

OFFICE OF THE DIRECTOR OF EXCISE AND LICENSES
CITY AND COUNTY OF DENVER, COLORADO

RECOMMENDED DECISION - AMENDED

IN THE MATTER OF THE APPLICATION OF COLD COMFORT, LLC DBA
COLD COMFORT FOR A HOTEL AND RESTAURANT LIQUOR LICENSE
FOR THE PREMISES KNOWN AND DESIGNATED AS 200 E. 7TH AVE.
DENVER, COLORADO 80211

This matter was presented for hearing on Wednesday, December 22, 2010 pursuant to an application and notice filed by COLD COMFORT, LLC DBA COLD COMFORT (Applicant) for a Hotel and Restaurant Liquor License for the premises known as 200 E. 7th Ave., Denver, Colorado.

Findings of Fact

The Applicant appeared and was represented by Clayton Barnett, Esq. The licensing authority was represented by Assistant City Attorney, Dan Douglas. Four people appeared in protest to the application.

The Assistant City Attorney and Applicant stipulated to the following exhibits:

- Exhibit A-1: Posting Affidavit showing continuous posting from October 12, 2010 thru December 22, 2010
- Exhibit A-2: Pre-Filed Petitions – 148 Residential signatures in support of Applicant and 33 business signatures in support of Applicant
- Exhibit A-3: Letter of Support from Capital Hill United Neighbors, Inc. (CHUN)
- Exhibit A-4: Certificate of completion from the Safe Serve alcohol vendor program
- Exhibit A-5: Menu of the proposed business
- Exhibit C-1: Publisher's affidavit showing that notice of the hearing was published in the *Daily Journal* on October 12, 2010
- Exhibit C-2: Neighborhood map of the designated area
- Exhibit C-3: List of Liquor Licenses in the Designated Area: Hotel and Restaurant (30), Tavern (8), Beer and Wine (4), Liquor Store (4)
- Exhibit C-4: Posting Affidavit showing Compliance checks by the licensing authority's inspectors of the Notice of Posting showing checks on October 12, 22, November 19 and December 10, 2010

Exhibit C-5: Detailed floor plan for the premises (4 pp)

The following Opposition exhibits were offered and admitted during testimony:

- Exhibit P-1: Area grid showing increase in number of liquor licenses in the immediate block around Applicant's desired location since 1997
- Exhibit P-2: Area grid showing increase in number of liquor licenses in the one block radius around Applicant's desired location since 1997
- Exhibit P-3: Area grid showing increase in number of liquor licenses in the two block radius around Applicant's desired location since 1997
- Exhibit P-4: Non Pre-Filed Petitions in opposition to the granting of the license with 14 signatures
- Exhibit P-5: Non Pre-Filed Petitions in opposition to the granting of the license with two (2) signatures
- Exhibit P-6: Non Pre-Filed Petitions in opposition to the granting of the license with five (5) signatures

Neighborhood Needs and Desires

The City has issued a total of 30 Hotel and Restaurant Liquor licenses in the designated area along with 8 Tavern and 4 Beer and Wine Licenses. (Exhibit C-3) One resident testified in support of the Applicant and a total of 148 residential signatures and 33 business signatures were obtained in support of Applicant. There was neighborhood opposition to the granting of this license most specifically based on an argument of over-saturation within the designated area which will cause significant harm to area business owners. A total of seven witnesses testified in opposition to the granting of the license and petitions with 21 signatures in opposition were presented.

Business Operations Witness

1. Applicant, Inc., is a Limited Liability Company. Mr. Anthony Milazzo is a managing member and was present and testified on the company's behalf. He has been an owner for seven years of a business in Boulder, Colorado that serves alcohol, with no violations of the state or municipal liquor code. He is currently certified in the sale of alcohol by the Serve Safe program. He has been certified for over 15 years. The business will be designed as a high end tavern, serving unique beers from around the world, and a higher end food offering than found in most taverns. Mr. Milazzo testified that there is nothing in the neighborhood, or even greater metro area that will resemble this idea. Beer will be paired with food in the way wine often is, and food will be made using beer as an ingredient.

There will be two patios that are mostly enclosed by other buildings and are inaccessible only from the main area. A bartender will be able to view the patios at all times. He expects to employ approximately 20-30 employees and be open from noon until 2:00 a.m. There will be a manager on site at all times, and all staff who serve alcohol will be

either TIPS or Serve Safe certified. Anyone appearing under the age of 50 will be asked for identification and the staff will be certified as "beer experts."

The location currently would have seven dedicated parking spaces and he expects to obtain more parking spaces for the business and patrons can utilize the parking lot across the street which has 30-40 parking spaces. He has spoken with a sub sandwich shop close by which may allow the renting of parking spaces as well as another business close to the anticipated location.

He believes there is a need in the neighborhood for this type of license and has a personal desire that the license issue. He would hope to be open for business by approximately June 1, 2011.

Under cross examination he testified that he will have approximately 3-10 staff per shift per night, and plans on seating for 75-80 people. He has behavior problems with patrons at the Boulder location on average of one time per month.

Supporting Witnesses

1. Mr. Andrew Spivack testified as a resident of the designated neighborhood. He has lived in the area at 111 W. 4th Ave, #2E for less than one month. He has patronized many of the restaurants in the designated neighborhood. He testified that there is a need and interest for this type of license in the designated area because of Applicant's unique offerings. He believes the more upscale food offerings based on quality ingredients will provide a unique offering in the neighborhood. It will add value to those who enjoy a quality craft beer and the many selections expected to be offered. He believes that the business growth will be good for the area, specifically adding job opportunities. He has a personal desire that the license be issued and he believes the business will have a positive effect on the neighborhood. He does not believe it will have any adverse impact on the health, safety, welfare or morals of the neighborhood. Under cross-examination he stated that he used to work for the Applicant at its Boulder location, and would be interested in employment again with the Applicant should the occasion arise.
2. Mr. Max Scott testified as the owner of Oedipus, Inc. Oedipus was responsible for conducting the petition surveys. He testified as to the methodology, areas surveyed and survey results. He testified that he did not attempt to canvas the entire neighborhood, but selected high density residential areas.
3. Mr. Roger Armstrong testified on behalf of the Capital Hill United Neighbors, Inc. (CHUN). He is the Executive Director. CHUN supports the granting of this license. Applicant made a presentation to the organization on December 2, 2010, at a meeting at the business location. CHUN sent emails to its members regarding the meeting, and also postcards and flyers were distributed in the neighborhood. Of those in attendance at the meeting, 18 were residents of the designated neighborhood. There were comments and discussions regarding parking concerns. After the presentation, a vote was taken and 14 members voted to support the application, with 4 voting to oppose. Emails were received but not tallied for purposes of voting. Mr. Armstrong testified that approximately eight (8) emails were received in opposition to the license. On December 14, 2010 the Board met and there were 15 members present. This constituted a quorum and a vote was taken. 11 Board members voted to support the application, with four (4) abstentions.

Opposition Witnesses

1. Mr. Holly Hares testified as a business owner in the neighborhood. She has owned the building at 677 Grant Street for ten years, and also conducts her business, Agape Journey, out of that location. She stated that she had done a recent survey, and determined the number of actual seats available at licensed establishments within a three block radius of the Applicant's desired location. She testified that in 1997 there were 377 seats at such businesses, and today there are 1873. She stated her method of determination was to call all of the restaurants in the focus area and ask their seating capacity. The 1997 figure was determined by contacting those restaurants that were in operation then, even if they have changed owners or business names. She stated that within a two block radius, there are nine liquor licenses, seven restaurants and 1113 seats at these restaurants. She asserted that the area has become saturated, and it is adversely affecting businesses, especially during peak hours at lunch and dinner. Parking for clients and visitors to the area is negatively impacted, and it therefore is negatively impacting businesses.

Under cross examination she stated that she had not done any study of the population growth of the neighborhood during the same time period. She acknowledged that there has been new high density construction in the neighborhood and that she does not know the growth pattern or possible loss of licenses or restaurants outside of the three block radius. She stated that she had no concerns for the lawful operation of the business, only concerns about negative and illegal behavior that she has personally witnessed of patrons at currently licensed establishments in the neighborhood.

2. Ms. Hares also testified to the circulation of her petitions, and her signature gathering methodology. After her testimony, Exhibit P-6 was admitted.

3. Ms. Mary Jane McBean testified as a business owner in the designated area. She has owned Denver Therapeutic Institute, at 671 Grant Street for 30 years. She stated that it used to be a quiet, pleasant area for small businesses but it has now become a destination for alcohol consumption and a bar area. She stated that there is much negative behavior associated with the current establishments and it has negatively impacted her business. She testified that the parking problem is most impactful, with cars parking in driveways and interfering with deliveries to her business as well as making it difficult for clients to patronize her business.

Ms. McBean also testified to the circulation of her petitions, and her signature gathering methodology. After her testimony, Exhibit P-4 was admitted.

4. Ms. Lindy Frolich testified as a business owner in the designated area. She testified to the circulation of her petitions, and her signature gathering methodology. After her testimony, Exhibit P-5 was admitted.

5. Ms. Linda Rawlings testified as a business owner in the designated area. She has owned and operated Travel Advocate, at 707 Sherman Street, for 16 years. She stated that she was not aware of the Applicant's petition efforts, nor did she receive notification by CHUN. She is concerned about the parking, noise and possible vandalism that may occur should the license issue. She testified as to her personal experiences with vandalism, illegal behavior, and property damage in the immediate vicinity of her business. She has called the police on several occasions and also attempted to

communicate her concerns directly with the surrounding establishments with little success. She said she has been contacted by Applicant to attempt to rent parking spaces under her control. She stated that she will not rent any to Applicant. She stated that the neighborhood is at its saturation point with the number of licensed liquor establishments and the granting of this license will negatively impact surrounding businesses and residents.

En Masse Testimony

Three business owners from the designated area testified En Masse in opposition to the granting of this license.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Colorado law requires that the local licensing authority post and publish the public notice of the hearing on an application for a liquor license "not less than ten days prior to such hearing." C.R.S. Sec. 12-47-311(1). The City of Denver, Department of Excise and Licenses ("Department") additionally requires the applicant to post notice of the public hearing for a period of 20 days prior to the hearing. The evidence shows that the Colorado statutory requirements were met. The evidence additionally shows that (a) the applicant complied with the Department's policies and procedures, and (b) actual notice of the application for a license was posted for more than 20 days prior to the hearing. Therefore, I conclude there has been compliance with the notice requirements for the hearing.
2. One resident testified in support of the Applicant regarding the neighborhood needs and desires for this license, A Registered Neighborhood Organization, CHUN, testified as to its support of the Applicant and 181 residential and business signatures were obtained by Applicant in support of the application.
3. Seven business owners testified in opposition to the Applicant regarding the neighborhood needs and desires for this license. A total of 21 signatures were obtained in opposition to the granting of this license.
4. The needs and desires of a neighborhood must be weighed in relation to the affect on the neighborhood on the health, safety, welfare or morals of the neighborhood. In this case, there is clearly a desire by a portion of the neighborhood for this license. The questions that arise are concerning the needs in the neighborhood based on the current number of licensed establishments in relation to the population, and the effect this license may have on the health or welfare of the neighborhood. There was no question or opposition to the license based on moral grounds or even safety of the residents.
5. Case law and review standards do not allow the assumption of illegal, destructive or improper behavior by expected future patrons of an applicant to be a reason to withhold a license. The behavior of patrons of currently licensed establishments cannot be held against any prospective licensee.
6. There are currently 30 licensed liquor establishments with a Hotel and Restaurant License, eight (8) Tavern licenses and four (4) Beer and Wine licenses. Uncontested testimony showed the substantial growth in the number of licensed establishments in the

neighborhood over the past decade. This testimony suggested that there is six times the number of seats at restaurants as there was 13 years ago, and the adverse impact to the neighborhood this has had. There has also most certainly been an influx of residents during that time as well. The testimony showed a pattern of growth within a three block radius, and the impact to that specific area of the neighborhood. Even though the testimony of those in the immediate proximity of the prospective licensee cannot be given more weight than those at the farthest distance in the neighborhood from the Applicant's location, the testimony reflects on the overall needs and health of the neighborhood.

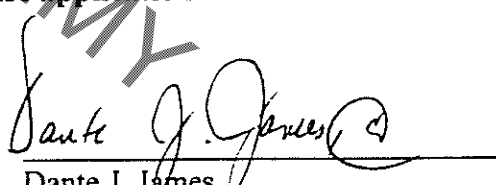
7. The parking opportunities for visitors and business patrons to a neighborhood reflect on the health and welfare of a neighborhood. Applicant has only seven dedicated parking spaces and hopes to contract with other businesses for more. He expects to have 80 patrons to his business and 20-30 employees, with up to 10 per shift per night. Even if patrons use a public parking lot across the street, that leaves 40-50 additional cars in the neighborhood, on the streets. Additionally, there was no testimony that any of the other restaurants in the area were so crowded as to be difficult to obtain an alcoholic drink or a seat for a meal.

8. Applicant has sustained its burden of showing that (a) the residents of the designated neighborhood desire that the requested license be issued and that (b) the granting of this license will not have an adverse impact on the safety or morals of the neighborhood.

9. However, Applicant has failed to sustain its burden of showing that (a) there is a need for the applied-for Hotel and Restaurant Liquor License at the establishment known as COLD COMFORT, LLC DBA COLD COMFORT for the premises known as 200 E. 7th Ave., Denver, Colorado in order to meet the reasonable needs of the neighborhood, and (b) there is no adverse impact to the health or welfare of the neighborhood.

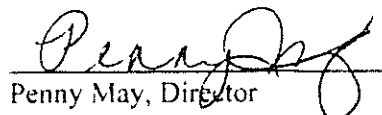
THEREFORE, it is recommended that the license application be denied.

Recommended this 2nd day of January, 2011


Dante J. James
Hearing Officer

The copy of the Recommended Decision accepted on January 4th inadvertently excluded one line at the top of page 5. That line has been included in this corrected version and as corrected the foregoing RECOMMENDED DECISION for the denial of the application for a Hotel and Restaurant Liquor License at the establishment known as COLD COMFORT, LLC DBA COLD COMFORT for a Hotel and Restaurant Liquor License for the premises known as 200 E. 7th Ave., Denver, Colorado is hereby accepted by the Director, Department of Excise and Licenses. The foregoing Recommended Decision is amended to provide notice to parties in interest that were inadvertently not included on the original. Parties in interest have ten (10) days to submit written objections.

ISSUED this 13th day of January, 2011


Penny May, Director

CERTIFICATE OF MAILING

The undergoing hereby certifies that on the 13th day of January, 2011, one true copy of the foregoing Recommended Decision was deposited in the mail of the U.S. Postal Service, postage prepaid, addressed to the following:

Mr. Clayton Barnett, Esq.
Messner & Reeves, LLC
1430 Wynkoop Street, #300
Denver, CO 80202

Ms. Holly Hares
677 Grant St.
Denver, CO 80211

Ms. Mary Jane McBean
671 Grant St.
Denver, CO 80211

Ms. Lindy Frolich
675 Grant St.
Denver, CO 80211

Ms. Linda Rawlings
707 Sherman St.
Denver, CO 80211

Ruthie Sullivan

CERTIFICATE OF INTER-OFFICE MAILING

The undergoing hereby certifies that on the 13th day of January, 2011, one true copy of the foregoing Recommended Decision was sent by inter-office mail to the following:

John Poley, Assistant City Attorney
City & County of Denver
Department of Law, 12th Floor
201 West Colfax Avenue
Denver CO 80202

Ruthie Sullivan

INC ACADEMY