

LICENSE APPEAL COMMISSION
CITY OF CHICAGO

Wal-Mart Stores, Inc.)
d/b/a Walmart Express)
Applicant (Packaged Goods))
for the premises located at) Case no. 11 LA 53
225 West Chicago Avenue)
)
v.)
)
Department of Business Affairs and Consumer Protection)
Local Liquor Control Commission)
Gregory Steadman, Commissioner)

ORDER

DECISION OF CHAIRMAN FLEMING

Wal-Mart Corporation filed an application for a Packaged Goods liquor license for its Walmart Express store located at 225 West Chicago Avenue. This application was denied by Gregory Steadman in his position as Commissioner of the Local Liquor Control Commission. The denial was based on Section 4-60-040, of the City of Chicago Municipal Code which states “The local liquor control commissioner shall deny an application if...the issuance of such license would tend to create a law enforcement problem...” The applicant filed a timely appeal of that decision with this Commission. The matter proceeded to hearing on February 29, May 10, and June 21 of 2012. The applicant was represented by Harlan Powell of the law firm Webster Powell, P.C., and Powell, and the City was represented by Assistant Corporation Counsel Shannon Trotter.

Since this case comes from the denial of an application, the matter before this Commission is to determine de novo the propriety of the denial. Since the transcript in this case is over 339 pages, a synopsis of the evidence will aid in understanding this decision.

Brendan Reilly has been the Alderman of the 42nd Ward for five years. 225 West Chicago Avenue is located within the 42nd Ward. He is aware that Walmart has filed an application for a packaged goods liquor license. He objected to the issuance of this liquor license in a letter, City's Exhibit 4, in evidence, which was sent to Gregory Steadman.

The Alderman described the demographics of the area of 225 W. Chicago as mixed use with a relatively dense residential population. South of the property is the Gallery District with high-end art galleries. There are also professional service offices, apartments, social service agencies, and restaurants within a few blocks. A moratorium of liquor licenses for both sides of Chicago Avenue came into effect after the date of this application. He introduced the moratorium because the Brown Line stop made this area a magnet for illegal activity and quality of life issues. He personally, along with his staff, field complaints about crimes in the area of 225 W. Chicago on a weekly basis. The types of crimes and quality of life issues complained of include aggressive panhandling, drunk and disorderly conduct, flash mobs, loitering, and snatch-and-grab.

City's Exhibit 8, in evidence, was identified as an overhead map of the area. There are methadone clinics at 310 W. Chicago and 609 N. Wells. A problem with these clinics, especially the 310 W. Chicago location, is that friends tend to accompany clients to the clinics. These friends tend to congregate outside. He has a legitimate concern that the patients from these

clinics will have the opportunity to purchase packaged liquor and that would be a negative contributing factor to the neighborhood.

The Brown Line L stop is about 50 feet from the Walmart location. There have been terrible experiences at this stop including, violent crime, aggressive panhandling, and intimidating actions by those loitering towards folks in the neighborhood. This stop is also an escape route for people who commit crimes downtown, and is a popular location for people to hang out. Adding another liquor location would only draw more of that element.

The YMCA and SRO at 30 W. Chicago is about three blocks away. Large groups of people congregate in front of this building. There is traffic from people visiting the residents. There have been incidents of drug dealing in that building.

The loitering, aggressive panhandling, and vagrancies affect the quality of life for the residents in that they cause concern for the safety of residents, as well as, business owners. The gallery owners have expressed concern, as has the River North Residents Association. The objection is not to Walmart, but to liquor on this block. There are a number of liquor licenses on this block. There are a number of liquor licenses in the area, and these licenses are an absolute tax on Chicago Police Department resources. Issuing another liquor license could amount to pouring gasoline on an already simmering fire.

The Alderman expressed concern over double parking and traffic congestion related to liquor. The traffic study commissioned by Walmart did not address his concerns because it did

not address a bus rapid transit lane proposed for Chicago Avenue. Double parking from patrons who purchase food or liquor would exacerbate the problem and disrupt a major mass transit improvement on Chicago Avenue.

The Alderman mentioned he had, on several occasions, offered to make himself available to find other locations within the 42nd Ward that would be appropriate for liquor. This Chicago Avenue corridor is not one of these locations. In those conversations, the Alderman expressed his concerns that crime and law enforcement problems would be created if this license issued. Walmart made a good faith effort to address those concerns, but that plan did not adequately address his concerns and he felt the proposals would not result in the level of neighborhood safety Walmart predicted.

It is his opinion, based on his role as Alderman and his own personal observations and experience, that granting this packaged goods license at this location would negatively impact the neighborhood by drawing an unwanted element to this area and would compound a problem they are struggling to deal with and would be a mistake.

The Alderman was asked to refer to his letter of opposition dated October 4, 2011. That letter indicated this area is plagued by aggressive panhandling and public drunkenness. It also mentioned the two drug treatment centers at 310 West Chicago and 609 North Wells require increased police resources to ensure neighborhood safety. While he has no knowledge of anything illegal with these facilities, large groups congregate outside these facilities. Eliminating the methadone clinics and the YMCA would not necessarily solve the problems on Chicago

Avenue since it is the combination of all these issues that have led to the unacceptable conditions on Chicago Avenue.

The Alderman highlighted the term “discount liquor” in his letter of opposition based on his familiarity that Walmart offers highly competitive prices. His opinion would not change if Walmart’s liquor pricing practices did not give it a competitive advantage.

With respect to the traffic study, the Alderman asserted again a rather significant input was not factored into that model. His general experience is that traffic studies do generally prove up the case advocated by their client. He did disagree with the conclusions in the report that the business would be drawing heavily from the folks who live and work in the immediate area. His parking concerns would exist if Walmart opened without liquor.

The Alderman acknowledged that he felt Walmart made a good faith effort to address his concerns. Walmart made the following proposals:

1. 24-hour camera surveillance with the real time images being available to the police.
2. An outside security firm employed one hour before opening and two hours after closing.
3. Installation and maintenance of a blue light camera.
4. Not to sell spirits for at least the first six months and then sell only beer and wine.
5. Not to sell fortified wines or lower-end alcohol associated with loitering and panhandling.
6. Limit the sale of alcohol from 7:00 a.m. until 10:00 p.m.

7. Install additional exterior lighting on Chicago and Franklin.

It is the Alderman's opinion that those proposals were not sufficient to adequately address his law enforcement concerns.

Ken Angarone has been a Chicago Police Officer for 31 years and the Commander of the 18th District for the last two years and five months. Prior to becoming Commander, he served as a Captain in this district for two years. He identified City's Exhibit 3, in evidence, as the letter he wrote to the Local Liquor Control Commissioner objecting to the issuance of this license. His primary objection is the presently existing quality of life issues like vagrancy and panhandling would be made worse by adding another alcohol source. There are two methadone clinics in the immediate area of Walmart. The Brown Line exit is directly overhead and this stop delivers clients of the clinics to the area. To the east at 30 West Chicago, is the YMCA SRO whose tenants congregate in the street. Conditions there contribute to the ongoing vagrancy issues.

In addition to vagrancy, other crimes such as urination, panhandling, loitering, and theft occur in this area on a daily basis. His opinion, based on 30 years of police work, is that adding alcohol will not make these conditions better, but will make them worse. These quality of life issues also exist on and around the CTA Brown line. While the CTA has a public transportation section, Chicago Police also respond to these crimes. The YMCA tenants are one rung above homelessness and may suffer from physical and mental illness, and may have substance and alcohol abuse issues. These problems and the fact they cannot smoke in the YMCA building lead them onto Chicago Avenue. They come to smoke, and the smoking leads to drinking, gambling, and urinating problems.

The Commander opined that the criminal element in this location comes from elsewhere. Many come to and/or have been coming to this area for years. The community people give to the panhandlers which, in turn, attract that element. Many of these individuals have mental illness and problems with drugs, alcohol or a combination of both. That stretch of Chicago Avenue from the Brown line to the Red line draws an inordinate amount of police resources and this is especially in the daytime. A liquor license to Walmart would make it worse.

Commander Angarone then identified a number of exhibits which listed calls for service, incident reports, and arrests which related to the area of Walmart over approximately a one-year period. These documents were allowed in evidence over objection. The Commander opined that these statistics were substantially above normal, and they draw an inordinate amount of police resources to this area. His further opinion was adding another liquor license would make it worse. He held this opinion even after his review of Walmart's plan, which he described as a very strong effort to mitigate the issues. Angarone felt that the overwhelming issue was the methadone clinic, and that could not be mitigated. The conditions surrounding 225 W. Chicago are bad, and the health, safety, and welfare of the area surrounding the store would be negatively impacted by the issuance of this license.

The Commander admitted crime has gone down each of the last 3 years in the 18th District in general, and specifically in the three beats in the area of Walmart. Those three beats compose a fairly large geographical area. Angarone did not review the statistics to ascertain what was designated as vice in those reports and how many of the incidents dealt with aggressive panhandling. He did admit calls for service and arrests does not mean arrests and convictions

were obtained in those incidents. He did not know independently if any of the incidents reports or arrests listed in the exhibits were alcohol related.

Jack Williams has worked for Walmart for 24 years, and since August of last year for the stores inside the city of Chicago. There are five Walmart facilities in the city of Chicago, and four have liquor licenses. Two of the liquor licenses are issued to Walmart Express locations similar to the applicant location. These are 15,000 square feet grocery stores with food consisting of 70% of the inventory, with the rest of things like health and beauty needs. The store at 3636 North Broadway received a liquor license after agreement that it would not sell single-serve beer or pocket-size liquor. No citations have been issued since that license issued. Alcoholic beverages represent less than 3 percent of overall sales at the Addison store and he anticipates a similar percentage at the Chicago Avenue store. That store would not sell single-serve, low cost malt liquor, or cheap wine. It would cater to high-end clientele that lives in the neighborhood.

With respect to this application, Walmart met with community associations and business associates. None have objected. The witness became aware in January of 2012, of the Alderman's objection. In response, the witness met with other Walmart personnel and they drafted Applicant's Exhibit A, in evidence. That letter set out a number of proposals to alleviate the Alderman's concern.

Subsequent to the letter, a meeting was held in mid-February of 2012, at Commander Angarone's office. The witness was present, as was Commander Angarone, and the Alderman's

Chief of Staff. The proposals were discussed and Walmart was asked to open and not sell alcohol for six months. In response, Walmart prepared Applicant's Exhibit 2, in evidence. It countered that Walmart forgo selling spirits for six months and only sell beer and wine. It also agreed to not sell tall boys or low-end product, and it would limit its hours of sale and have security. Walmart did not want to give up all liquor sales because it wanted to serve the needs of customers with respect to beer and wine. When Walmart cannot offer the range of products its consumers are seeking it becomes harder to maintain customer loyalty. Other grocery stores like Jewel, Dominick's, and the Walgreens one half block away sell beer and wine.

Williams testified store managers have no latitude to adjust the retail price of liquor. That price is set at the corporate level. Liquor is not sold as a loss leader below market cost to gain market share. Walmart does not use a business model that depends on a large volume of low profit margin products. He feels issuing this license would impact the quality of life for nearby residents as a positive manner by offering products at a lower retail price and to buy food in their neighborhood. People coming and going into the store will help the safety concern and discourage panhandling. The witness lives about six blocks from the location and walks to the store. He is at the store as early as 6:00 a.m. and as late as 1:00 a.m. He feels the area is not a high crime area. Williams admitted he has no law enforcement training and has seen the same two guys panhandling by the Starbucks.

Luay Aboona has been a practicing traffic engineer since 1986, and has a bachelor's degree in civil engineering from the University of South Hampton in England, and a master's in engineering science from Northwestern University. He has been a licensed professional engineer

in the State of Illinois since the early 1990's. He represents private clients, as well as municipalities, and has testified before village boards, as well as, the Zoning Board of Appeals of Chicago and Cook County.

He was retained by Walmart to provide a parking and traffic study for 225 W. Chicago. The first purpose was to establish the character of the neighborhood to ascertain if customers will drive or walk to the store, and the second purpose was to understand the parking conditions.

His opinion was that this site was an urban location where the majority of the customers would walk to the location. The close proximity of the store location to a major train station where both the Brown and Purple lines have stops that are heavily used gave him a feel for the pedestrian traffic. Also, his opinion was that there was ample parking available throughout the day to accommodate any additional parkers resulting from the store. He verified these opinions subsequent to the store opening and prior to his testimony. Neither of these reports took into consideration the introduction of alcohol into Walmart. Based on his understanding, alcohol sales would bring about a 4 percent increase in sales and his opinion at the hearing was that alcohol sales would not impact the traffic or parking situation in the neighborhood. He did not take into account the impact of a projected bus lane, but such a lane would impact parking only if parking spaces are removed as part of the bus lane.

Kristopher Lamaze is the market asset protection manager for Walmart who covers multiple stores in Chicago. He explained that before Walmart opens a store it conducts a "store level risk remodeling," in which it factors the vulnerability of the proposed store from a safety

and security perspective. Information is pulled from city and crime analysis websites and the CAPS index. The store is rated either A for high risk, B for middle, or C for low risk. This information, as well as a personal review of the site of the store, is reviewed to determine the type of security needed. His observation on a half a dozen occasions and his review of data led him to conclude this was a good and decent neighborhood. This location would have been assessed a C, with the lowest security, but due to its urban location it was assessed a B, moderate risk. There have been no problems at this location in the six weeks it has been open and no problems with aggressive panhandling.

The witness did observe loitering in the area, but did not see panhandling in the areas of the L and the methadone clinics.

Mark McKeithan has been a regional asset manager for seven years with the responsibility of protecting the assets of Walmart and its customers. He previously worked in law enforcement for twelve years in North Carolina when he retired as a lieutenant. He is responsible for this location which was assessed as a level B, moderate risk. As a moderate risk, the initial appropriate security measures were security cameras, appropriate lighting, and closed-circuit television cameras. Thirty-three cameras have been installed. The point of sale system prompts the cashier to check anyone under 40 for identification. All employees have been trained in safety and security. The video from the camera records the perimeter of the store and the rear of the store 24/7, and the video is maintained for 30 days. This store has one full-time asset protection employee and off duty police officers who stand at the front-end of the store and will walk the front of the store. There have been no reports of criminal activity at or in the area

surrounding the store since it has opened. Security is re-evaluated on a quarterly basis or on receipt of incidents. Walmart's policy on panhandling is aggressive hospitality when the panhandler would be encouraged to leave. If they did not do so, the off duty officer or management would ask them to leave. Since opening there have been no issues with respect to aggressive panhandling along the public way of the store. The witness has observed a few people standing around but did not see panhandling.

There are three approaches to the issue of whether the issuance of this license at this location would tend to create a law enforcement problem. The first approach would be under reasoning in the Vino Fino case that concentrates on the history of the applicant with respect to past violations of the law and liquor laws in particular. The City has acknowledged they are not pursuing this theory and there is no evidence in the record that would support a denial on this theory.

A denial based on law enforcement can be upheld on the concept that the issuance of the liquor license, at that location, would create such traffic problems as to cause a law enforcement problem. That theory was used in the Ace Produce case. The evidence in that case showed the location of the applicant was in a hazardous traffic location. The evidence in this case from the City, on the issue of traffic, came from Alderman Reilly who testified he felt the issuance of this license would create an opportunity for double parking, and congestion issues which would require more police attention. The Alderman later conceded these parking issues would be an outstanding concern with or without the liquor license. The other traffic concern expressed by the Alderman dealt with the possibility of a bus rapid transit lane being installed on Chicago

Avenue. That would eliminate parking on Chicago Avenue in the curb lane and could exacerbate the potential for double parking for folks running in to buy food or liquor. Just as the other parking concerns would exist with or without a liquor license at this location, problems of double parking from a rapid transit bus lane would occur at this location with or without Walmart having a liquor license. The type of traffic problems that are discussed in this record are not equal to the type of traffic problems that supported the denial of the liquor license in Ace Produce.

The third approach to denials of liquor licenses based on “law enforcement” relies on the case of MJ Ontario, in which the focus of the investigation as to whether the issuance of the liquor license at that location did not look at the specific history of the applicant to see if the issuance would tend to create a law enforcement problem. The denial on MJ Ontario was affirmed based on the argument that the issuance of the license would exacerbate previously existing law enforcement problems. It should be noted that the denial in the MJ Ontario case was based on the deleterious impact section of the municipal code. Under that section of the code, a license can be denied if the issuance of this license “would have a deleterious impact on the health, safety, and welfare of the surrounding community.” Within that definition is the concept that if the issuance of the license would tend to exacerbate law enforcement problems, that would be a deleterious impact on the health, safety, and welfare of the surrounding community.

The testimony in the MJ Ontario case from Alderman Natarus and a neighborhood resident, based on personal observations, was that they had seen fights in the area, inebriated

people walking into the streets, and people soliciting drugs and sex. There was also testimony about sex acts in cars and litter necessitating street cleaning. The Chicago Police Lieutenant testified to the issuance of a late hour license would exacerbate the existing problems.

The MJ Ontario opinion from the Appellate Court rejected the requirement that evidence of deleterious impact be site specific and rejected the argument that the evidence in the record was speculative.

The testimony from the Alderman and the Police Commander established there are quality of life issues with panhandling and loitering in the area. These matters are sufficient to show a law enforcement problem exists in the area of 225 W. Chicago. It is not necessary that the City prove the area is a high crime area. The criminal activity and responses to it add to the proof that there is a law enforcement problem.

While the impact of a Walmart selling liquor might be less than if a pure liquor store selling half-pints, 40 ounce beers, single cans of beer, and fortified wine was seeking this license, the evidence from Commander Angarone based on his 30 years experience is that adding alcohol to these types of conditions will not make it better and the conditions will get worse.

The City has met its burden of proof that the issuance of this packaged goods liquor license to Walmart at 225 W. Chicago would tend to create a law enforcement problem. The denial of this license application is affirmed.

CONCURRING OPINION OF COMMISSIONER O'CONNELL AND SCHNORF:

We have reviewed Chairman Fleming's review of the evidence and agree with that recitation of the facts. We also agree that there are two approaches to the question of whether issuance of a liquor license, at a specific location, would tend to create a law enforcement problem. The approach under the Vino Fino case concentrates on whether this specific applicant's background is such that they would tend to violate liquor laws. Under this theory, an applicant with a history of liquor violations, at a different licensed premises, shows a propensity of violating liquor laws in the future at the applied for premises. The second approach, which we will refer to as the M.J. Ontario approach, allows a reviewing tribunal to concentrate on what the effect of the legal sale of alcohol might be to the area of the applicant based on existing quality of life issues not related to the operation of the applicant's business.

Under the facts of this case, the City did not and could not argue the Vino Fino theory. There was no evidence that there has been a history of any liquor law violations at any of the Walmart sites that sell liquor in Chicago. There was no evidence of any liquor law violations against Walmart arising from its sale of liquor at any of its stores in the state of Illinois.

Under the M.J. Ontario approach, the City can and did establish, through the testimony of Alderman Reilly and Commander Angarone, that quality of life issues dealing with law enforcement problems do exist in the area of 225 West Chicago. Their testimony was sufficient to establish issuance of this license would tend to create a law enforcement problem and it would tend to exacerbate the already existing quality of life problems. That in turn, would tend to

aggravate the already existing law enforcement problem. On that basis, we agree with Chairman Fleming and affirm the denial of this license.

Having decided that fact, we do feel it is necessary to comment further on the process in this case. If the City denies a liquor license based on the fact that its issuance would tend to create a law enforcement problem, then that is the sole issue before this Commission. If the City denies a liquor license on the grounds that the issuance of the license would create a deleterious impact on the health, safety, and welfare of the community, the applicant is allowed to present a plan of operation to abate that deleterious impact. This is allowed when the deleterious impact deals with crime and/or quality of life issues that could lead to crime. In those cases, there are two issues to be decided by this Commission:

- a. Would the issuance of this liquor license cause a deleterious impact on the health, safety, and welfare of the community;
- b. Would the proposed plan of operation reasonably abate the deleterious impact.

A license can issue subject to the terms of a proposed plan of operation.

While we do not dispute the Local Liquor Control Commissioner has the discretion to deny an application for any of the reasons listed in the Municipal Code, it is unfortunate that this denial was not based on deleterious impact because we believe that the matters set out by Walmart would have been sufficient to overcome any deleterious impact caused by the issuance of a packaged goods license at this premises.

If we had the authority to do so, we would remand this matter to the Local Liquor Control Commission with direction to issue the packaged goods license for this location subject to the proposals made by Walmart. These proposals would be the matters set out on Page 5, of the Chairman's opinion.

Since we do not have the authority to remand and since a plan of operation is not relevant to denials on law enforcement grounds, we agree with the findings of Chairman Fleming and affirm the denial of the packaged goods license for the Walmart Express at 225 West Chicago Avenue.

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: October 19, 2012

Dennis M. Fleming
Chairman

Donald O'Connell
Member

Stephen B. Schnorf
Member