

STATE OF ILLINOIS
LIQUOR CONTROL COMMISSION

TIMBUKTU SALOON INC.
5180 HICKORY POINT FRONTAGE ROAD
DECATUR, IL
Illinois Lic. 1A-1128457
Appellant,
vs.
LOCAL LIQUOR COMMISSIONER FOR
DECATUR, ILLINOIS
Appellee.

Case No.: 20 APP 20

FINAL ORDER

FINAL ORDER

THIS MATTER having come to be heard before the Liquor Control Commission of the State of Illinois (hereinafter “the State Commission”) upon the appeal of Timbuktu Saloon, Inc. Appellant, (hereinafter “Timbuktu”) the State Commission being otherwise fully informed and a majority of its members do hereby state the following:

Procedural History

The Decatur Liquor Control Commission (“Decatur”) issued a Notice of Hearing to Timbuktu on November 30, 2020. The charges contained in the Notice alleged principally that Timbuktu violated Sections 37(H) and 37(I) of Chapter 52 of the Decatur City Code. A hearing was held on December 2, 2020, before Decatur Liquor Control Commissioner Pat McDaniel (“Decatur Commissioner”). At the end of the hearing, the Decatur Commissioner found Timbuktu failed to comply with Section 37(H) and 37(I) of Chapter 52 of the Decatur City Code and

suspended Timbuktu's liquor license for thirty (30) days. Timbuktu filed an appeal with the State Commission on December 7, 2020. Designated Commissioners from the State Commission held an on the record appeal hearing and heard oral arguments from both parties on July 29, 2021, via a remote audio and video conference. A quorum of the State Commissioners reviewed the entire record and deliberated on the matter at the August 18, 2021, State Commission meeting.

Decision

On August 18, 2021, the State Commission AFFIRMED the Decatur decision to suspend Timbuktu's liquor license for thirty (30) days for a violation of Section 37(H) and (I) of the Decatur City Code.

Findings

Facts related to the Decatur suspension of Timbuktu's license are not contested and are as follows:

1. On or about August 3, 2020, Decatur amended its local liquor ordinance and adopted Section 37.
2. The ordinance amendment complied with all requirements of procedural due process necessary to make such an amendment by, inter alia, providing notice to the public and the opportunity to be heard.
3. Section 37 placed nine (9) requirements on retail liquor license holders which were identified by subsections (A) through (I).
4. Decatur alleged that Timbuktu violated subsections (H) and (I) of Section 37.
5. Subsection (H) states: "Licensees shall be prohibited from allowing persons to congregate on licensed premises in a number greater than allowed by guidelines set forth in Illinois

Department of Public Health and the Illinois Department of Commerce and Economic Opportunity guidelines." *Amended Decatur Ordinance No. 2020-122, August 3, 2020.*

6. Subsection (I) states: "Licensees shall be required to follow all guidelines set forth by the Illinois Department of Commerce and Economic Opportunity for Restaurant and Bar establishment Safety Guidelines not otherwise specifically set forth." *Id.*
7. In its Notice of Hearing, Decatur alleged Timbuktu violated Subsections (H) and (I) and the incorporated "Resurgence Mitigations guidelines set forth by the Illinois Department of Public Health and the Illinois Department of Commerce and Economic Opportunity pursuant to Executive Order 2020-67 issued by the Governor of the State of Illinois, to wit, allowing or providing indoor service, allowing or providing ordering or seating at the bar." *Notice of Hearing, November 30, 2020, p. 1.*
8. Counsels for Decatur and Timbuktu stipulated that the facts related to "allowing or providing indoor service, allowing or providing ordering or seating at the bar" occurring within Timbuktu were substantially similar to the facts established in a similar case held prior to the Timbuktu hearing. (Re: Variety Liquors., d/b/a Bourbon Barrel Bar & Grill, December 2, 2020). *Timbuktu Transcript p. 2.*
9. In the Variety Liquors matter, a Decatur law enforcement officer testified that he arrived at Variety Liquors and "[o]bserved several patrons sitting at the bar and at tables with the beverages in front of them." *Variety Liquors, Local Transcript, p. 8.*
10. In the Variety Liquors matter, the Decatur law enforcement officer testified as follows:

"Yeah, I asked [the licensee] if she understood the guidelines and the ordinances, and she said she did. I asked her if she was willing to close service down inside, and she said she was not." *Id.*

11. In the Variety Liquors matter, a second Decatur law enforcement officer testified he observed “approximately 14 customers inside the business” “drinking beverages” on November 30, 2020. *Id.*, at pp. 21-22
12. At the end of the Timbuktu hearing, the local Commissioner asked the Timbuktu representative if he would continue to operate his business by allowing customers to conduct indoor dining and drinking. The representative for Timbuktu stated that they would continue to be open. Per the transcript:

Commissioner: Again I ask when you leave here, are you going to allow inside dining?

Mr. Conaway: Yes.

Mr. Gilbert: We have to.

Timbuktu Transcript, pp. 4-7.
13. Included in the "Mitigation Requirements" for Illinois Department of Commerce and Economic Opportunity ("DCEO") "Resurgence Mitigations," "Bars" were not permitted to have "indoor service" and "Restaurants" were not permitted to have "indoor dining or bar service." *Decatur Exhibit 3*, p. 1.
14. The DCEO Mitigation Requirements were required by the Illinois Governor's Executive Order in Response to COVID-19 (Executive Order 2020-67, October 30, 2020) which instituted "public health restrictions and mitigations" for Illinois Region 6 which includes Decatur's Macon County. *Decatur Exhibit 2*, p. 2.
15. Executive Order 2020-67 went into effect on November 2, 2020, requiring "All restaurants and bars in the region must suspend indoor on-premises consumption." *Id.*

16. The Illinois Governor's authority to issue executive orders in extraordinary circumstances like a global pandemic is authorized by Sections 7(1), 7(8), 7(9), and 7(12) of the Illinois Emergency Management Act, 20 ILCS 3305 ("IEMA Act").
17. The Illinois Governor's authority to issue executive orders, including Executive Order 2020-67, pursuant to the IEMA Act has been adjudicated by multiple courts of law to be a necessary and valid exercise of the Governor's emergency authority. *See Fox Fire Tavern, LLC v. Pritzker, 2020 IL App (2d) 200623, 161 N.E.3d 1190, 2020 Ill. App. LEXIS 767, 443 Ill. Dec. 538.*

Conclusions

Section 7-9 of the Liquor Control Act of 1934 (“the Act”) places the statutory responsibility to hear appeals from final orders entered by Local Liquor Commissioners on the State Commission. 235 ILCS 5/7-9. If the county board, city council, or board of trustees of the associated jurisdiction has adopted a resolution requiring the review of an order to be conducted on the record, the State Commission will conduct an “On the Record” review of the official record of proceedings before the Local Liquor Commission. *Id.* The State Commission may only review the evidence found in the official record. *Id.* The Decatur City Code requires that decisions of Decatur Commission be reviewed by the State Commission on the record. *Decatur Resolution, No. 2516.* Accordingly, the State Commission will only review the evidence as found in the official record.

In reviewing the propriety of the order or action of the local liquor control commissioner, the Illinois Liquor Control Commission shall consider the following 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 the light of the whole record. 235 ILCS 5/7-9.

The Illinois Appellate Court has provided guidance that this Commission's duty is to determine whether local agency abused its discretion. Koehler v. Illinois Liquor Control Comm'n, 405 Ill. App. 3d 1071, 1080, (2nd District 2010). "Such review mandated assessment of the discretion used by the local authority, stating that [t]he functions of the State commission, then, in conducting a review on the record of license suspension proceedings before a local liquor control commissioner is to consider whether the local commissioner committed an abuse of discretion." Id.

A. Whether the local liquor control commissioner has proceeded in the manner provided by law.

Decatur proceeded in a "manner provided by law" because it provided Timbuktu with due process required by law prior to imposing a thirty-day suspension of Timbuktu's liquor license. Decatur gave Timbuktu required notice of the charges, an opportunity to be represented by counsel, an opportunity to prepare a defense, and even an opportunity to change its behavior prior to the imposition of the thirty-day suspension. Moreover, Decatur relied on a duly enacted ordinance as the foundation of the charges against Timbuktu.

Timbuktu's basis for this appeal is: 1) The Decatur ordinance, Section 37 (H) and (I) of the Chapter 52 of the Decatur City Code (hereafter "Section 37"), is impermissibly vague and; 2) Decatur is circumventing the exclusive jurisdiction of the Illinois Department of Public Health which has the sole jurisdiction to close eating and drinking establishments for public health

reasons. The State Commission has reviewed the arguments of counsel and has determined that Decatur has proceeded in a manner provided by law.

1. Section 37 is of the Decatur City Code is not impermissibly vague.

Section 37 of the Decatur City Code is not impermissibly vague. A statute or ordinance is vague if it either (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or (2) authorizes or encourages arbitrary and discriminatory enforcement. *City of Chicago v. Pooh Bah Enterprises, Inc.*, 224 Ill. 2d 390, 441-42, 865 N.E.2d 133, 309 Ill. Dec. 770 (2006).

The capacity and safety limits established by Section 37 are not impermissibly vague because they provided the licensee with a plain language option and, thus, a “reasonable opportunity to understand” the requirements of the Governor’s Executive Order. Subsection (H) of Section 37 states: “Licensees shall be prohibited from allowing persons to congregate on licensed premises in a number greater than allowed by guidelines set forth in Illinois Department of Public Health and the Illinois Department of Commerce and Economic Opportunity guidelines.” *Amended Decatur Ordinance No. 2020-122, August 3, 2020.* Subsection (I) states: “Licensees shall be required to follow all guidelines set forth by the Illinois Department of Commerce and Economic Opportunity (“DCEO”) for Restaurant and Bar establishment Safety Guidelines not otherwise specifically set forth.” *Id.* Therefore, instead of referencing a legal document like the Governor’s Executive Order to convey the capacity and safety restrictions for bars and restaurants, Decatur offered licensees the simplified and plainly written guidelines published by the agency responsible for communicating the Governor’s Executive Orders. In its guidelines, DCEO plainly states for “Bars” that “No indoor service” is permitted. *Decatur Exhibit 3.* For “Restaurants,” DCEO guidance plainly states, “No indoor dining or bar service.” *Id.* Such provisions are easily

referenced, plainly stated, and provide “reasonable opportunity to understand” the capacity and safety restrictions.

The fact that Section 37’s restrictions change with the changing Executive Orders over time does not make the ordinance impermissibly vague. As required by law, Executive Orders imposed pursuant to the pandemic resulting in the suspension of indoor dining and drinking service cannot extend beyond a thirty-day period. If a local ordinance is tied to such an Executive Order, then, by design, the capacity and safety restrictions are likely to change over time. In fact, the capacity and safety restrictions required by the Governor’s Executive Order were tied to the COVID-19 positivity rates which fluctuated daily. Unless the Decatur City Council planned to meet and pass a new ordinance every time there was a change in the positivity rate or Executive Order, there was an expectation that the capacity and safety restrictions imposed by Section 37 would be different at different stages of the pandemic. It seems reasonable that a person reading the Decatur ordinance would understand the fluctuations inherent in pandemic-related orders and easily reference the DCEO website to know if the Region 6 capacity and safety restrictions in bars and restaurants had changed with the changing positivity rates. Fluctuations in the substantive provisions of Section 37 do not necessarily make the ordinance vague.

Furthermore, to determine whether a person had a reasonable opportunity to understand the prohibited conduct of Section 37, the ordinance must be read in the context of the pandemic and how likely a bar or restaurant holder would have understood the restrictions at that time. It would be difficult to imagine that a reasonable person owning a Decatur restaurant or bar would not have known that the Executive Orders issued by the Illinois Governor in November 2020 were suspending indoor eating and drinking service. At the time, Executive Orders were suspending indoor dining and drinking throughout the entire State. At the time of the violation against

Timbuktu, indoor capacity restrictions were set a zero, not a more elusive calculation based on a percentage of the overall capacity. In this case, if for some reason, Timbuktu had ignored most of the media coverage at the time and truly did not know it could not permit any person to consume food or beverages inside its bar or restaurant, the Decatur ordinance made it easy for them to find out by directing it to the DCEO website for guidance.

Evidence that Sections 37 was not vague is Timbuktu's understanding that they were violating the law but choose to continue to operate for its business to survive as they claim. In the Variety Liquors case (Facts stipulated to by Timbuktu were "identical" to those in Variety Liquors with de minimis exceptions. *Timbuktu Transcript*, p. 2.), Decatur law enforcement testified as follows:

Q. Okay. Can you describe the contents of your conversation with [licensee]?

A. Yeah, I asked her if she understood the guidelines and the ordinances, and she said she did. I asked her if she was willing to close service down inside, and she said she was not.

Variety Liquors Transcript, p. 8. In fact, even after it was clear that Timbuktu knowingly violated Section 37, the Decatur Commissioner gave Timbuktu another opportunity to comply by asking if Timbuktu intended to remain open. Per the record:

Commissioner: Again, I ask when you leave here, are you going to allow inside dining?

Mr. Conaway: Yes.

Mr. Gilbert: We have to."

Timbuktu Transcript, p. 7. It is clear, therefore, that the ordinance was not vague to the owners of Timbuktu. They clearly understood that they were not permitted to allow indoor dining and

drinking and were given an opportunity to change their behavior. The difficulty experienced by Timbuktu was not that they didn't know the law but rather what compliance would do to their business. Timbuktu was faced with an inordinately difficult choice of shutting down its indoor dining and drinking business or face a penalty. Notwithstanding the difficult circumstances under which Timbuktu was placed, the fact that they understood the law and choose to violate it is evidence that the ordinance was not vague.

As to the second test of vagueness, nothing in the record establishes that Section 37 “authorize[d] or encourage[d] arbitrary and discriminatory enforcement” of Decatur licensees. As mentioned, the record in this case is nearly identical to the record in the Variety Liquors case which is evidence that Decatur enforced the law against other businesses allowing indoor dining and drinking service. This suggests that enforcement of the indoor dining and drinking restrictions was not discriminatory. Furthermore, Timbuktu did not raise any argument that it was the target of selective enforcement of Section 37. Although not in the record, a reasonable inference might be drawn that Timbuktu was held accountable for allowing indoor drinking and dining because other Decatur competitors who were closed complained to Decatur that Timbuktu was open in violation of Section 37. Whether such an inference is true does not change the fact that the record does not reflect any evidence that the language of Section 37 promoted “arbitrary and discriminatory enforcement” of the law against Decatur liquor license holders.

For the above stated reasons, Section 37 is not impermissibly vague, and Decatur offered Timbuktu sufficient due process to understand its responsibilities under the law.

2. Case law has regularly affirmed the Illinois Governor's executive authority pursuant to the IEMA Act as a valid basis to restrict many forms of activity including public indoor dining and drinking in order to control the spread of COVID-19.

Timbuktu alleges that Decatur improperly relied on the Illinois Governor’s Executive Authority to suspend public indoor dining and drinking activities in Decatur because the Illinois Department of Public Health has sole jurisdiction over such matters. Because this question relates to the constitutional authority of the Governor under the Illinois Emergency Management Agency Act (“IEMA Act”), the State Commission defers to the State and Federal Court systems to determine if the Governor’s Executive Orders related to the pandemic and the suspension of indoor dining and drinking in Executive Order 2020-67 unconstitutionally encroached on the authority of the Illinois Department of Public Health.

With that, however, both the State and Federal courts have thus far definitively ruled that the Illinois Governor has authority under the IEMA Act to take all necessary executive and emergency action to control the spread of the COVID-19 virus. Such authority has been adjudicated by courts as necessary because of the urgency in controlling the spread of COVID-19 even when such an emergency authority affects speech, religious, and assembly rights. An overwhelming number of State and Federal decisions have supported the reasonable use of the Governor’s Executive Order under the IEMA Act to limit the spread of COVID-19. Some cases supporting the Governor’s Executive Order authority are cited here:

- Fox Fire Tavern, LLC v. Pritzker, 2020 IL App (2d) 200623, 161 N.E.3d 1190, 2020 Ill. App. LEXIS 767, 443 Ill. Dec. 538.
- Nowlin v. Pritzker, 2021 U.S. Dist. LEXIS 29403, 2021 WL 669333.
- Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 2020 U.S. App. LEXIS 18862, 2020 WL 3249062.
- Cassell v. Snyders, 458 F. Supp. 3d 981, 2020 U.S. Dist. LEXIS 77512, 2020 WL 2112374.

- Vill. of Orland Park v. Pritzker, 475 F. Supp. 3d 866, 2020 U.S. Dist. LEXIS 136833, 2020 WL 4430577.
- Ill. Republican Party v. Pritzker, 973 F.3d 760, 2020 U.S. App. LEXIS 28118, 2020 WL 5246656.

The State Commission defers to the Federal and State courts for constitutional rulings on specific matters but because the courts have regularly upheld the Governor's Executive Order authority related to COVID-19 directives, Timbuktu's argument that the Illinois Department of Public Health has the sole authority to suspend indoor dining and drinking is not persuasive.

B. Whether the order is supported by the findings

In reviewing whether the order is supported by the findings, this Commission analyzes whether the findings contained within the local order constitute grounds to suspend the license. Upon review, an agency's findings of fact are held to be prima facie true and correct, and they must be affirmed unless the court concludes that they are against the manifest weight of the evidence.” Daley v. El Flanboyan Corp., 321 Ill. App. 3d 68, 71, (1st Dist. 2001). We take guidance from Administrative Review Law jurisprudence. We limit our review to whether the local liquor commissioner's order contained factual findings that support the imposed sanction.

The order contains sufficient findings of fact and conclusions of law from which to base the ultimate decision. The record is clear that the facts in this matter are not contested. A Decatur law enforcement officer visited Timbuktu on or about November 20, 2020, and “[o]bserved several patrons sitting at the bar and at tables with the beverages in front of them.” A second Decatur law enforcement observed “approximately 14 customers inside the business” “drinking beverages” on November 30, 2020. *Variety Liquors Transcript*, p. 21-22. These actions were clearly in violation

of the Illinois Governor's Executive Order 2020-67 and Section 37 of the Decatur ordinance. Therefore, the findings set forward sufficient facts by which a decision could be reached.

C. Whether the findings are supported by substantial evidence in the light of the whole record.

Finally, this Commission must review whether the findings are supported by substantial evidence in the light of the whole record. We hold that findings related to the 30-day suspension of Timbuktu's liquor license are supported by substantial evidence in light of the whole record.

The Illinois Appellate Court has ruled that, as a reviewing body, the issue is not whether the reviewing court would decide upon a more lenient penalty were it initially to determine the appropriate discipline, but rather, in view of the circumstances, whether this court can say that the commission, in opting for a particular penalty, acted unreasonably or arbitrarily or selected a type of discipline unrelated to the needs of the commission or statute. Jacquelyn's Lounge, Inc. v. License Appeal Comm'n of City of Chicago, 277 Ill. App. 3d 959, 966, (1st Dist. 1996).


The Decatur Commission's decision to suspend Timbuktu's license for 30 days was not unreasonable or arbitrary and is supported by evidence in the record. Again, the facts in the case are not contested. Timbuktu is a bar/restaurant and was offering indoor dining and drinking inside its licensed premises on or about November 20, 2020, and November 30, 2020. This act was in violation of Section 37 of the Decatur City Code and Illinois Governor Executive Order 2020-67. Allowing congregations inside an eating or drinking establishment ignored the public health warnings which formed the basis of the Illinois Governor's Executive Order to prohibit such congregations. Especially at a time prior to the availability of vaccines, allowing congregations at the height of the COVID-19 infection period severely jeopardized the health of the people

congregating at Timbuktu as well as people who did not congregate at Timbuktu but who may have been infected by a person who did. Furthermore, Decatur acted to penalize Timbuktu not only to protect the health and safety of its residents but also for the benefit of other bars and restaurants who abided by Section 37 and Executive Order 2020-67. A 30-day suspension of a liquor license is a less severe penalty when compared with the amount of time other Decatur businesses were closed because of the COVID-19 pandemic. For these reasons, Decatur's 30-day suspension of Timbuktu's liquor license is not an unreasonable or arbitrary exercise of Decatur's regulatory responsibility.

IT IS HEREBY ORDERED:

For the reasons stated herein, the decision of the Decatur Local Liquor Commission is **AFFIRMED.**

ENTERED before the Illinois Liquor Control Commission at Chicago, Illinois on August 18, 2021.



Cynthia Berg, Chairman

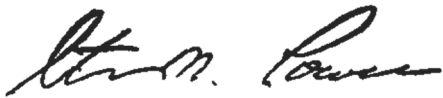


Melody Spann Cooper, Commissioner

Julieta LaMalfa, Commissioner



Thomas Gibbons, Commissioner



Steven Powell, Commissioner



Donald O'Connell, Commissioner

Patricia Pulido Sanchez, Commissioner

THIS IS A FINAL ORDER

Pursuant to 235 ILCS 5/7-10 of the Illinois Liquor Control Act, a Petition for Rehearing may be filed with this Commission within twenty (20) days from the service of this Order. The date of mailing is deemed to be the date of service. If the parties wish to pursue an Administrative Review action in the Circuit Court, the Petition for Rehearing must be filed within twenty (20) days after service of this Order as such Petition is a jurisdictional prerequisite to the Administrative Review.

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UNDER PENALTY OF PERJURY, as provided by law, section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that I caused copies of the foregoing ORDER to be e-mailed by agreement of the parties prior to 5:00 p.m. on the following date: October 22, 2021.

/s/ Richard Haymaker

Richard Haymaker

Variety Liquors Inc.
c/o Tom DeVore, esq.
tom@silverlakelaw.com

Local Liquor Commissioner for Decatur, Illinois
c/o Amy Waks, esq.
awaks@decaturil.gov