

LICENSE APPEAL COMMISSION
CITY OF CHICAGO

Nick's on Wilson, LLC)	
d/b/a Nick's on Wilson)	
Citizens Appeal)	
for the premises located at)	Case No. 06 LA 26
1140 West Wilson Avenue)	
)	
v.)	
)	
Department of Business Affairs and Licensing)	
Local Liquor Control Commission)	
Scott V. Bruner, Director)	
)	

AMENDED ORDER

OPINION OF CHAIRMAN FLEMING JOINED BY COMMISSIONER KOPPEL AND
COMMISSIONER SCHNORF

This matter comes before the License Appeal Commission based on an appeal filed by a private citizen objecting to the issuance of a Tavern license and a Public Place of Amusement license to Nick's on Wilson at 1140 West Wilson Avenue. The long history of this case has been made of record in the proceedings and we do not repeat it in the opinion. For any purposes it is sufficient to state that this private citizen, Heidi Myers, has a statutory right to file this appeal pursuant to 235 ILCS 5/7-9. With the appeal properly filed the next matter to be reviewed is how this hearing would procedurally proceed. The normal method of advising a license applicant that its application has been denied by the Local Liquor Control Commission is a letter to the applicant from the Director of the Local Liquor Control Commission setting out the reasons for denial. That letter is allowed in evidence as a charging or notice letter, not for

substantive evidence.

That procedure was not applicable to this case since it is a citizen appeal and also since the City is on the side of the licensee in this case. After different arguments and motions it was determined that the citizen objection set out her reasons for appealing the issuance of this license in a Bill of Particulars.

A review of that Bill of Particulars suggests the grounds presented by the Citizen Intervenor as the reasons that the License Appeal Commission should reverse the issuance of the liquor and public place of amusement licenses for 1140 West Wilson Avenue:

- A. The Licensee applied for a liquor license within 100 feet of a pre-existing home for the indigent in violation of 235 ILCS 5-6-11(a).
- B. The Licensee applied for a liquor license within 100 feet of a pre-existing home for the aged in violation of 235 ILCS 5-6-11.
- C. The Licensee erroneously received a Public Place of Amusement license within 200 feet of a daycare center and high school in violation of Chicago Municipal Code 4-156-330.
- D. Licensee erroneously received a Tavern license within 100 feet of an educational institution in violation of 235 ILCS 5/6-11.
- E. The Local Liquor Control Commissioner failed to comply with Section 4-60-050 and 4-156-311 in its review of the Tavern and Public Place of Amusement applications.
- F. The Local Liquor Control Commissioner's decision approving the Tavern and Public Place of Amusement licenses failed to consider deleterious impact upon the neighborhood.

This Commission is not the proper forum to litigate any matters concerning the issuance

of the Public Place of Amusement license. Matters dealing with the application of Public Place of Amusement licenses are set out in Section 4-156-290 through 520. The process for voicing objections to the issuance of this type of license is set out in Section 4-156-311 and that hearing is conducted under the auspices of the Director of Business Affairs and Licensing. Appeals by this ordinance go to the adjudication division of the Department of Business Affairs & Licensing, not to the License Appeal Commission: all objections to the issuance of the Public Place of Amusement license issued to this licensee at 1140 W. Wilson Avenue are dismissed due to lack of jurisdiction in this forum.

Having determined that Heidi Myers is entitled to a hearing before the License Appeal Commission on the remaining allegations the issue next to be addressed is the type of hearing she is entitled to. Her attorney argues that we need to take live testimony and allow him the right to cross-examine all witnesses in order to provide her with due process. Counsel for the licensee asserts such a full hearing is not needed and that this matter can be resolved in a manner similar to motions for summary judgment in the Circuit Court. In such matters and under certain circumstances if cases can be determined on the basis of affidavits. If affidavits show a question of material fact, summary judgement would be inappropriate.

Counsel for licensee cited Cato v. Village of Dolton 250 Ill. App 3d 130 (1993) as precedent for the proposition that this case can proceed by summary disposition. The fact is that the statute in the Cato case specifically allowed for summary dispositions. A review of the Illinois Liquor Control Act and the Administrative Procedure Act did not reveal a similar

provision concerning summary dispositions. Certain provisions of the Administrative Procedure Act do provide some guidance on this issue. A contested case is defined as an adjudication proceeding in which the individual's rights, duties or privileges of a party are required by law to be determined by an agency only after an opportunity to be heard. Section 100-10-25 (b) states that on a contested case there must be an opportunity to all parties to be represented by legal counsel and to respond and present evidence and argument. Section 100-10-40 (c) sets out that a party may conduct the cross-examination required for a full and fair disclosure of the facts. Case law suggests that an administrative agency is given broad discretion in conducting a hearing with the proviso that due process must be adapted to the nature and circumstances of the dispute within fundamental principles of and requirements of due process. Taking these matters into consideration it is the opinion of this Commissioner that each of the bases argued by the citizen intervenor must be reviewed individually to determine if they can be determined by summary disposition while preserving the due process rights of the citizen objector.

The assertion that the Local Liquor Control Commissioner's decision approving a tavern license failed to consider deleterious impact upon the neighborhood is a matter that can be disposed of by summary disposition without denying the objector her due process rights. It is important to note that this allegation does not address whether the issuance of this license would cause a deleterious impact and did not allege the Director mistakenly determined that the issuance of a license would not cause a deleterious impact. Those allegations, if before this Commission, might require evidence. The allegation is that Director Bruner failed to consider the deleterious impact upon the safety and welfare that would be caused by the issuance of this

license. The affidavit of Scott Bruner in the record as Exhibit D to the Licensee's Motion to Strike, and/or for Summary Disposition as to Citizens Bill of Particulars is conclusive evidence on this allegation. Paragraph 7 of this affidavit states in pertinent part,

“...I determined the issuance of the License to the Licensee would not have a deleterious impact upon the surrounding community in which the premises were located, nor would it create any law enforcement problem.”

This sworn affidavit is not rebutted. The response filed by the attorney for the citizen intervenor does not address the issue in this case. The citizen objector has failed to prove by a preponderance of the evidence that Scott Bruner as the Local Liquor Control Commissioner failed to consider whether the issuance of the license would cause a deleterious impact to the health and safety of the community.

The issue of whether the Local Liquor Control Commissioner failed to comply with Chicago Municipal Code 4-60-050 can also be dealt with in a summary disposition. That section of the Municipal Code requires that:

Within five days after receiving an application under this Chapter for a liquor license, the department of business affairs and licensing shall serve notice by first class mail on all legal voters residing within 250 feet of the location for which the license is sought.

The ordinance goes on to explain how the area shall be measured and what information must be placed on the notice. Those specifics are not important since there is no question of fact that Heidi Myers and 15 other voters registered at 4603 N. Racine did not receive the notice by first class mail. There is no factual issue but only a legal issue as to what remedy, if any, is to be imposed for the City's failure to notify those 16 voters by first class mail.

The issue is how does one interpret the use of the word “shall” on this ordinance. The general interpretation of “shall” in administrative procedure and law is that it is mandatory. One must follow what has been prescribed. That general interpretation does not apply to situations that “merely directs a manner of conduct for the guidance of the officials or specifies the time for the performance of an official duty.” Andrews v. Foxworthy, 71 Ill. 2d 13 (1978). An ordinance is mandatory when it prescribes the result that will follow if the required acts are not done. Sip & Save Liquors, Inc. v. Daley, 275 Ill. App. 3d 1009. This section of the Municipal Code does not specify a result if the mailing was not sent to all voters in the prescribed area. That makes the use of the word “shall” in this ordinance directory and not mandatory. Failure to comply with its literal requirements is not a basis to deny this license.

It is also important to note that the purpose of that ordinance is to give citizens the right to object to the issuance of a license. It is only one of various ways in which notice is given to the community. Scott Bruner’s affidavit asserts, without contradiction, that notice was given to the Alderman and published in a daily newspaper of general circulation in Chicago four times over a two week period. Bruner’s affidavit states on information and belief notice was posted on the premises. That would be not conclusive but there is no allegation that this notice requirement had not been complied with by this licensee. While 16 voters did not receive actual mailed notices and did not have the right to object, there was substantial compliance with the notice provisions of the ordinance.

The remaining bases set out by the citizen objector all relate to issues of whether the premises of this licensee at 1140 West Wilson are too close to a home for the indigent named

Sylvia Center at 4615 North Clifton; to a home for the aged, named St. Martha's Manor at 4621-29 North Racine; and to an educational institution at 1145 W. Wilson. The analyses as to these assertions will first address whether there are any factual disputes as to the distance between the licensee's premises and these institutions and then, if necessary, are these institutions such that a license cannot issue if they are less than 100 feet from the licensee.

The licensee has submitted the affidavit of Mirko Mihajlovic who is licensed by the State of Illinois as a Professional Land Surveyor. In that affidavit he sets out the following property line to property line measurements from Nick's on Wilson:

1. To the Sylvia Center is over 111 feet;
2. To the Truman Middle College Alternative High School is over 487 feet.

While it is not mentioned in the affidavit a review of the survey shows a distance of 80 feet from Nick's on Wilson to the property line of Truman College. Based on this Commissioner's review of the transcript of the oral argument in this case on January 28, 2008, it seems all parties agree with these measurements. The issue is the legal effect of these measurements with respect to the issue of issuing a tavern license.

There appears to be no argument that Sylvia Center located at 4615 N. Clifton is a program providing housing for indigents and, as such, would be subject to the 100 foot limit. The citizen objector has attached an annotated map and aerial photo which purports to establish this distance as 45.17 feet. She also asserts personal knowledge that the distance is less than 90 feet but sets forth no bases for that assertion. The certified survey reflects this distance as 111.44

and the surveyor has set out this distance in his affidavit. As referred to earlier, there was no argument with these measurements at the oral argument. The citizen objector did not reference any other evidence to rebut the measurement. Based on the totality of these facts, it is appropriate to issue summary disposition that Nick's on Wilson is not located within 100 feet of the Sylvia Center at 4615 N. Clifton.

As counsel for licensee pointed out in his brief the 100 foot rule does not refer to "educational institutions" but prohibits the issuance of a liquor license within 100 feet of any "school other than an institution of higher learning." Truman College is an institution of higher learning and is exempt from the 100 foot rule. Since Truman itself is exempt from the 100 foot rule it would seem logical that facilities located within an institution of higher learning would also be exempt. To do otherwise would seem to go against the intent of the legislature.

Assuming that interpretation is wrong, the undisputed facts remain that the distance between Nick's on Wilson to the Truman Middle College is 487 feet and to the Child Development Lab is 274 feet. As a matter of law this Commissioner feels that is the proper measure to be considered. This is not a case like Lakeview Billiards where the entire building was leased by the applicant, and while he did not use some of the leased space for his business, that unused portion was leased by him. If one is to say the 100 foot rule applies to the Truman Middle College High School and Child Development Lab, one must measure to those facilities. As such the 100 foot rule is not violated with respect to those institutions.

The remaining institution to be discussed is St. Martha's Manor which is located at 4621 N. Racine and which the citizen objector alleges is a "home for the aged" within 100 feet of the premises. Since St. Martha's Manor is not mentioned in the surveyor's affidavit or shown on the actual survey one can surmise it is within 100 feet of Nick's on Wilson. The issue then shifts to whether St. Martha's Manor is a "home for the aged" under the 100 foot rule. The evidence presented by the citizen objector on this point is based on information and belief that the facility has operated as a nursing home since 2004 and that it holds a Long-Term Care Facility license from the City of Chicago. While this Commissioner has not found a case defining "home for the aged," the term "aged" is defined in part in 20 ILCS 105-3.05 as a person of 55 years or older. That would suggest a home for the aged would be a home for persons aged 55 and over. That definition comports with the Attorney General opinion set forth in the licensee's supporting documents. The affidavit of Peter O'Brien asserts that St. Martha's Manor is licensed by the State of Illinois as a Long-Term Skilled and Intermediate Care facility. It provides service to persons over 18 years of age and is not open only to people over 55 years of age. A long-term skilled and intermediate care facility would not be interchangeable with a home for the aged. The 100 foot rule would not apply to St. Martha's Manor.

This Commissioner is wary of setting a precedent for proceeding in the cases before the Commission on summary disposition and should not be considered as opening the door to the City or applicants to believe that live testimony is not required. The facts of this case are unique. While I have been Chairman of this Commission less than a year, my review of cases going back several years indicates this may be the only such case. The due process rights of both

parties have been balanced and I feel that proceeding in this manner has given the citizen objector the hearing she is entitled to under the State Statute.

Based on the previous discussions it is the opinion of this Commissioner to rule that the citizen objector failed to meet her burden of proof on all the issues she raised. The decision of the Local Liquor Control Commissioner is affirmed.

THEREFORE, IT IS HEREBY ORDERED That the said order or action of the Local Liquor Control Commissioner of the City of Chicago be and the same hereby is **AFFIRMED**.

Pursuant to Section 154 of the Illinois Liquor Control Act, a petition for rehearing may be filed with this Commission within TWENTY (20) days after service of this order. The date of the mailing of this order is deemed to be the date of service. If any party wishes to pursue an administrative review action in the Circuit Court, the petition for rehearing must be filed with this Commission within TWENTY (20) days after service of this order as such petition is a jurisdictional prerequisite to the administrative review.

Dated: April 3, 2008

Dennis M. Fleming
Chairman

Irving J. Koppel
Commissioner

Stephen B. Schnorf
Commissioner

