant the requested permit would aggravate the circumstances surrounding the premises. The problems appellant cites are endemic to the neighborhood and are not specific to the particular location and business seeking the permit.

{¶25} Appellant also presented evidence of public urination and drug activity near the proposed premises, with most of the problems involving homeless persons who congregate in a city park across the street from the site. Quoting *Maggiore v. Ohio Liquor Control Comm.* (Mar. 29, 1996), 10th Dist. No. 95APE06-713, appellant notes "public drinking and negative behavior linked to liquor such as congregating to drink and routine incidents of public urination can properly be viewed as substantially interfering with the public decency, sobriety, peace, and good order." (Appellant's brief, 28.)

{¶26} Similar to *18121 Euclid*, the requested permit renewal in *Maggiore* was denied because the problems were directly linked to the operation of the convenience store. By contrast, here the issue of loitering homeless persons remained a problem even after a previous carryout and state liquor store near the location closed. "The clear inference to be drawn from this fact is that whether or not a liquor store and carryout was at the proposed location had no impact on loitering." (Dec. 1, 2008 Decision, 12-13.) Appellant did not establish a connection between the proposed premises and the problems subject of its complaints.

{¶27} Appellant's reliance on *Aldi, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 05AP-804, 2006-Ohio-1650, is also misplaced. *Aldi* affirmed the denial of a new carryout permit on the basis that an experienced police officer's testimony concerning the potential impact of a new carryout permit on an adjacent neighborhood park constituted reliable, probative, and substantial evidence supporting the commission's decision to deny the permit application. By contrast, appellant's witness, Detective Graves, testified a new permit would not increase the number of homeless people loitering in the park: "I don't think it would increase the number. I think that instead of walking down to Bridge

Avenue [where another carryout is located, one block away], they're going to go right across the street, and get it, and come back." (Tr. 24-25.) While Graves also testified the easier access to a carryout would create more interaction between loiterers and patrons of the other businesses in the area, most notably higher-end restaurants, bars, and a community market, that statement fails to support the commission's decision. In the end, although the new permit premises may lessen the length of trips to a carryout for individuals loitering in the park, the essential fact is the number of loiterers will remain the same, and the impact upon the park will not change.

{¶28} Other evidence appellant presented centered on community opposition to the new premises, suggesting a new carryout was not the highest and best use of the location. As this is not one of the grounds for denying a permit under R.C. 4303.292, the common pleas court correctly concluded such evidence failed to support appellant's contention that the permit should not have been granted.

{¶29} In the final analysis, the common pleas court correctly discounted the speculative nature of concerns that a new carryout would worsen the situation in the neighborhood. Since the location in the past had been approved for a state liquor agency store, and problems with loiterers in the nearby park existed independent from the presence of a carryout in close proximity, appellant's evidence failed to sufficiently demonstrate that a new carryout permit would substantially and negatively interfere with the neighborhood's public decency, sobriety, and good order. The common pleas court did not abuse its discretion in so concluding.

{¶30} Because appellant did not demonstrate the common pleas court abused its discretion in reversing the commission's order denying IMEF's application, appellant's

sole assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

McGRATH and TYACK, JJ., concur.

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