

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STUART KOZAL, d/b/a JUMPING EAGLE INN; ARROWHEAD INN, INC., d/b/a ARROWHEAD INN; CLAY BREHMER and DANIEL BREHMER, d/b/a STATE LINE LIQUOR; and SANFORD HOLDING, LLC, d/b/a D & S PIONEER SERVICE,

Petitioners,

v.

NEBRASKA LIQUOR CONTROL COMMISSION,

Respondent.

CASE NO. CI 17-1559

ORDER VACATING THE DECISION OF THE NEBRASKA LIQUOR CONTROL COMMISSION AND REMANDING THE CASE WITH DIRECTIONS

CLERK OF THE DISTRICT COURT

2017 APR 27 AM 9 42

LANCASTER COUNTY

THIS MATTER is before the court on appeal from the April 24, 2017 order of Respondent Nebraska Liquor Control Commission (NLCC). The order denied long-form applications for Retail Class B liquor licenses submitted by the Petitioners. Each Petitioner currently holds a Nebraska Class B liquor license, which licenses are set to expire on April 30, 2017. Petitioners' efforts to exercise their renewal privilege have been denied.

On April 26, 2017, the court held a hearing on Petitioners' motion for an order staying the NLCC's order and allowing the automatic renewal of Petitioners' licenses. Andrew W. Snyder appeared for Petitioners. Melissa Johnson-Wiles appeared for Respondent. The court takes judicial notice of the NLCC's order, which is attached to the Petition. Exhibits 1 through 8 will not be received or considered for the purposes of this order. Further, although not considered by this court in rendering its decision here, the court is aware of prior litigation in Lancaster County District Court involving the same parties seeking relief consisting of enjoining

the NLCC from requiring them to go through a long-form application process and ordering the NLCC to renew their licenses under the automatic renewal provisions of the law. *See* Or. of Dismissal, *Kozal, et al., v. NLCC*, (Dist. Ct. Neb. April 5, 2017) (No. CI 17-985, available on JUSTICE).

After a de novo review and making independent findings of fact, the court finds, based on the face of the NLCC's order, the NLCC's action was arbitrary and unreasonable. The court finds, under the facts and circumstances of this case, Petitioners are entitled to relief and that a stay would not prevent the unlawful cancelation of Petitioners' licenses. The NLCC's decision is vacated and remanded with directions to follow decisions of the Nebraska Supreme Court and the relevant Nebraska statutes.

STANDARD OF REVIEW

This appeal is governed by the Administrative Procedure Act (APA). NEB. REV. STAT. § 84-917(1) (Reissue 2014). Under the APA, the court reviews the agency's decision "without a jury de novo on the record of the agency." NEB. REV. STAT. § 84-917(5)(a). In a review de novo on the record, the district court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *Med. Creek LLC v. Middle Republican Nat. Res. Dist.*, 296 Neb. 1, 8 (2017); *Schwarting v. Neb. Liquor Control Comm'n*, 271 Neb. 346, 351, 711 N. W.2d 556, 561 (2006). The district court may affirm, reverse, or modify the decision of the agency or remand the case for further proceedings. NEB. REV. STAT. § 84-917(6)(b).

The NLCC is vested with discretion in the granting or denial of retail liquor licenses, **but it may not act arbitrarily or unreasonably.** *Schwarting v. Neb. Liquor Control Comm'n*, 271 Neb. 346, 351, 711 N.W.2d 556, 560 (2006) (emphasis added). An administrative agency is

limited in authority to those powers granted to it by statute. *Grand Island Latin Club v. Neb. Liquor Control Comm'n*, 251 Neb. 61, 66, 554 N.W.2d 778, 781 (1996).

DISCUSSION

The court finds the NLCC's decision is in violation of the Petitioners' clearly established constitutionally protected interests in obtaining automatic renewal of their existing licenses. The NLCC's order is void as a matter of law for two reasons. First, in contravention of Petitioners' "renewal privilege" as licensees, the NLCC required Petitioners to submit long-form license applications. Second, the NLCC based its decision to deny Petitioners' long-form applications on statutory factors which, as a matter of law, cannot be applied to current license holders. For these reasons, the court vacates the NLCC's order, orders the NLCC to not interfere with Petitioners' efforts to renew their licenses through the shorthand online process, and orders the NLCC to honor the renewal of those licenses upon application, as is the Petitioners' constitutional right.

- 1. The NLCC's decision is void as a matter of law, because the NLCC failed to make the necessary showing that Petitioners' were not entitled to their renewal privilege.**

The Nebraska Supreme Court established a formal distinction between a first-time applicant for a liquor license and a renewal applicant in *Pump & Pantry, Inc. v. Grand Island*, 233 Neb. 191, 197, 444 N.W.2d 312, 317 (1989). "[Sections 53-135 and 53-135.02] establish a privilege or limited right of renewal pertaining to an existing liquor license." *Id.* "[A]s the result of the renewal privilege established by [NEB. REV. STAT. § 53-135.02], a licensee is entitled to renewal of a license, that is, continuation of an existing license, if at the time for renewal the licensee meets the requirements which existed when the license to be renewed was

initially issued.” *Id.* at 197, 444 N.W.2d at 317 (emphasis added). Thus, as a matter of Nebraska statute, liquor licensees are entitled to a renewal privilege, absent a change of circumstances from the initial application.

The Nebraska Supreme Court has characterized the renewal privilege as a **constitutionally protected interest**. *Grand Island Latin Club v. Nebraska Liq. Cont. Comm.*, 251 Neb. 61, 554 N.W.2d 778 (1996); *Pump & Pantry, Inc.*, 233 Neb. at 197, 444 N.W.2d at 317 (“the phrase ‘**renewal privilege,**’ means a right or benefit granted in favor of a licensee seeking an extension or continuation of a previously issued license.”) (emphasis added). That interest is jeopardized where active liquor licenses are wrongfully taken away. *Orchard Hill Neighborhood Ass’n v. Orchard Hill Mercantile, L.L.C.*, 274 Neb. 154, 161, 738 N.W.2d 820, 827 (2007).

Despite the fact that each Petitioner has continuously held a retail liquor license for several years, on November 2, 2016, the NLCC issued an order requiring each Petitioner to submit a long-form liquor license application, in contravention of the Petitioners’ renewal privilege. The law is clear the NLCC cannot require those who already hold a license to submit a long-form application without a showing of cause. The requisite showing of cause by the NLCC is limited to consideration of only three factors, as established by the Nebraska Supreme Court.

A licensee may renew a liquor license provided (1) the licensee is then qualified to receive a license, (2) the premises for which such renewal license is sought are the same premises designated in the initial license, and (3) the premises are suitable for the sale of alcoholic beverages in accordance with the initially issued license. *Grand Island Latin Club v. Neb. Liquor Control Comm’n*, 251 Neb. 61, 66, 554 N.W.2d 778, 781 (1996); *Bosselman, Inc. v.*

State, 230 Neb. 471, 432 N.W.2d 226 (1988). Without a showing that the Petitioners did not meet one of these renewal requirements, the NLCC could not demand the Petitioners to submit a long-form application. *Grand Island Latin Club*, 251 Neb. at 66, 554 N.W.2d at 781. It is undisputed, in its decision, the NLCC failed to make any findings regarding the three relevant factors discussed above. Absent such a showing, the NLCC could not interfere with Petitioners' right to renewal and could not demand that Petitioners submit a long-form application. In demanding long-form applications, the NLCC exceeded its statutory authority, violated Petitioners' constitutionally protected interests, and based its decision on a number of considerations which, as a matter of law, cannot be applied to a current license holder.

- 2. The NLCC's decision is void as a matter of law, because the NLCC relied upon NEB. REV. STAT. §§ 53-132(2) and (3) in its decision. These statutes cannot be violated by a current license holder.**

The NLCC's decision to deny Petitioners' long-form applications expressly relies on NEB. REV. STAT. §§ 53-132(2) and (3). The NLCC's reliance on these provisions to deny applications of current license holders is contrary to settled Nebraska law. The authority of the NLCC to cancel a license is set forth in NEB. REV. STAT. §§ 53-116.01 and 53-117.08 (Reissue 2010). Each of these sections gives the NLCC authority to revoke, cancel, or suspend a liquor license where, after a proper hearing, the licensee has been found to have violated a provision of the Nebraska Liquor Control Act (the Act), NEB. REV. STAT. §§ 53-101 to 53-1,122, a regulation adopted pursuant to the Act, or a lawful ordinance of a local governing body. *Grand Island Latin Club*, 251 Neb. at 67, 554 N.W.2d at 782. Rather than revoking or canceling Petitioners' licenses pursuant to the NLCC's enumerated authority, the NLCC primarily invoked NEB. REV. STAT. §§ 53-132(2) and (3) as justifications for its decision.

For example, pursuant to NEB. REV. STAT. § 53-132(2), the NLCC found Petitioners “failed to show that they can conform to all provisions of the [Act] or that the license is or will be required by the present or future public convenience and necessity.” Moreover, the NLCC heavily relied on NEB. REV. STAT. § 53-132(3)¹ when it chose to base its decision upon findings related to citizens’ protests and the adequacy of existing law enforcement.

The Nebraska Supreme Court has made clear:

Section 53-132(2) clearly describes the general standards by which initial applicants are judged to be fit to obtain a liquor license and to follow the rules and regulations that bear on license holders. This statute, however, is not itself a rule or regulation which can be violated by a current licensee and subject the licensee to cancellation under the power given to the Commission by §§ 53-116.01 and 53-117.08.

Grand Island Latin Club, 251 Neb. 61, 68, 554 N.W.2d 778, 782. Every finding made by the NLCC based upon NEB. REV. STAT. §§ 53-132(2) and (3) fails as a matter of law.

Thus, the NLCC’s order is void on its face.

CONCLUSION

For the foregoing reasons, the court sustains the following errors assigned by Petitioners:

- (1) the NLCC’s decision was arbitrary and unreasonable;
- (2) the NLCC’s decision exceeds NLCC’s statutory authority; and,
- (3) the NLCC’s decision is contrary to Nebraska statutes and prior rulings of the

Nebraska Supreme Court.

¹ The court notes NEB. REV. STAT. § 53-132(3) is inextricably tied to NEB. REV. STAT. § 53-132(2). By its terms, NEB. REV. STAT. § 53-132(3) is the mechanism the NLCC shall consider in making its determinations regarding NEB. REV. STAT. § 53-132(2).

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that, in accordance with this opinion, the NLCC's order is vacated and the NLCC is ordered to not interfere with Petitioners' efforts to renew their licenses through the shorthand online process, to honor those renewals upon application, and to adhere to the applicable Nebraska statutes and the following Nebraska Supreme Court decisions: *Grand Island Latin Club v. Neb. Liquor Control Comm'n*, 251 Neb. 61, 554 N.W.2d 778 (1996); *Pump & Pantry, Inc. v. Grand Island*, 233 Neb. 191, 444 N.W.2d 312 (1989); *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988).

DATED this 27 day of April, 2017.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Andrew Jacobsen", written over a horizontal line.

ANDREW JACOBSEN
DISTRICT COURT JUDGE