To: Mr. Tom Downey

Director, Denver Excise and License

Matador Letter of Comment 21 April 2013

My name is Steve Kite; I live at 4001 W 30th Ave, and have since 1986. My home is in the designated neighborhood. I did not attend the hearing on this matter and signed no petition. The Recommendation Letter was forwarded to me by another interested resident of the neighborhood. I can walk a block from my house to 32nd and Perry to three enjoyable restaurants, one which serves liquor only with meals, two which serve both with meals and at a full bar. And if I walk east on 32nd, my choices expand for blocks. I'm frankly stunned that anyone would claim with a straight face that "the reasonable requirements of the neighborhood are not being met by existing outlets".

I was eager to look at the evidence, but I just can't find it.

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Having read the Recommendation Letter on this matter several times over the past week, I confess that I remain at a loss to find the logical and factual connective tissue that links the Applicant's Exhibits and Testimonies to the standards that Colorado state law sets for applicants before a license may be issued.

The standards are old and well known:

> Before a liquor license can be issued under subsection (2), two requirements must be affirmatively established:
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> 1. that the reasonable requirements of the neighborhood are not being met by existing outlets, and
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> 2. that the inhabitants of the neighborhood desire its issuance.

Taking the second test first, the Code says that licensing authorities shall consider "… the desires of the adult inhabitants as evidenced by petitions, remonstrances, or otherwise…" in determining whether the applicant meets the test.

The Applicant in this instance had one Exhibit providing petitions and the owner of the professional canvassing firm who collected the signatures testified that they comprised signatures of 38 business owners/managers and 165 residents. He further stated that he found 5 persons who declined to sign and that the overall approval rate of those he approached reached 97/98 percent.

The Recommendation Letter offers no discussion of this matter, despite there being nothing in the Letter asserting that the 38 were in fact inhabitants as well as owners/managers, despite the later presentation by citizen volunteers of some 128 signatures of adult inhabitants having no desire to have the license issue (in contrast to the professional canvasser's finding of only 5), and despite the fact that the 165 represent a small and apparently biased sample of the total adult inhabitant population of the defined neighborhood.

Regardless of the ensuing conclusion, a discussion of the standard to be met by the Applicant and the exhibits and testimony presented and how the latter supported the former would be helpful; there is none. Such a discussion and evaluation of the specifics might have at least suggested some windage might be applied to the Applicant's numbers.

Without discussion or evaluation, the bald summarizing assertion of the recommendation is not particularly persuasive.

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Before addressing the 'reasonable requirements' test, I'd like to spent a moment on "entrepreneurial vision" as an element in liquor licensing hearings. Oftentimes, these hearings, especially when held during the workday, put ordinary citizens at a serious cost disadvantage to the Applicant and his/her team. Unlike jury duty, which is in fact a duty, lost time from work in these matters is not recompensed by the state, and so it seems incumbent upon the Officer in charge to keep extraneous matters off the table in order to economize everyone's time and help level the playing field. Some Officers do this well, announcing at the outset that these are liquor license hearings, not business plan reviews and that the law is blind to the business plan and concept at the time of issuance and also later at a time of license transfer.

From the record (as summarized in the Recommendation Letter), that did not happen in this case. Fully three of the 5 Applicant Exhibits have to do with entrepreneurial vision and business plan and virtually all the Applicant's testimony expounds on the vision and miscellaneous issues of square footage, hours of operation, revenue expected from food sales, etc.

Nowhere does the Applicant himself address the only two issues which are the purpose of the hearing: are existing licensed outlets failing to meet the reasonable requirements of the neighborhood, and do the adult inhabitants of the neighborhood desire another licensed outlet?

The Officer appears especially accommodating to the Applicant in this regard and less thoughtful as to the needs of citizens voluntarily participating. In Item 15, though, a note is made that perhaps half of those opposed to the issuance of the license left the hearing room prior to the en masse testimony. (Seven voted en masse, "less than ten" left early: thus about half.) Perhaps this could have been avoided.

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Were even the entire adult inhabitant population of the neighborhood to sign petitions of desire, however, Colorado state law requires that no license be issued unless the second requirement of Subsection 2 is affirmatively established by the Applicant, ie, that the existing outlets are failing to meet the reasonable requirements of the neighborhood.

Here is a sample of the language used early on when the meaning of the Code was less settled:

Showing of inadequate service required. An applicant is entitled to a license only on proof that the neighborhood sought to be served is not adequately served by the other licensed outlets. Bd. of County Comm'rs v. Salardino, 138 Colo. 66, 329 P.2d 629 (1958).

Lack of proof of the fact that the neighborhood is not adequately served precludes the issuance of a license. Hauf Brau v. Bd. of County Comm'rs, 145 Colo. 522, 359 P.2d 659 (1961).

Where there are a number of licensed outlets in an area, an applicant for an additional liquor license has the burden to establish by competent evidence that the needs of the community are not being adequately met by existing outlets. Bd. of County Comm'rs v. Evergreen Lanes, Inc., 154 Colo. 413, 391 P.2d 372 (1964).

Showing of inadequate service alone is insufficient. Where there are a number of licensed outlets in an area in which a restaurant license is sought, evidence that many residents of the neighborhood desired to dine at applicants' restaurant and desired to be served liquor with their meals, does not alone establish that existing outlets were inadequate to satisfy …the reasonable requirements of the neighborhood. Bd. of County Comm'rs v. Bova, 153 Colo. 230, 385 P.2d 590 (1963).

Notice that the language of this requirement is not about "petitions and remonstrances", but about ***proof*** and ***fact*** and ***evidence.*** This is an important difference. Yet, the Recommendation Letter makes no mention of this in the "evaluation" of the Applicant's proffered exhibits and testimonies. Anecdote and even hearsay anecdote ("…clients discuss the waiting they must do…" Item 6) are all that can be found in the Recommendation Letter in terms of the Applicant's offerings of proof, fact, and evidence. No Applicant Exhibits address the matter at all.

In fact, in the Recommendation Letter, the testimony that comes closest to meeting the standard required for this element of the Code is found in Item 12. Here the person "…testified that she took an informal survey of approximately 20 liquor-licensed outlets in the neighborhood and none of them responded that they had constant wait-lists or were constantly seated to capacity." Of course, this was informal, not systematic, and was conducted by a person opposed to issuance of the license rather than by an unbiased third party, and no documentary evidence of the survey was submitted as an Exhibit. Yet this is the closest in the Recommendation Letter to the required proof, fact, and evidence.

There is no discussion of any of this by the Officer in the Recommendation Letter.

Lastly, the standard here invokes "reasonableness": a challenge to careful and judicious evaluation. Clearly, having to drive two miles for a cocktail is not reasonable; yet neither is an expectation of waitless serving every twenty feet along a residential neighborhood Main Street (except perhaps Bourbon St in NOLA!). One of the many benefits of delegating license issuance to local authorities is that these authorities are closer to the facts of the contexts of the designated neighborhoods whose reasonable requirements are being evaluated. Designated neighborhoods in disparate contexts (industrial areas, residential areas, commercial areas, entertainment districts) may reasonably have differing requirements for alcohol service. Local authorities are more likely to be knowledgeable of these facts and able to apply them to the "proof, fact, and evidence" presented by the Applicant to demonstrate the failure of existing outlets to adequately serve the reasonable requirements of the neighborhood.

Unfortunately, here the Applicant provided no "proof, fact, and evidence" to describe what might be the actual reasonable requirements, alleged to be currently unmet, of this particular designated neighborhood (a low density, residential area with a small embedded commercial district) and the Recommendation Letter contains no discussion or evaluation of the matter.

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This is a seriously flawed and inadequate Recommendation Letter. It shows no evidence of thoughtful, judicious, and fact-based evaluation of Testimony and Exhibits.

I urge you to disregard its unsupported, even arbitrary, conclusion and recommendation.

Thank you for your patience,

Steve Kite

303-480-1891