

STATE OF ILLINOIS
LIQUOR CONTROL COMMISSION

NEW CORNER BAR AND GRILL, INC.
20600 TORRENCE AVENUE
LYNWOOD, IL

Appellant,

vs.

LYNWOOD LIQUOR CONTROL
COMMISSION

Appellee.

Case No.: 21 APP 10

License Number: 1A-0098597

ORDER

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

Procedural History

New Corner held a local and State of Illinois liquor license at 20600 Torrence Avenue, Lynwood, Illinois. The Lynwood Liquor Control Commission (hereinafter “Lynwood Commission”) had previously issued a Class A liquor license (restaurant with separate bar facilities) to New Corner. On or about August 1, 2021, there was a shooting at the New Corner licensed premises. On or about August 5, 2021, the Lynwood Commission served a five count “Complaint and Citation” (“Local Complaint”) on New Corner. The Lynwood Commission held an evidentiary hearing on August 11, 2021, resulting in the issuance of “Decision and Order” on August 12, 2021. The Decision and Order fined New Corner \$750 finding evidence of Counts II and IV and revoked the local New Corner Class A liquor license finding evidence of Counts I, III,

and V. On August 27, 2021, New Corner filed a Notice of Appeal with the State Commission. On March 24, 2022, the State Commission represented by Commissioner Julieta LaMalfa heard on the record arguments of counsel on the matter. The State Commission as a whole reviewed the entire record and deliberated on the matter at the May 18, 2022, State Commission meeting.

Decision

Upon review of the entire certified record, the State Commission REVERSES the order of the Lynwood Commission to fine and revoke the New Corner Class A liquor license.

Discussion

Section 7-9 of the Liquor Control Act of 1934 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 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.* Lynwood has adopted a local ordinance requiring any appeal from an order of the Lynwood Liquor Control Commissioner to be a review of the official record. *Lynwood Ordinances, Section 10-65(d)*. Accordingly, the 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 State 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 Dist. 2010). The Court held that “[s]uch review mandated assessment of the discretion used by the local authority, stating that ‘[t]he function 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 a manner provided by law.

The Lynwood Commission acted in a manner provided by law by providing New Corner with the minimum due process necessary to defend against the charges identified in the Local Complaint.¹ As to technical notice requirements, the Liquor Control Act requires a local commission to provide a minimum of three days written notice of the charges to a licensee to answer revocation or suspension charges at a hearing. 235 ILCS 5/7-5. In this case, the Lynwood Commission served a Local Complaint on New Corner on or about August 5, 2021, and the hearing was eventually held on August 11, 2021, six (6) days later. *ILCC*, pp. 001-004; 006. The Local Complaint alleged very specific facts on a five (5) count charge alleging that New Corner violated

¹ The State Commission's decision herein does not include a review of the Local Commission basis for summary closure issued for seven (7) days from August 5, 2021, through August 11, 2021, pursuant to Section 10-65(c) of the Lynwood City Code and 235 ILCS 5/7-5.

three primary local ordinance sections sufficiently related to the sale of alcoholic liquor: 1. Section 10-118(b), the Lynwood City Code (“City Code”) disorderly conduct ordinance; 2. Section 10-93, the City Code ordinance section establishing under 21 alcohol violations; 3. Section 22-27, the City Code public nuisance ordinance. *ILCC, pp. 001-002*. The Lynwood Commission charged New Corner with five (5) counts of violating the City Code. In summary:

- Count I – Permitted disorderly conduct by suffering or allowing shootings to occur on premises (Ordinance 10-118(b)).
- Count II – Permitted disorderly conduct by selling or otherwise providing alcoholic liquor to person under 21 (Ordinance 10-118(b)).
- Count III – Engaged in disorderly conduct by permitting amusement/exhibition to become disorderly (Ordinance 10-118(b)).
- Count IV – Provided alcoholic liquor to person under 21 by permitting a person under 21 to purchase or attempt to purchase or accept as a gift alcoholic liquor. (Ordinance 10.93).
- Count V – Operated a Nuisance in Fact (Ordinance 22-27)

ILCC, pp. 3-4. New Corner was not represented by counsel at the local hearing, but the Lynwood Commission gave New Corner the chance to request a continuance and New Corner did not make such a request. *ILCC, pp. 13-14*.

Contrary to the argument of New Corner counsel on appeal, the Lynwood Commission was not required to refrain from conducting a hearing on the merits of the charges on account of the licensee, Lynwood Bar & Grill, Inc., a corporation, was not represented by legal counsel. In fact, presuming the notice requirement was satisfied, the law seems to require that the Lynwood Commission proceed with the case instead of issuing a default judgment against New Corner for effectively failing to appear with an attorney at the hearing.

The law on the disposition of cases against corporations or limited liability companies (“Corporations”) represented by officers or members, but not licensed attorneys, does not

definitively restrict a municipality from prosecuting a case against a Corporation. The authority cited by licensee counsel, *Downtown Disposal Services v. City of Chicago*, 979 N.E.2d 50 (2012), clearly holds that non-lawyer officers of Corporations cannot represent such Corporations in legal matters. This would include representation at an administrative hearing. Nevertheless, the same legal authority states that such unauthorized representation does not automatically lead to the “nullification” of a matter which would preclude subject matter jurisdiction for tribunals. The *Downtown Disposal* court disagrees with the inflexible reading of some courts that non-lawyer representation of Corporations should lead to the “entry of a default judgment against the corporation, or vacatur of any judgment rendered.” *Downtown Disposal*, 979 N.E.2d at 54. Instead of “nullifying” proceedings in which Corporations were not represented by licensed attorneys, such representation by a non-attorney does not affect “subject matter jurisdiction” *Id.* at 56.

Applying the *Downtown Disposal* standard to this case, it is clear the Lynwood Commission proceeded according to law. The record is clear that Lynwood provided adequate notice to New Corner of the charges filed against it more than three days before the scheduled hearing as required by the Illinois Liquor Control Act. 235 ILCS 5/7-5. While the record is unclear if such notice was personally served on the registered agent of New Corner, or was served at the business premises, as required by law, New Corner corporate officer Sharon Birkfeneld appeared at the hearing in person and stipulated to receiving proper notice. *ILCC*, pp 57-58. Furthermore, the record demonstrates the Lynwood Commission gave Birkenfeld the opportunity to request a continuance and obtain counsel for New Corner. *ILCC*, pp. 13-14. Birkenfeld declined such an offer and the hearing proceeded. Because Birkenfeld was not a licensed attorney, New Corner was not represented at the hearing and thus, arguably, failed to appear. Instead of issuing a default judgment order against New Corner effectively nullifying Birkenfeld’s representation of New

Corner, the Lynwood Commission proceeded with the case and attempted to prove the five count charges in the Complaint and Citation. In not issuing a default judgment against New Corner for failing to appear at the hearing through a licensed attorney, the Lynwood Commission acted in accordance with the legal authority and proceeded according to law.

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 order constitute grounds to fine and revoke the license. 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).

In this case, if the Lynwood Commission met all evidentiary standards to prove Counts I, III, and V to revoke the New Corner license, or Counts II and IV to fine New Corner \$750, then the Lynwood Commission would have appropriately acted within its discretion to take such disciplinary measures. A \$750 fine for selling or serving alcohol to a minor and a revocation of a license for failing to prevent a public nuisance resulting in the death of one person and injuries to two others are reasonable and non-arbitrary penalties.

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

The Lynwood Commission did not, however, issue findings supported by substantial evidence in light of the whole record. 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). A finding is “against the manifest weight of the evidence only if an opposite conclusion is clearly evident from the record.” *Vino Fino Liquors, Inc v. License Appeal Comm’n of the City of Chicago*, 394 Ill.App.3d 516, 522 (1st Dist. 2009). In this case, the record is clear that the Lynwood Commission ruled against the manifest weight of the evidence on all counts and charges. For Counts II and IV related to the sale or service of alcohol to a minor, the Lynwood Commission presented no evidence that New Corner sold or served alcohol to an underaged person, nor was their evidence presented that New Corner failed to monitor on-premises consumption by an underaged person. For Counts I, III, and V related to disorderly conduct and public nuisance charges, while it is tempting to want to hold New Corner liable for a shooting that occurred at the premises causing death and serious injury, the evidence of record failed to establish that New Corner knew or should have known of a threat to its patrons, or to the community, violating a standard of care on August 1, 2021.

Counts I, III, V – Disorderly Conduct/Public Nuisance Charges

The Lynwood disorderly conduct and public nuisance ordinances state:

Section 10-118(c) - Disorderly conduct: No person having a license under (Chapter 10 – Alcoholic Beverages) shall violate or suffer or allow to be violated any of the conditions and restrictions contained in such license, or any of the provisions of this chapter. No licensee shall suffer or permit any exhibition or amusement on the licensed premises to become disorderly.

Section 22-27. – Nuisance Prohibited

No business, whether licensed or not, shall be so conducted or operated as to amount to a nuisance in fact.

ILCC pp. 073-075.

The Lynwood Commission found New Corner at fault for both the omission and commission of acts violating the disorderly conduct and nuisance in fact Lynwood ordinances. For Counts I and III, the Lynwood Commission Order and Decision (“Order”) found the licensee liable for “suffering or allowing the August 1 shootings to occur. . . . Sharon Birkenfeld testified that she regularly employs security on the licensed premises However, for reasons not explained, no security was present on August 1, 2021. . . .” *ILCC p. 065*. For Count V, the Lynwood Commission found New Corner to have operated as a “nuisance-in-fact” because of the “substantial disruption that caused the Village of Lynwood to expend a considerable amount of resources in reacting to a violent shooting” August 1, 2021, at New Corner. *ILCC p. 066*.

The Lynwood ordinances in the record do not expressly define a disorderly conduct or nuisance in fact. The lack of a defined disorderly conduct or public nuisance definitions does not mean that New Corner cannot be held accountable for committing such offenses, but it does mean that New Corner actions and inactions related to the charges should be judged on a common law negligence standard. Illinois courts have accepted the Torts Restatement definition of nuisance. *Wheat v. Freeman Coal Mining Corp.* (1974), 23 Ill. App. 3d 14, 18, 319 N.E.2d 290; *City of Chicago v. Commonwealth Edison Co.* (1974), 24 Ill. App. 3d 624, 631, 321 N.E.2d 412. The Restatement defines nuisance as an “unreasonable interference with a right common to the general public.” *Restat 2d of Torts, § 821B*. Based on this definition, New Corner cannot be held strictly liable for disorderly conduct or public nuisance emanating from its business. For liability to attach to New Corner, New Corner agents must have *negligently* acted or failed to act which, in the end, interfered with a common right.

In this case, the basic facts detailing the tragic August 1 shootings at New Corner are not contested. The record is clear and uncontested that New Corner was open and serving alcohol at

the time of the August 1 shootings. *ILCC p. 062*. New Corner had permitted a party to take place on the licensed premises and the party goers were regulars at the business. *ILCC p. 061, 063*. New Corner owner Sharon Birkenfeld testified that she did not have security working at the bar at the time of the shooting nor could she recollect the total occupancy of her business. *ILCC p. 053*. While the bar was open and operating, video evidence clearly demonstrates the violent shootings at and near the licensed premises. *Joint Exhibit 3* The testimony of a local police officer on the scene confirmed the shootings resulted in the death of one person and the gunshot injuries of two others. *ILCC p. 066*

As to Count V, there are no facts in the record that show New Corner agents or employees operated the business as a “nuisance in fact.” The simple fact that a shooting occurred at the location and involved patrons of the business is not sufficient to establish a common law nuisance of fact violation. A strict liability application of Section 22-27 not only fails to comply with common law standards of negligence but also would lead to absurd results of holding any business liable if any of their patrons were involved in a similar altercation. Why would a grocery store or gas station, restaurant, or other similar liquor licensed business be liable for a public nuisance if one of its customers was involved in a shooting at the licensed location while the business was open? Beyond strict liability, there has to have been some other proof in the record that New Corner agents negligently acted or failed to act to cause the nuisance which led to the shootings. The basis in the order for finding a violation of Section 22-27, namely the video evidence and testimony of a police officer that the shootings occurred, is not sufficient to prove the actions or inactions of New Corner negligently caused the shootings.

The findings in Counts I and III, however, state that New Corner violated the disorderly conduct Section 10-118(b) by “suffering or allowing the August 1st shootings to occur.” *ILCC p.*

065. Count I implies that New Corner was negligently liable for general disorderly conduct violations of Section 10-118 because New Corner failed to employ security on premises during the August 1 shooting. Likewise, per Count III, New Corner similarly permitted an exhibition or amusement on the licensed premises without hiring security for such exhibition or amusement. Seemingly, as a demonstration of the New Corner negligence, the Order further states New Corner owner Sharon Birkenfeld could not testify to the maximum occupancy number allowable at New Corner. *Id.*

Neither the facts referenced in the Order, nor any other facts in the record, however, demonstrate how New Corner's actions or inactions were negligent in causing disorderly conduct. Lynwood does not have any express requirements in its ordinances, nor any published guidelines, mandating minimum security requirements for its liquor license holders. While such lack of specificity in security mandates does not mean that New Corner does not need to hire sufficient security, it does mean that New Corner security obligations should be evaluated on a reasonable standard.

The evidence in the record does not support a finding that New Corner negligently failed to hire enough security to prevent the August 1st shootings. There is nothing in the record mandating New Corner be required to have security personnel at all times. There is no evidence in the record that the conditions at New Corner were ripe for a violent act. New Corner was not providing nor had advertised that it was providing entertainment on August 1st. There is no evidence of large crowds congregating in or around New Corner. There are no facts that the persons at New Corner involved in the shooting were a violent group. In fact, the record demonstrates that the group having a private party at New Corner was a prayer group with no indication of prior violent behavior. The fact that there is some evidence that New Corner employs

security sometimes but did not on this occasion is not evidence that there was a need to have security on July 31/August 1, 2021. Under these circumstances, there is no evidence that the agents of New Corner either knew or should have known to employ security on July 31/August 1, 2021, nor unreasonably “suffered or permitted” disorderly conduct in violation of Section 10-118(b) of the Lynwood City Code.

Counts II and IV – Selling or Otherwise Providing Alcoholic Liquor

In addition to the Lynwood Commission revocation findings related to the August 1st shootings, the Lynwood Commission also assessed a \$750 for underage sales or service of alcoholic liquor in violation of the Code. The Lynwood Commission order states New Corner engaged in disorderly conduct “by **selling or otherwise providing** alcoholic liquor to Angelo McDowell, a minor under the age of 21.” *ILCC p. 065 (emphasis added)*. Also, per the Lynwood Commission, New Corner violated Section 10-93 of the Code by 1) “**providing** alcoholic liquor to Angelo McDowell”; 2) “suffered or permitted Angelo McDowell . . . to **purchase, attempt to purchase or accept as a gift** an alcoholic beverage or to have an alcoholic beverage in his **possession**”; 3) “failed to demand some form of positive identification, containing proof of age, **before providing alcoholic liquor** to Angelo McDowell.” *Id (emphasis added)*. In its findings, the Lynwood Commission found that Angelo McDowell was present at New Corner at midnight on August 1, 2021, and found that it was “more likely than not that the license holder or an agent thereof, served alcohol to Angelo McDowell or to a person they should have known was purchasing alcohol on Mr. McDowell’s behalf.” *ILCC p. 63*.

Notwithstanding the findings, however, the evidence in the record does not establish a violation of the Lynwood alcohol age-related ordinances. A simple reading of Section 10-93 of the Lynwood City Code required the Lynwood Commission to prove: 1) New Corner sold or

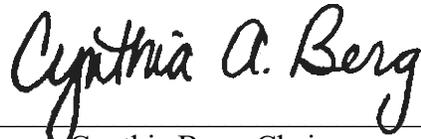
otherwise provided alcohol to McDowell; 2) suffered or permitted McDowell's attempts at alcohol purchases; 3) allowed McDowell to possess alcohol on premises; or 4) allowed someone else to purchase alcohol on McDowell's behalf. There is no ordinance requirement of record that prohibited a 19-year-old from being present at New Corner. The only evidence used to prove McDowell purchased, attempted to purchase, consumed, or possessed alcoholic liquor is the uncontested evidence that he was physically present at New Corner on August 1st during the shootings, and that he was 19 years old. The record is bereft of *any* evidence that McDowell purchased, consumed, or possessed an alcoholic beverage at New Corner. If video evidence showed McDowell drinking or possessing an alcoholic beverage, or if evidence identified McDowell sitting at a table with an alcoholic beverage in front of him, then there is a possibility the underage sales or possession charges could have been founded. To establish a likelihood that McDowell bought, consumed, or possessed alcohol just because he was present at the bar on August 1st is an unreasonable inference to draw and is against the manifest weight of the evidence.

IT IS HEREBY ORDERED:

For the reasons stated herein, because the Lynwood Commission did not rely on substantial evidence in light of the whole record to prove Counts 1-V of the Citation, the Lynwood Commission decision to assess a \$750 fine and to revoke the New Corner Class A liquor license, are REVERSED.

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 no Petition for Rehearing is filed, this order will be considered the final order in this matter. 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 the Petition for Rehearing is a jurisdictional prerequisite to filing an Administrative Review action.

ENTERED before the Illinois Liquor Control Commission at Chicago, Illinois, on May 18, 2022.


Cynthia Berg, Chairman



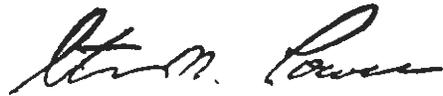
Melody Spann Cooper, Commissioner



Thomas Gibbons, Commissioner



Julieta LaMalfa, Commissioner



Steven Powell, Commissioner



Brian Sullivan, Commissioner

STATE OF ILLINOIS)
COUNTY OF COOK) 21APP 10

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: June 13, 2022.

/s/ Richard R. Haymaker

Richard R. Haymaker

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