

LICENSE APPEAL COMMISSION
CITY OF CHICAGO

C.S. Productions, Inc.)
Carey Weiman, President)
Licensee/Fine)
for the premises located at)
1675 North Elston Avenue)
) Case No. 15 LA 2
v.)
)
Department of Business Affairs and Consumer Protection)
Local Liquor Control Commission)
Gregory Steadman, Commissioner)

ORDER

DECISION OF CHAIRMAN FLEMING JOINED BY COMMISSIONER O'CONNELL

The licensee received notice that pursuant to 235 ILCS 5/7-5 and Title 4, Chapter 4, Section 280 of the Municipal Code of Chicago, that a hearing was to be held in connection with disciplinary proceedings regarding the City of Chicago retail liquor license and all other licenses issued to it for the premises located at 1675 N. Elston. The charges against the licensee were:

1. That on or about November 23, 2013, the licensee, by and through its agent, constructed, installed, or maintained a structure upon the public way without having a public way use permit, in violation of Municipal Code of Chicago 10-28-010.
2. That on or about November 23, 2013, the licensee, by and through its agent, sold, served or allowed the sale or service of alcoholic liquor for consumption in the outdoor, privately owned portion of the licensed premises in violation of Municipal Code of Chicago 4-60-130(c).
3. That on or about December 22, 2013, the licensee, by and through its agent, permitted a person under 21 years of age to enter or remain within the premises licensed as a tavern, unaccompanied by a parent or guardian, in violation of Municipal Code of Chicago 4-60-140(a).

The hearing was held by Deputy Hearing Commissioner Robert Emmett Nolan who found the City met its burden of proof on Charges 1 and 2, and did not sustain its burden of proof as to the allegations in Charge 3. He further found the appropriate punishment of the violation of Charge 1 to be a \$1,000.00 Fine, and the appropriate punishment for Charge 2 to be a \$1,500.00 Fine. Gregory Steadman, Local Liquor Control Commissioner, adopted these findings. The licensee filed a timely appeal.

Since this case deals with an appeal of a fine the issues before this License Appeal Commission are:

- a. Whether the local liquor control commissioner has proceeded in the manner provided by law;
- b. Whether the order is supported by the findings;
- c. Whether the findings are supported by substantial evidence in light of the whole record.

A summation of the record will be helpful in understanding the rationale of this decision.

Aaron Levine has been a Chicago Police Officer for eight years and is currently assigned to a mission team in the 14th District. That team works on community concerns, troubled buildings, and licensed premises investigations. On November 24, 2013, he conducted a licensed premise check at the premises located at 1675 N. Elston. The premise is primarily a tavern with Public Place of Amusement and Outdoor Patio licenses. The operator is C.S. Productions, d/b/a Koncrete. He was conducting a violence reduction initiative with the Illinois State Police because a nexus of violent incidents with a nexus to the licensee's premises had

been identified. He arrived at the open premises at 1:00 am accompanied by his police partner Officer Angelo.

Levine and his partner entered the premises. There is a front room tavern bar area, a table area, and a back room. The business had an outdoor patio license. The witness went to this area and observed a gentleman drinking from a small plastic cup. There were about 15 other persons on the patio. Some were smoking, some congregating, and others drinking from similar such cups. This was about twenty minutes after he arrived. When on the patio, he spoke with a gentleman in possession of a cup which he identified as a Pussy Pop, which was an item sold inside for \$10.00. That gentleman explained it was a Malibu Rum drink that he bought inside. The witness saw a sign board that it was being sold inside. Officer Levine issued an administrative notice of violation for open alcohol after hours on the outdoor patio.

Officer Levine also examined the exterior of the premises. He observed on the front sidewalk a barrier in place which required patrons and other pedestrians to walk into the roadway. He had previously asked that it be remedied and he issued an administrative notice of violation for the barrier being placed on a public way without permission from the Chicago Department of Transportation. The Officer felt it was a safety issue as it forced patrons into the street. His investigation ended that night with the issuance of two notices of violation.

Officer Levine conducted his November 24 visit with his partner, probably an additional Chicago Police Officer, and two or three other officers from the Illinois State Police. There was also a firefighter from the Fire Prevention Bureau.

He had never seen these types of barricades at other bars in that it had lines outside the venue. He charged the respondent with a violation of Municipal Code 10-28-010, which requires a permit from the City of Chicago for these barricades. He would not describe these barricades as a canopy, a marquis, an awning, or a loading platform. Licensee agreed the barricades were not permanent; they were removable. They were not attached to the public way, but were placed upon the public way.

At the time of his inspection, Officer Levine was familiar with the safety plan of the premises. Levine and other team members entered the premises and they asked the employees to give them a tour of the premises. The licensee would know their premises better than the officers. He was not aware one of the employees guiding the officers had been at the door leading to the outdoor patio.

Officer Levine issued a citation for the one individual he spoke to who was holding a drink on the patio. He did not talk to every person on the patio. He never saw anyone on the patio serving or dispensing an alcoholic beverage on the patio. There were no bartenders in the patio and the person who the officer spoke to got the drink inside and walked outside. The citation was issued to the licensee based on one individual being outside with a drink. He is not aware of any individual being struck by a car at or near the premises of 1675 N. Elston on nights when there were events.

Carey Weiman is the General Manager of 1675 N. Elston. Prop House Konkrete, which is a special events nightclub opens to the public only on Saturday Nights. The operating company is C.S. Productions, d/b/a The Prop House. The license was issued in 1990 and it currently has a Late Hour Liquor License and a Public Place of Amusement License. The crowds on Saturday nights are between 250 and 500 people arriving at different times. The licensee has used barricades for fifteen years to control the crowds attempting to enter. Barricades were being used on November 24, 2013. The barricades are four feet long with two feet at the bottom on each side that hold them up. When in place there is pedestrian access to the sidewalk and the barricades do not impede pedestrians walking on the sidewalk. The barricade kept people in a nice and orderly single file line. The barricades were not affixed to the street or sidewalk and they were brought inside at the end of the night. The barricades were only used when needed if it looked like there was going to be a crowd.

The police arrived at 11:00 pm and entered the premises around 12:45 to 1:00 am. There were at least eight Chicago police officers, four state police officers, and a fire person. Upon entering the premises, they requested to inspect the premises. They asked the employees to direct them through the premises. Security was pulled out of their stations to walk the fireman through the premises. Security from the station leading to the patio garden was pulled to escort the fireman. Prior to that, the door to the outdoor patio was guarded to ensure people did not walk outside with drinks. That was done routinely when the premises were open after midnight. If not for the inspection, that individual would have been at the door to prevent individuals from leaving the inside to go out to the patio with drinks.

Mr. Weiman has been using these barricades for ten years off and on. November 24, 2013, was the last time they were used. He went to City Hall's Building Department and to two Aldermen to find out how to get a permit. There is not permit for this. This was after the officer told him to obtain a permit. He had not sought a permit previously.

RELEVANT ORDINANCES AND DEFINITIONS

10-28-010(b) – Unless otherwise authorized by the code, it shall be unlawful for any person to construct; install or maintain any of the following one, under or above the public way without a public use premise authorized by ordinance passed by the city council:

- (1) a canopy, as that term is defined in Section 17-17-0233;
- (2) a marquee, as that term is defined in Section 17-17-0295;
- (3) an awning, as that term is defined in Section 17-17-0215;
- (4) a bay window;
- (5) a bridge;
- (6) a kiosk;
- (7) a clock or post at the curb, or a clock attached outside the face of any building
- (8) a loading platform, switch track or pushcart track;
- (9) subsidewalk space use;
- (10) or any other structure or device, except for a city digital sign, that is on, over, or under the public way.

“Kiosk” means a free standing, permanent structure erected as an accessory to a building and used to provide information concerning the building or its occupants – Chicago Municipal Code 10-28-010(a).

“Awning” a roof like structure of fabric or similar non-rigid material attached to a rigid frame that is supported completely or partially by either an exterior building wall or wall exterior to an individual tenant space – Chicago Municipal Code 17-17-0215.

“Canopy” a rooflike structure of a permanent nature that projects from the wall of a building and overhangs the public way – Chicago Municipal Code 17-17-0233.

“Marquee” a rooflike structure of a permanent nature that projects from the wall and overhangs the public way – Chicago Municipal Code 17-17-0295.

“Structure” anything built on land from a shed to a high-rise – dictionary definition.

Municipal Code of Chicago 4-60-130(c)(1) – ...no person licensed to operate an outdoor patio shall sell, serve or allow the sale or service of alcoholic liquor for consumption in the outdoor, privately owned portion of the licensed premises on Saturdays and Sundays between 12:01 am and the legally established hour of opening, or on Sundays through Thursdays between the hours of 11:00 pm and the legally established hour of opening on the following day.

Since this is an appeal of a Fine, the scope of inquiry by the License Appeal Commission is limited to these three issues:

- a. Whether the local liquor control commissioner has proceeded in the manner provided by law;
- b. Whether the order is supported by the findings;
- c. Whether the findings are supported by substantial evidence in light of the whole record.

There is no dispute between the parties that the licensee placed barricades on the public way for crowd control. It is also not disputed that these barricades for crowd control were not permanent; they were removable and not attached to the public way. With respect to this count, the issue of the credibility of the witness is not relevant. The issue is whether these temporary removable barricades are a “structure” within the meaning of the Municipal Code. A second

issue on this charge is whether that determination is a legal issue or a factual issue. If it is a factual issue, the decision of the Deputy Hearing Commissioner must be affirmed if there is substantial evidence supporting that finding. Substantial evidence is a very broad standard which has been interpreted as any evidence supporting a finding. The substantial evidence scope of review would not be applicable if the issue of structure is a legal issue.

Section 10-28-010(b) does not define the term “structure” and this Commissioner could not find a definition of “structure” in any other section of the Municipal Code. In determining what is a “structure” under this ordinance that requires a permit, it is instructive to look at the definitions of other items that do require a public way permit. The definitions in the Municipal Code for kiosk, canopy, and marquee contain the term “permanent.” 10-28-010(b) uses the term “any other structure” which suggests one should look to the definitions of the presiding items to determine the definition of “structure.” Since the barricades used to control the crowds on November 24, 2013 were not permanent and were not attached to the ground and were removable, this Commissioner finds as a matter of law those barricades were not structures within the scope of Section 10-28-010(b) and no permit was needed. The decision of the Deputy Hearing Commissioner as to Charge 1 is Reversed.

There is also no real factual dispute as to Charge 2. No one testified on behalf of the licensee to dispute Officer Levine’s testimony that he observed individuals on the outdoor patio after 1:00 am. No one disputed Officer Levine’s testimony that he spoke with one of the patrons who was on the outdoor patio. That patron was in possession of a cup which had a drink in it which the patron identified as a Pussy Pop. That item was for sale inside for ten dollars. The

licensee did present evidence that the reason patrons gained access to the outdoor patio was due to the inspection of the premises, but that evidence would be more an investigation than a defense to this count.

The fact that the alcoholic drink was not purchased on the outdoor patio area also does not constitute a defense. The ordinance does not require the sale or service of the alcohol to occur on the outdoor patio. The ordinance deals with sale of alcohol for consumption in the outdoor patio area. It is the location where the alcohol is consumed that is the focus of this ordinance. The evidence in this case of consumption of alcohol in the outdoor patio is not strong but it is sufficient to meet the burden of substantial evidence on this count. The decision of the Deputy Hearing Commissioner as to Charge 2 is affirmed.

The Deputy Hearing Commissioner determined the appropriate punishment for Charge 2 was a \$1,500 fine. The record is absent on any explanation for this finding and specifically no past disciplinary history is in the record. It appears that this fine amount is within the range authorized for this violation and will be affirmed.

The decision of the Deputy Hearing Commissioner on Charge 2 and the imposition of a \$1,500 fine on Charge 2 is affirmed.

IT IS THEREFORE ORDERED AND ADJUDGED that the order to Fine the Appellant the sum of \$1,000.00 on Charge 1 is REVERSED **AND** the sum of \$1,500.00 on Charge 2 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: May 6, 2015

Dennis M. Fleming
Chairman

Donald O'Connell
Member