

[Cite as *Wells v. Ohio Liquor Control Comm.*, 2011-Ohio-2875.]
IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Robert D. Wells, :
Appellant-Appellee, :
v. : No. 10AP-889
Ohio Liquor Control Commission, : (C.P.C. No. 10CVF 04-6589)
Appellee-Appellant. : (REGULAR CALENDAR)

D E C I S I O N

Rendered on June 14, 2011

Lumpe & Raber, J. Richard Lumpe, and David A. Raber, for appellee.

Michael DeWine, Attorney General, and Scott A. Longo, for appellant; Sustersic Law Office, and Edward G. Sustersic, for Village of Bellaire, Ohio.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Appellant, Ohio Liquor Control Commission ("commission"), appeals the judgment of the Franklin County Court of Common Pleas, which rendered a decision in favor of appellee, Robert D. Wells. The court reversed a decision by the commission, which had denied Wells' request for a liquor permit. Having concluded that the trial court did not abuse its discretion, we affirm.

{¶2} Wells applied for a D-1 liquor permit for a food and ice cream establishment, Tee Pee Fast Foods, in Bellaire, Ohio. A D-1 permit would allow beer sales for carry-out and service on the premises. The Ohio Department of Commerce, Division of Liquor Control ("division"), conducted an investigation and held a hearing. Thereafter, the division denied Wells' application.

{¶3} In its denial, the division found that issuance of the permit would result in substantial interference with public decency, sobriety, peace or good order. Specifically, the division found that the property lies in a residential area. Traffic, including speeding cars and accidents, is a problem in the area. According to the division, "[t]here is a concern that the issuance of this permit will further increase vehicular traffic in the area especially when construction of a new exit ramp from State Route 149 is completed." In addition, the division stated that many young children frequent the business, and there is a school bus stop across the street. "Many residents and city officials are fearful for the safety of these young children who frequent the business and area."

{¶4} Wells appealed to the commission. Following a hearing, the commission affirmed the division's denial, without opinion.

{¶5} Wells appealed to the trial court. The court reversed, concluding that the commission's decision was not supported by reliable, probative, and substantial evidence. Rather, the court found that the evidence on which the commission relied was speculative in nature.

{¶6} The commission filed a timely appeal and raises the following assignment of error:

THE COMMON PLEAS COURT ABUSED ITS DISCRETION IN REVERSING THE LIQUOR CONTROL COMMISSION'S ORDER BY FINDING THAT THE COMMISSION'S ORDER WAS NOT SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE, AND NOT IN ACCORDANCE WITH LAW.

{¶7} 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.

{¶8} 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.)

{¶9} 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 not 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.

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. However, on the question whether the commission's order was in accordance with the law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶10} The division may refuse to issue a liquor permit if it finds that the place for which the permit is sought "[i]s 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). Here, the commission contends that the trial court abused its discretion by reversing the commission's affirmance of the division's denial of the permit on this statutory basis. While the trial court found that the commission relied on mere speculation and conjecture to affirm the denial of the permit, the commission contends that some speculation is necessary where, as here, the application is for a new permit, as opposed to a renewal of an existing permit.

{¶11} Because the commission affirmed the division's denial without explanation, we cannot determine, just as the trial court could not determine, the specific evidence on which the commission relied. On appeal, the commission directs us to the following: (1) the testimony of Michael Kovalyk, Chief of Police for Bellaire; (2) the testimony of village council members, who also reside in the area; and (3) the testimony of other residents.

{¶12} First, Chief Kovalyk described the premises and neighborhood. He identified pictures of the premises, which showed a restaurant, a walk-up area for ice

cream, and a drive-thru in the rear. He also identified areas of congestion surrounding a construction project relating to the re-routing of State Route 149. When asked to identify his concerns, "[a]s chief of police," about the issuance of a liquor permit for carry-out and service in the restaurant, he said that the Tee Pee had been an ice cream establishment in the neighborhood for a long time, "and it attracts a lot of children. And the concerns I have is the traffic that may come out of there through the drivethrough if there is alcohol involved there." (Tr. 28.) When asked if he had concerns as a parent, Chief Kovalyk said he was concerned because children also use a playground next to an old school building close by. He said that the business is located in "the quietest neighborhood" in Bellaire. (Tr. 29.)

{¶13} On cross-examination, Chief Kovalyk also discussed the location of a nearby carry-out that sells beer. The unused school building and playground lie about equidistant between the Tee Pee and the other carry-out. He was unaware of any problems relating to the other carry-out. He had no specific dates or reports relating to accidents in the area, and he has had no parking problems at the Tee Pee.

{¶14} Chief Kovalyk clarified that the construction in the area would relocate State Route 149 so that it will now be a separate route running parallel to Washington Street, the road directly in front of the Tee Pee. The end result is that State Route 149 traffic that normally would have traveled through Bellaire will no longer travel directly in front of the Tee Pee.

{¶15} Rickie Parker, a member of Bellaire's village council, testified that he had received a lot of complaints about the application for a liquor permit at the Tee Pee. He said some residents were concerned about the potential for increased traffic and noise if

a liquor permit were allowed. He noted the location of other bars in the area and the issues they have had with loud music, cars, and motorcycles. As noted by the trial court, it is unclear from Mr. Parker's testimony whether the village council passed a resolution opposing the permit or voted it down.

{¶16} James Williams, also a member of Bellaire's village council, testified that he had concerns about the issuance of a permit to the Tee Pee. Specifically, he expressed his concern as "probably the type of traffic that you're going to get there closing up, guys going in and out of there that have been drinking, the noise." (Tr. 52.) He identified a document prepared by the Forest Hills Community Center officers, all of whom objected to the issuance of a permit. He also identified petitions signed by area residents opposed to the permit.

{¶17} On cross-examination, Mr. Williams specified that he was concerned about noise that might occur after 10:00 p.m. Asked if he thought there would be a noise problem if the business closed at 10:00 p.m., he said, "[N]ot for me, no." (Tr. 61.)

{¶18} Kathy Smith, an area resident, testified that she is "completely opposed" to an on-site permit. (Tr. 63.) She was concerned that individuals who consume alcohol "may consume way too much, and they become rowdy, and then other types of bad behavior or unsavory behavior and noise and traffic would occur. That would not be conducive to the quiet and peaceful quality of our neighborhood." (Tr. 63.) She said her concerns would remain whether the permit was for on-site consumption or for carry-out. She also expressed her opinion that the parking lot was insufficient.

{¶19} Robert Campbell, an area resident, testified that, in his view, there are inadequate restrooms in the facility. The addition of restrooms, he added, would

decrease the size of the parking lot. He had never been in the existing restrooms, however.

{¶20} Lillian Hepburn, an area resident, testified that many residents walk or ride bikes to the Tee Pee, and Little League teams go there after games. In her view, it is not an appropriate place to sell beer.

{¶21} Wells testified that he is not seeking to start a new carry-out business; rather, he wanted only to expand his existing business. He had owned the Tee Pee for 15 years, but a business had existed on the property for 50 years. Until the construction started two years ago, the business was open from April 1 to October 31 each year. The first year of the construction, he closed in August; the second year, he did not open at all. The relocation of State Route 149 will decrease traffic flow past his business by 8,000 vehicles per day. The construction will result in there being no flow of traffic past his business.

{¶22} The parking on the property has remained the same since he bought the business. As for the school bus stop that was across the street, Wells (a certified school bus driver) testified that it had been moved by about one-half block.

{¶23} Wells' intent is to have the majority of his beer sales from carry-out business. He intends to close the entire business at 10:00 p.m. and said he would agree to forfeit the permit if he stayed open later. For on-site sales, he would install a draft system and sell beer by the glass at prices that would not encourage patrons to "sit in there and drink." (Tr. 85.)

{¶24} Wells thought that the value of his business would increase with a liquor permit. He has no intention of selling the business.

{¶25} General, speculative evidence is insufficient to establish substantial interference with public decency, sobriety, peace or good order under R.C. 4303.292. *Cleveland v. Fast & Friendly, Inc.*, 10th Dist. No. 07AP-912, 2008-Ohio-2293, ¶12. Important for our purposes here, "general speculation that traffic and accidents will increase with the issuance of the permits is insufficient to meet the requirements of 'substantial interference' under R.C. 4303.292(A)(2)(c)." *Serv. Station Holdings v. Liquor Control Comm.* (June 27, 1996), 10th Dist. No. 96APE01-22.

{¶26} The least speculative testimony here was that of Chief Kovalyk, who testified about his concern for increased traffic, given current traffic patterns and issues. The congestion associated with the construction project was short-term, however. And, once completed, State Route 149 will run parallel to Washington Street, and the traffic that would have passed directly in front of the Tee Pee will be eliminated. The end result will be a substantial decrease in traffic past the business.

{¶27} To be sure, Chief Kovalyk and other witnesses testified about the possibility of increased traffic going into or out of the Tee Pee with the addition of beer sales. The trial court discerned no evidence, however, of "substantial interference" with the peace and good order of the surrounding neighborhood. There was no specific or quantifiable evidence about the expected increase in traffic. While questions arose concerning the size of the parking lot, there was no evidence that on-site or carry-out beer sales would cause an increase in the need for parking spaces. And, while Chief Kovalyk expressed concern for the wall outside the walk-up window in front of the Tee Pee, the wall has existed for decades. There was no evidence connecting accidents

that may be caused by the obstructed view to Third Street and the possible sale of beer from the business.

{¶28} For all these reasons, we conclude that the trial court did not abuse its discretion in reversing the decision of the commission. Therefore, we overrule the commission's assignment of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.
