LICENSE APPEAL COMMISSION
CITY OF CHICAGO

Tsuki Entertainment	)	
Li Chih Tseng, President	)	
Licensee/Suspension	)	
1441-1445 West Fullerton	)	Case No. 08 LA 20
	)	
v.	)	
	)	
Department of Business Affairs & Licensing	)	
Local Liquor Control Commission	)	
Mary Lou Eisenhauer, Acting Director	)	
	)	

ORDER

OPINION OF CHAIRMAN FLEMING JOINED BY COMMISSIONERS KOPPEL AND SCHNORF

The City filed an Amended Notice of Hearing in connection with license disciplinary proceedings regarding the City of Chicago liquor license and all other licenses issued to the licensee for the premises located at 1441-1445 West Fullerton. This notice alleged that on May 31, 2007, the licensee violated Title 4, Chapter 156, Sections 305 and 410 of the Municipal Code in that it presented, for gain or profit, an amusement without a Public Place of Amusement license and that it failed to display a Public Place of Amusement license in plain view in a conspicuous place. Deputy Hearing Commissioner Raymond Prosser was appointed to conduct these proceedings by Mayor Richard M. Daley. The hearing was conducted on December 6, 2007, January 10, 2008 and January 31, 2008. Commissioner Prosser entered Findings of Fact sustaining Charges 1 and 2 and, based on the facts of this case and licensee's prior disciplinary history recommended a three day suspension.

Mary Lou Eisenhauer, Acting Director of the Department of Business Affairs and Licensing adopted those findings and the three day suspension was imposed. The licensee filed a timely appeal with this Commission and oral argument was heard on June 11, 2008.

Since this matter is before this Commission on an appeal of a suspension, our scope of review is limited to these questions:

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.

Since our scope of review is limited by the state statute this Commission does not have the power to rule on the constitutional arguments made by the attorney for the licensee. They are noted in the record for any appeal.

The only evidence presented by the City is the testimony of Police Officer Brian Cavanaugh. He works as a license investigator for the Chicago Police Department and in the cause of that employment he went to the Tsuki Japanese Restaurant located at 1441-1445 W. Fullerton. Prior to going to the establishment, he verified it was operating with a Consumption on Premises - Incidental Activity license and a retail food license. The interior has approved occupancy of 184 and there was an outdoor patio with an occupancy. He obtained City Exhibits 4 and 5, which were described as advertisements for the licensee but those exhibits were not allowed in evidence. When he entered the restaurant he observed patrons eating and drinking

what appeared to be alcoholic beverages. He saw a person in a booth setting with electronic equipment and he was playing music. The equipment was a mixer and two cd components which allowed the DJ to blend one record or song with another song. The DJ was mixing the music. He did not see a valid PPA license conspicuously displayed at the establishment. On cross, the officer described that he walked through the establishment into another room from where he had been seated. It was in that room that the person was playing music. The patrons in that room were sitting at tables facing each other. There were no theater like seats in front of the person playing music. The patrons were not dancing and were not singing. The person at the DJ booth was just working the machine, the mixer, by putting cd's into a machine. None of the patrons were participating in this activity. There was no cover charge. On redirect, it was established the mixer the DJ was playing could be heard from speakers throughout the whole room.

Section 4-156-300 of the Municipal Code of the City of Chicago makes it unlawful for the owner, lessee or manager of any property, or for any person to produce, present or conduct thereon, for gain or profit, any amusement unless the owner, lessee or manager of such property has first obtained a public place of amusement license. In order to determine if this section has been violated the terms "amusement" and "for gain or profit" must be analyzed.

The relevant definition under 4-156-010 of the Municipal Code is....any exhibition, performance, presentation or show for entertainment purposes, including, but not limited to any theatrical, dramatic, musical or spectacular performance, promotional show, motion picture

show, flower, poultry or animal show, animal act, circus, rodeo, athletic contest, sport, game or similar exhibition such as boxing, wrestling, skating, dancing, swimming, racing, or riding on animals or vehicles, baseball, basketball, softball, football, tennis, gold, hockey, track and field games, bowling or billiard or pool games. "Live theatrical, live musical or other live cultural performance" means a live performance in any of the disciplines which are commonly regarded as part of the fines act, such as live theater, music, opera, drama, comedy, ballet, modern or traditional dance, and book or poetry readings.

There is no definition of the term "for gain or profit" set out in the Chicago Municipal Code. As such this Commission must construe the meaning of that term so that each word or clause is given reasonable meaning.

The case of *City of Chicago v. Severini*, 91 Ill.App.3d 38, 414 N.E.2d67, gives some guidance to proper construction of that term. This case dealt with the City's prosecution of the Candy Club and Cecil E. Severini for operating without a public place of amusement license. The Candy Club provided performances of several females dancing on stage in various stages of dress and undress accompanied by music from a record player. Patrons entering were required to pay a membership fee of $4.00 each time that patron entered the club. There was also a table charge of $6.00 per person which entitled the patron to all the near beer and soda desired. The Appellate Court rejected the defendant's argument that since the Candy Club was not a profit for corporation, the amusement presented was automatically not "for profit or gain". While the court set out the definition of gain as profits, an increment in value or the difference between receipts

and expenditures, and the definition of profit a gain realized from business or investments over and above expenditures, it diverts us not to focus on those definitions but to look to see if the performance was presented with a purpose, design or objective for gain or profit even if the purpose was not successful. It pointed out that the fact there was a positive income flow from the performance in the form of the $4.00 cover and the $6.00 table charge.

In order for the City to prove the violations alleged it needed to show that the DJ in this restaurant was an amusement as previously defined and that the amusement was presented for gain or profit. Failure to prove either of these elements is fatal to the City's prosecution.

This Commissioner is aware of the limits imposed on the License Appeal Commission on issues of fact and is aware that the fact that I might disagree with factual findings made by Local Liquor Control Commissioner is not a basis for reversal. I am also aware of the law burden the City has on review in showing substantial evidence in the record as a whole supports the decision of the Local Liquor Control Commission. They did not meet this burden on this case on either of the elements mentioned above. The evidence as to a man being in a booth with electronic equipment, a turntable and mixer and that he was mixing and playing music is not substantial evidence to support a violation of Charge 1. The Assistant Corporation Counsel in her closing refers to what she describes as a new art form called *turntablism*. If the evidence in the record showed such activities were being performed in this case, another decision might have been appropriate. The evidence does not show this type of performance. As to the issue of "for gain or profit" there was no evidence of any income going to the licensee from the DJ's actions.

There was no cover charge or table charge. Any argument that this aspect can be assumed due to the fact that there were advertisements for this music cannot be considered since the exhibits dealing with the alleged advertisements were not allowed in evidence.

As a final point these allegations deal with a public place of amusement license. There are specific penalties set out in the Municipal Code for those who violate that ordinance. While Section 4-4-280 of the Municipal Code allows the Mayor to suspend or revoke any license for violation of a city ordinance, case law has placed limits on that power. The use of that section should be restricted to violations of statutes, ordinances, or regulations fairly related to liquor. While a violation of the PPA ordinance by a tavern licensee might present difficult facts requiring a different decision, this Commissioner does not feel that this type of a violation of the PPA ordinance in a restaurant serving alcohol incidental to food is fairly enough related to liquor so as to allow that violation to be a basis of a suspension of the liquor license. For all of those reasons the three day suspension of the liquor license is reversed.

IT IS THEREFORE ORDERED AND ADJUDGED That the order suspending the liquor license of the appellant for THREE (3) days is hereby REVERSED.

Pursuant to Section 54 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: October 7, 2008

Dennis M. Fleming
Chairman

Irving J. Koppel
Member

Stephen B. Schnorf
Member