

STATE OF NORTH CAROLINA
COUNTY OF WAYNE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
18 ABC 04808

<p>Express Food Mart Of Goldsboro Inc Petitioner,</p> <p>v.</p> <p>North Carolina Alcoholic Beverage Control Commission Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER came on for hearing before the Honorable Stacey Bice Bawtinheimer, Administrative Law Judge, on January 16, 2019, at the Wayne County Courthouse in Goldsboro, North Carolina, on Petitioner's appeal of the rejection of its application for ABC permits. Following the Parties' submission of the exhibits, proposed decisions, the record in this case was closed. Based on a record of the record, as well as the evidence and testimony from the hearing, the Undersigned finds that Petitioner's application for ABC permits was properly denied by the Respondent.

APPEARANCES

For Petitioner: Glenn B. Lassiter, Jr.
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For Respondent: Rachel M. Spears
Assistant Counsel
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ISSUE

Whether Respondent deprived Petitioner of property, substantially prejudiced Petitioner's rights, exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and/or otherwise failed to act as required by law or rule on June 8, 2018, in its decision to reject Petitioner's application for Malt Beverage, Fortified Wine, and Unfortified Wine ABC permits?

EXHIBITS ADMITTED

For Petitioner (“Pet. Ex.”): Ex. 1: Aerial Map
Ex. 2: Photos – Express Food Mart
Ex. 3: Official Notice of Rejection
Ex. 4: Pre-Permit Investigation Report
Ex. 5: Inspection/Zoning Compliance Form
Ex. 6: Diagram – Express Food Mart

For Respondent (“Resp. Ex.”): Ex. 1: Local Government Opinion – City of Goldsboro
Ex. 2: Local Government Opinion – Goldsboro Police Department

WITNESSES

For Petitioner: Mr. Hauter Mohamed Assalamy, Petitioner
Mr. Jeff Lasater, Expert Witness

For Respondent: Ms. Agnes Stevens, NC ABC Commission
Sgt. Michael Sweet, Goldsboro Police Department
Inv. Eric Goins, Goldsboro Police Department

Offer of Proof:

Cpl. Andrew Cox, Goldsboro Police Department
Officer William Smith, Goldsboro Police Department

APPLICABLE STATUTES AND RULES
(Including But Not Limited To)

N.C.G.S. §§ 18B-100, 18B-203, 18B-207, 18B-800(c), 18B-900, 18B-901, 18B-906
N.C.G.S. §§ 150B-2(2), 150B-23, 150B-25.1

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following **FINDINGS OF FACTS**.

In making the **FINDINGS OF FACTS**, the undersigned Administrative Law Judge has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate facts for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences, about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

1. Both parties are properly before this Administrative Law Judge, in that jurisdiction and venue are proper, and both parties received notice of hearing.

2. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they are intended to be considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011). *Warren v. Dep't of Crime Control*, 221 N.C.App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den.*, 366 N.C. 408, 735 S.E.2d 175 (2012).

3. An Administrative Law Judge need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993).

4. On or about April 19, 2018, Petitioner Assalamy, owner of the Express Food Mart of Goldsboro, Inc., applied for temporary Malt Beverage, Unfortified Wine, and Fortified Wine Off-Premise ABC permits (the "permit") for an establishment known as "Express Food Mart," located at 518 East Elm Street, Goldsboro, NC.

5. Petitioner Hauter Mohamed Assalamy ("Assalamy" or "Petitioner") is the sole owner of Express Food Mart of Goldsboro, Inc. On the property location is a combination of a gas station and convenience store. (*See* Pet. Exs. 1 & 2)

6. Respondent North Carolina Alcoholic Beverage Control Commission (the "ABC Commission" or "Commission") issues all ABC permits in North Carolina pursuant to N.C.G.S. § 18B-901(a).

7. The ABC Commission is responsible for implementing a uniform system of control over the sale and purchase of alcoholic beverages in North Carolina as to providing procedures to insure the proper administration of the ABC laws under a uniform system throughout the State. N.C.G.S. § 18B-100.

8. Before applying for ABC permits, in January 2018 Assalamy purchased the business and property from his father. (Tr. p. 45:1-19) Until June 2018, this property held a business operating under previous ABC permits. Prior to the application period, Assalamy sold beer and wine for two weeks under the previous permit before he was advised to stop until he

obtained his own ABC permit. At the time of the hearing, Assalamy had operated his store without ABC permits since January 2018. (Tr. p. 45:1-19)

9. Before issuing a permit, the Commission must be satisfied that the applicant is a suitable person to hold an ABC permit and that the location is a suitable place to hold the permit for which the applicant has applied. N.C.G.S. § 18B-901(c).

10. It was uncontested that Assalamy, the applicant, was suitable. The issue was whether the location/premises was suitable. “Premises” means all areas, whether inside or outside the licensed premises, where the permittee has control of the property through a lease, deed or other legal means. N.C.G.S. § 18B-101(12a)

11. As a part of the application process, N.C.G.S. § 18B-901(c)(7) affords the local government an opportunity to make a recommendation to the ABC Commission on ABC permit applications.

12. Goldsboro had at the time designated Jennifer Collins, Interim Planning Director as the person to make such recommendations.

13. On March 23, 2018, Ms. Collins executed a Local Government Opinion Form indicating an objection to the issuance of the permit, both to the applicant and to the location. (Resp. Ex. 1)

14. Later on March 28, 2018, Ms. Collins forwarded additional documents by letter to Deputy Director Stevens given more specific details about the City’s objection to the issuance of a permit to the Petitioner, including a letter of objection from Mayor Allen. (Resp. Ex. 2)

15. Petitioner submitted its permit application to the Respondent in April 2018. But for the letters of objection, it was uncontested that Petitioner otherwise qualified for the ABC Permits under N.C.G.S. § 18B-900. The location was also in compliance with the local zoning ordinance. (Pet. Ex. 5)

16. The Commission policy in effect at that time was to do a pre-permit investigation prior to the issuance of any permit where there was a local governmental objection. Stevens initiated that investigation of Petitioner’s application.

17. The pre-permit investigation was conducted, and a report was prepared. That report was admitted as Petitioner’s Exhibit 4.

18. On June 8, 2018, ABC Commission Deputy Administrator Agnes Stevens (“Stevens”) issued an “Official Notice of Rejection” to Petitioner, denying its ABC permit application. The denial was based on recommendations of the local governing body, under N.C.G.S. §18B-901(c)(7), as well as evidence of fighting, disorderly conduct, other dangerous activities, and illegal drug activity on or about the licensed premises, under N.C.G.S. §18B-901(c)(9)(b)&(c). The Official Notice of Rejection was entered into evidence at Petitioner’s Exhibit 3.

19. In the Official Notice of Rejection, Stevens referenced a March 28, 2018 letter from Goldsboro Mayor Chuck Allen, which stated the sale of alcohol at Petitioner's location would be detrimental to the neighborhood and that he was adamantly opposed to the issuance of an ABC permit of any kind there. Stevens also cited a March 21, 2018 letter from Goldsboro Police Department ("GPD") Sgt. Michael Sweet ("Sweet") stating the location in question is well-known by local law enforcement for gang activity, illegal drug sales, loitering, and violence. Stevens also referenced various GPD investigation reports about dangerous criminal activity that took place on the premises, including but not limited to, a stabbing in 2017 and homicides in 2015 and 2016. (Petitioner's Ex. 3).

20. On August 1, 2018, Petitioner filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings to appeal the rejection of his ABC permit application.

21. Petitioner opened its case-in-chief with testimony from Assalamy regarding various improvements he made to Express Food Mart after taking over the business, including the addition of 32 security cameras and changes to the lighting, both inside and outside the store, as well as posting "No Loitering" signs. However, he was unclear as to when the changes were made and could not say whether any occurred before the business applied for ABC permits in April 2018.

22. In addition, all of the evidence so introduced concerned events that occurred prior to Petitioner's purchase of the business. No connection to the Petitioner was shown with regard to any of these "problems."

23. Petitioner offered unchallenged evidence supporting a conclusion that since it had taken over the store and during the time it was not permitted that there had been none of the types of issues cited in the Notice of Rejection. (Tr. p. 38:16-19)

24. Former Alcohol Law Enforcement ("ALE") Supervisor in Charge Jeff Lasater ("Lasater") was tendered as an expert witness for Petitioner in ABC laws and ABC investigations in general. Lasater worked with ALE for about 28 years, until his retirement in 2017. Lasater worked in the ALE District IV office, which is located in Raleigh, NC.

25. In Petitioner's case-in-chief, Lasater testified regarding his training and experience with ALE, and that he visited Respondent's establishment on November 5, 2018.

26. During Respondent's case-in-chief, Administrator Stevens testified regarding the standard procedure the ABC Commission used in evaluating Petitioner's ABC permit application. Stevens is currently serving as the Administrator of the ABC Commission, but at the time Petitioner applied for permits, she was the Deputy Administrator.

27. When the ABC Commission receives a local government objection to an ABC permit application, a Pre-Permit Investigation is conducted by the Audit Division of the ABC Commission ("Audit Division") to gather more information before a decision is made about the application. A local government concern about an application is taken very seriously by the ABC Commission but is just one of many factors considered in determining whether permits should be granted to an applicant.

28. Petitioner's application and the City of Goldsboro's concerns were brought to Stevens' attention in her role as Deputy Administrator after the ABC Commission received letters from the Mayor of Goldsboro (Resp. Ex. 1) and GPD (Resp. Ex. 2) in the Local Government Opinion, which both strongly opposed the issuance of permits at Petitioner's business and reported a history of violent and criminal activity at the location.

29. Per standard ABC Commission procedure, Stevens directed the Audit Division to conduct a Pre-Permit Investigation. (*See* Pet. Ex. 4)

30. After reviewing Petitioner's application and the Pre-Permit Investigation Report, Stevens concluded it was not appropriate to issue permits to Petitioner at the location in question. The Pre-Permit Investigation confirmed the concerns in the Local Government Opinion regarding crime and violence at the location, as well as two homicides which occurred there in 2015 and 2016.

31. At the end of Stevens' testimony, Petitioner moved for summary judgment and asked the court to order Respondent to issue ABC permits to Petitioner. This motion was denied.

32. GPD Sergeant Michael Sweet ("Sweet") also testified for Respondent at the hearing. Among other duties, Sweet serves as the Chief of Police's designee for ABC applications. When a business in Goldsboro applies for ABC permits, GPD receives a Local Government Opinion Form. Sweet is designated by the Chief of Police to investigate the proposed location and submit a recommendation as to the applicant and location's suitability to hold ABC permits on behalf of GPD.

33. Sweet utilized the same procedure for investigating Petitioner's location as he does in any suitability investigation before submitting GPD's Local Government Opinion. First, Sweet analyzes any documented criminal history at the location, such as calls for service, arrests, and police reports. Sweet then uses the "Factors in Issuing a Permit" found in N.C.G.S. § 18B-901(c) as a guideline for approval or disapproval of the ABC permit application.

34. When Sweet received Petitioner's Local Government Opinion Form, he immediately recognized the address of the location in question. During his career with GPD, Petitioner's location has always been a well-known area for crime and violence. Sweet referred to the business as a "very violent location."

35. Sweet obtained the location's documented history of crime, as well as the calls for service, and spoke with other GPD officers who had direct involvement investigating crimes at the location.

36. After completing his investigation, Sweet submitted a Local Government Opinion on behalf of GPD recommending denial of permits to Petitioner and at Petitioner's location. Sweet included a letter citing a documented history of crime and violence at Petitioner's location, which included various assaults, a stabbing, two homicides within the preceding three years, and various other crimes. Sweet stated the location was well-known by GPD for gang activity, illegal drug sales, and loitering. Petitioner's location has always had an enormous need for police response and created an undue burden on GPD personnel and resources. (Resp. Ex. 2)

37. Sweet testified that those mentioned in his letter were just a “small sampling” of the documented crimes that occurred at Petitioner’s location, which has been a drain on police resources throughout Sweet’s career with GPD, due to the disproportionate need for officers to respond to calls for service at this business, in comparison with other convenience stores in Goldsboro.

38. GPD Investigator Eric Goins (“Goins”) also testified for Respondent. Goins, who investigated many of the crimes mentioned in Sweet’s letter, has worked with GPD for almost 17 years and has spent much of his time responding to calls for service at Petitioner’s location. Goins has investigated a variety of crimes at the location, including drug activity and violent crimes like assaults, stabbings, and shootings. He was the lead investigator in the 2015 and 2016 homicides at Petitioner’s location.

39. After the close of Respondent’s case, Petitioner re-called Lasater as a rebuttal witness. At this time, Lasater testified that, in his opinion, the issuance of ABC permits at Petitioner’s establishment would not be detrimental to the neighborhood.

40. Lasater stated he reviewed calls for service from November 2017–April 2018 to Petitioner’s location and compared them with that of two other convenience stores in Goldsboro, Slocumb Mini Mart and Bees Town. According to Lasater’s testimony, Slocumb Mini Mart had substantially more calls for service than the other locations. Lasater could not recall whether Bees Town or Petitioner’s location had more calls for service than the other. However, neither Slocumb Mini Mart nor Bees Town held ABC permits during the time frame Lasater reviewed. No documentation of calls for service at any location was entered into the record.

41. Lasater also reviewed calls for service to Bees Town and Petitioner’s location for the period covering 2013-2017, when both locations held ABC permits. According to Lasater’s testimony, Petitioner’s location had roughly half as many calls for service as Bees Town, during this time period, about 43% of which were for foot patrols, checkouts, or traffic accidents. No documentation of the numbers or substance of calls for service to either location was entered into the record.

42. Lasater testified that he visited Respondent’s establishment once in preparation for this case. The visit, which took place on November 5, 2018, was during the day and lasted approximately two hours. He also visited the business once during the day in the preceding year for another case.

43. Lasater stated he did not use any standard methodology in forming his expert opinion regarding Petitioner’s suitability as an ABC permit applicant. Rather, this opinion was based on his training and experience with ALE, a review of calls for service and Petitioner’s Pre-Permit Investigation Report (Pet. Ex. 4), a visit to Petitioner’s location, observations made during an unrelated hearing in 2018 involving another business, and observations made during the hearing in this case.

44. Lasater was unsure when he formed his expert opinion, but testified it was sometime during the hearing that day. As such, Lasater did not prepare a report of any kind to document and/or explain his findings.

45. Had Petitioner been able to prove that there had been no change in the amount of criminal activity at the Express Food Mart when alcohol was not being sold between January 2018 and the installation of the security cameras/lighting sometime in April 2018, such evidence could have shown that there was no nexus between the criminal activity and the ABC permits at that location. However, Petitioner's expert witness did not testify about this even though the information should have been available.

46. Petitioner's testimony supports that there was a nexus. Petitioner stated that since he had owned the premises there had been little or no criminal activity. This period was during the time that the premises were not ABC permitted and would have included the period before installation of any security cameras/additional lighting. Petitioner's admission supports the GPD and City of Goldsboro's positions that criminal activity and the sale of alcohol were related.

47. The rules, however, do not require the Commission to show a nexus between the sale of alcohol and the undesirability of a location. The Undersigned finds that the ABC Commission did have material and substantive evidence to support its decision. GPD and officials from the City of Goldsboro are appropriate, credible, and reliable sources of information for the ABC Commission to rely on regarding specific Goldsboro businesses and their suitability to hold ABC permits.

48. Because they have personal knowledge of the area and the location's effect on the community, the GPD officers who testified in this case are better situated than Petitioner's expert witness to evaluate Petitioner's suitability to hold ABC permits. Furthermore, GPD has had years of experience responding to calls for service and investigating criminal activity at Petitioner's location, whereas Lasater has only visited the business twice.

49. That is not to preclude the possibility that with Petitioner's improved security measures, the City of Goldsboro and GPD may no longer have concerns about the ABC permitting of that location and, upon Petitioner's reapplication, the Commission may reach a different decision.

50. Petitioner bears the burden of proof in this case and failed to prove, by the preponderance of the evidence, that Respondent deprived Petitioner of property, substantially prejudiced Petitioner's rights, exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and/or otherwise failed to act as required by law or rule on June 8, 2018, in its decision to reject Petitioner's application for Malt Beverage, Fortified Wine, and Unfortified Wine ABC permits.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following Conclusions of Law:

1. The Office of Administrative Hearings has jurisdiction in this matter. N.C.G.S. § 18B-906(a) and N.C.G.S. § 150B-23.

2. Petitioner bears the burden of proving the facts alleged in the petition by a preponderance of the evidence. N.C.G.S. § 150B-25.1(a).

3. The duty of the Undersigned is to review the evidence and determine whether the ABC Commission had before it any material and substantial evidence sufficient to support its findings. *C'est Bon, Inc. v. North Carolina Bd of Alcoholic Control*, 279 N.C. 140, 181 S.E. 2^d 448 (1971).

4. “Other than as authorized by a legally issued permit, there is no right to sell beer, wine and other alcoholic beverages in North Carolina.” *Hursey v. Town of Gibsonville*, 284 N.C. 522, 527, 202 S.E.2d 161, 164 (1974).

5. “The right to sell beer and wine has its foundation in a validly issued permit and does not exist as a constitutional or property right.” *AGL, Inc. v. N.C. Alcoholic Beverage Control Comm'n*, 68 N.C. App. 604, 609, 315 S.E.2d 718, 721 (1984).

6. Respondent did not deprive Petitioner of property or substantially prejudice Petitioner’s rights by rejecting Petitioner’s application for ABC permits, as there is no property right to an ABC permit.

7. Respondent has the “sole power, in its discretion, to determine the suitability and qualifications of an applicant for an ABC permit, as well as the authority to determine the suitability of the location to which an ABC permit may be issued.” N.C.G.S. § 18B-901(d).

8. As Respondent has the sole authority to evaluate ABC permit applications and decide whether an applicant and permit location is suitable, Respondent did not exceed its authority or jurisdiction in rejecting Petitioner’s ABC permit application.

9. Petitioner alleged Respondent acted erroneously in considering the information in the City of Goldsboro’s Local Government Opinion about violent and criminal activity at Petitioner’s location, while evaluating Petitioner’s ABC permit application, without conducting an independent investigation of the allegations therein. However, under N.C.G.S. §18B-901(c)(7), Respondent shall consider the recommendations of the local governing body when evaluating an ABC permit application. Furthermore, a decision was not rendered regarding Petitioner’s ABC permit application until after the Audit Division of Respondent conducted a Pre-Permit Investigation.

10. Because Petitioner provided no evidence indicating Respondent acted erroneously in its evaluation and ultimate rejection of Petitioner’s ABC permit application, this burden also has not been met.

11. Under N.C.G.S. § 18B-901(c), Respondent shall consider several factors in determining whether an applicant and the business location are suitable to hold ABC permits. One factor to consider is whether the operation of the applicant's business at that location would be detrimental to the neighborhood, the evaluation of which can include evidence of fighting, disorderly conduct, other dangerous activities, and illegal drug activity on or about the licensed premises. N.C.G.S. § 18B-901(c)(9)(b)&(c).

12. N.C.G.S. § 18B-901(c)(9) does not require any connection between the aforementioned activities and the sale of alcoholic beverages in order for those activities to be considered by Respondent in evaluating the suitability of ABC permit applicants.

13. The recommendations of the City of Goldsboro and GPD, and evidence of violent and criminal activities at the location were reasonable bases to reject Petitioner's application for ABC permits under N.C.G.S. § 18B-901(c).

14. Petitioner provided testimony that Petitioner's ABC permit application was evaluated using the same, standard procedure as any other permit application. No evidence was presented to suggest Respondent deviated in any way from its standard procedure in the case at hand. Rather, Petitioner argued the current rules and statutes offered insufficient guidelines for this process.

15. The Administrative Procedure Act defines a "contested case" proceeding and clarifies that it does not include rulemaking. N.C.G.S. § 150B-2(2). As such, any evaluation of, or change made to the current Alcoholic Beverage Control Laws and Rules of North Carolina would be outside the scope of this case.

16. Because Respondent followed proper procedure in evaluating the suitability of Petitioner to hold ABC permits and had a reasonable basis for the rejection of Petitioner's permit application, Petitioner has not met its burden in showing Respondent acted arbitrarily or capriciously, and/or failed to act as required by law or rule.

17. Therefore, the Undersigned concludes that Respondent did not exceed its authority or jurisdiction, act erroneously, arbitrarily or capriciously, fail to use proper procedure, or fail to act as required by law or rule, to the substantial prejudice of Petitioner's rights or deprivation of Petitioner's property, in rejecting Petitioner's application for temporary Malt Beverage, Unfortified Wine, and Fortified Wine ABC permits on June 8, 2018.

FINAL DECISION

Based upon the foregoing Findings of Facts and Conclusions of Law, the Undersigned hereby **UPHOLDS** Respondent's decision to deny Petitioner's application for ABC permits.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.**

In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.**

N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 12th day of April, 2019.



Stacey Bice Bawtinheimer
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 12th day of April, 2019.



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