

KENTUCKY ALCOHOLIC BEVERAGE CONTROL BOARD

In the matter of:

Bakos, Inc.)	Case No. 08-ABC-240
DBA Bakos Liquors)	
3400 West Market Street)	056-B
Louisville, KY 40212)	056-NQP
)	Appeal

FINAL ORDER

Introduction

This case was brought on for hearing before the Kentucky Alcoholic Beverage Control Board on September 22, 2008, pursuant to an appeal by the Applicant, Bakos, Inc., DBA Bakos Liquors, regarding the denial of an application for a Retail Beer License and a Retail Package Liquor License by William P. Schreck, Louisville/Jefferson County Metro Alcoholic Beverage Control Administrator.

The hearing was held before Distilled Spirits Administrator Jeff Middendorf and Malt Beverage Administrator Danny Reed, the Honorable Middendorf presiding. The Applicant, Mr. El-Khoury, was present, and was represented by counsel, the Honorable Teddy B. Gordon. Administrator Schreck was present and was represented by the Honorable Larry Osterhage.

Findings of Fact/Conclusions of Law

Based upon the testimony and evidence presented at the hearing, the record herein, having considered the arguments, and being otherwise sufficiently advised, a majority of the Board, pursuant to KRS 243.550, hereby makes the following findings:

The Applicant, Bakos, Inc., DBA Bakos Liquors, (hereinafter "Bakos") applied for a Retail Beer License, Retail Package Liquor License, and an Extended Hours License for premises located at 3400 West Market Street, Louisville, Kentucky. Administrator Schreck (hereinafter "Shreck") denied the applications by letter dated July 3, 2008. The primary reasons for Schreck's refusal were: expressed public sentiment in the area in opposition to issuance of the licenses, type of transportation available in the area, number of licensed outlets in the area, and type of area involved. Bakos appeals this denial.

On September 11, 2007, a wet/dry election was held in Louisville, Kentucky, in Precincts 104, 105, 107, and 109. All four Precincts voted themselves dry. Precinct 106, which is situated between the precincts, was excluded from the vote, was not affected by the vote, and continues to permit the sale of alcohol. Mr. El-Khoury, President of the Applicant Corporation, previously held a retail package liquor license and a retail beer license at Bakos Liquors, in Precinct 105, at 34th Street and West Market Street. Mr. El-Khoury is proposing to move directly across the street into Precinct 106 which is a wet precinct.

Mr. El-Khoury has lived in Louisville, Kentucky, for eighteen (18) years. Mr. El-Khoury owned and operated a grocery store at 34th and Market Streets for eight (8) years in Precinct 105. The grocery business was slow and El-Khoury lost a lot of money. Mr. El-Khoury applied for and was issued a retail beer license and a retail package liquor license at the former location at 34th Street and West Market Street. El-Khoury sold liquor, cigarettes and lottery tickets. On September 11, 2007, a wet/dry vote was held in Precincts 104, 105, 107, and 109. Precinct 105 voted itself dry by a

vote of 130 for a ban on alcohol to 34 for the sale of alcohol. Mr. El-Khoury employed four (4) people at his former liquor store prior to the wet/dry vote. He now has one (1) employee and sells cigarettes and lottery tickets.

Mr. El-Khoury testified that he did not receive any citations or permit any criminal acts while located at 34th and West Market Streets and he kept the premises clean inside and outside. Crime did not exist in the area prior to his opening the liquor store, and he was unaware of any criminal acts in the area of his store. The former liquor store at 34th and Market Streets was close to 4,000 sq. ft., and the premises had a small parking area. Mr. El-Khoury became aware of a vacant building across the street at 3400 West Market Street, in wet Precinct 106, and signed a five (5) year lease on the property with a contingency clause for another five (5) year term. Mr. El-Khoury has held the lease on the proposed premises at 3400 West Market Street for around three to four months. The lease has a voiding clause and renewal is contingent upon Mr. El-Khoury being issued a retail package liquor license, a retail beer license, and an extended hours license, i.e., if Mr. El-Khoury does not receive a liquor license, the lease becomes null and void. The proposed premises at 3400 West Market Street has around 800 to 1,000 sq. ft with a large parking area. Mr. El-Khoury has renovated his former premises at 34th and Market Streets and, if granted a liquor license for premises at 3400 West Market Street, might open another business at the 34th and Market Streets location, i.e., grocery store, bookstore, etc.

The area of the proposed premises, West Market Street, is a high traffic area. The proposed premises building is currently empty, but Mr. El-Khoury plans to renovate the building if he is granted the licenses. Mr. El-Khoury plans to employ 7 to 8 people at

the new location. A liquor store was previously located in the building, but it closed several years ago. A barber shop is located on the Southeast corner on 34th and Market Street. A gas station was located across the street to the South but it is closed. There have been no thriving retail businesses in the area for the last two to three years since the gas station closed. There are currently three closed businesses at the corner.

Mr. El-Khoury testified that he kept the area around his business at 34th and Market Streets cleaned. Mr. El-Khoury did not know he had a weed and grass citation pending with the Louisville Metro Government. Mr. El-Khoury stated he did know the Shawnee Neighborhood, which his premises is situated in, was a high crime neighborhood. Mr. El-Khoury stated he had no problems at his former liquor store, however, Mr. El-Khoury acknowledged that he had installed a bullet-proof glass window to protect the employees.

Mr. El-Khoury stated that the closest liquor store to the site of his proposed premises is eight (8) blocks away at 42nd Street, eight (8) blocks away at 34th Street, and eight (8) blocks away at 26th and Market Streets. Mr. El-Khoury is present at his business everyday between four to five hours.

Mr. Jerry Stewart is unemployed and lives one block away from the proposed premises. Mr. Stewart and several of his friends frequented Mr. El-Khoury's former package liquor store, Bakos Liquors. Mr. Stewart testified that he went to Bakos Liquors between two to three times daily. Although Mr. Stewart did not know of any crime committed at Bakos Liquors, Mr. Stewart acknowledged there are usually a lot of people standing around the outside of Vermont Liquors. Vermont Liquors holds a retail package liquor license and a retail beer license. Vermont Liquors is located at 34th and

Vermont Streets. Residential housing is located near Vermont Liquors and Bakos Liquors. Mr. Stewart has never seen the owner of Vermont Liquors disperse a crowd from the front of the premises. Mr. Stewart felt there is a need for another package liquor store in the area to service people who do not have any type of transportation. Most of the customers who frequented Bakos Liquors were area people without transportation. Although Mr. Stewart has lived in the neighborhood three years and has observed people standing around the front of Vermont Liquors, he did not know if the people milling around the front of Vermont Liquors were selling or using drugs or drinking alcohol. Mr. Stewart testified that Bakos Liquors sold a lot of pint bottles and single malts.

Mr. Robert E. Scott, Sr. is employed by AARP and resides on North 32nd Street, four to five blocks away from the proposed premises location. Mr. Scott has known the Applicant for ten years and has worked as a painter at Bakos Liquors in the past. Mr. Scott stated that after the wet/dry vote, Bakos now sells only small grocery items. Mr. El-Khoury's proposed new location at 3400 West Market Street has a lot of parking and would employ several people. The closest package liquor store known to Mr. Scott is at 28th and Market Street, around one-half mile away. Mr. Scott did not know of any illegal activity occurring outside Vermont Liquors. Mr. Scott stated that the corner of Mr. El-Khoury's proposed premises at 3400 West Market Street has good sized sidewalks in front and the corner is a city bus stop. Mr. Scott testified that the former Bakos Liquors sold single malts and half pint bottles. Mr. Scott testified that Bakos Liquors "stayed stocked."

Mr. William P. Schreck is the Director for the Department of Codes and Regulations in Louisville, Kentucky. Mr. Schreck is also the Alcoholic Beverage Control Administrator. Mr. Schreck received an application for a retail beer license, a retail package liquor license, and an extended hours license submitted by Bakos, Inc., DBA Bakos Liquors, for premises to be located at 3400 West Market Street, Louisville, Kentucky. Mr. Schreck denied the application by letter dated July 3, 2008, primarily because of expressed public sentiment in the area in opposition, type of transportation available, number of licensed outlets, and type of area involved.

Expressed Public Sentiment in the Area: Mr. Schreck testified that he attended several Shawnee Neighborhood and block watch meetings and heard concerns about Bakos proposed application. The Shawnee Neighborhood is bordered on the North by Market Street, on the South by Larkwood Avenue, on the East by 34th Street, and on the West by South Western Parkway. The Shawnee Neighborhood held a wet/dry vote in Precincts 104, 105, 107, and 109 on September 11, 2007 and all four precincts voted themselves dry. In addition to comments received from concerned citizens, Mr. Schreck received three hundred fifteen (315) letters protesting the Bakos application. All protest letters urged Mr. Schreck to deny the Bakos license application. The factors Mr. Schreck has at his disposal in reviewing liquor applications are: sentiment of the area, type of area involved, transportation, number of licensed outlets in the area, potential of future growth, and financial potential of the area.

Type of Transportation Available: The Shawnee Neighborhood is a dense residential neighborhood. Commercial development in the Shawnee Neighborhood is primarily located on the corners of some of the streets. There is a bus stop on both

sides of the street at the 34th and Market Streets intersection. Also in the area is a former church building which has been converted into housing. Mr. Schreck took the type of transportation available in the area into consideration in issuing his denial. Types of available transportation taken into consideration are school buses and TARC buses. Having a liquor package store adjacent to a bus or school stop location is not a favorable location to bring people together. Sometimes people drive at a high rate of speed on Market Street. A city sidewalk is the only obstruction between the bus site and the proposed premises. The area at 34th and Market Streets is primarily a strong neighborhood not a commercial area.

Number of Licensed Outlets: Shawnee High School, several churches, and some small quick marts are located near the proposed premises. A full service Kroger is located at 34th and Bank Street. The Shawnee neighborhood is underserved for every type of retail outlet EXCEPT for beer and liquor outlets. Mr. Schreck took retail underservice into consideration in denying the application. In the Shawnee Neighborhood, Council District 5, there currently exists six (6) retail package outlets, twenty-nine (29) malt beverage outlets, four (4) private club outlets, and four (4) retail drink outlets. Vermont Liquors is located on the corner of 34th and Vermont Streets. Mr. Schreck considers Vermont Liquors to be in the Shawnee Neighborhood.

Type of Area Involved: Mr. Schreck thinks there is more activity around package liquor stores and has personally observed people loitering around the front of Vermont Liquors. The Shawnee Neighborhood Association is trying to change the community around and having people standing around in front of a liquor store is not a good way to introduce someone to the area.

Ms. Mariann Dunherly lives in Precinct 105. Ms. Dunherly testified that Mr. El-Khoury is moving his package liquor business 40 feet from a dry precinct into a wet precinct. One of Ms. Dunherly's main concerns is crime in the area. Ms. Dunherly started a Shawnee Neighborhood Block Watch in her area and serves on the West End Crime Prevention Council and is on a steering committee for the Shawnee Weed and Seed Program. Weed and Seed is a program funded by the Department of Justice, a federal program designed to help recognize blighted areas to weed out crime and blight and seed in good elements, e.g., economic development, neighborhood restoration, programs for children and seniors – whatever is needed in a particular area.

Ms. Dunherly was actively involved in the wet/dry vote in 2007. Precinct 105 voted itself dry by a large margin. Ms. Dunherly was involved in collecting names for 315 protest petitions. Ms. Dunherly distributed the petitions through various block watches, email, through the Shawnee Neighborhood Weed and Seed Program, the Crime Prevention Council, local churches, etc. After the precincts were voted dry, property and violent crime decreased. The Shawnee Neighborhood is not served well by retail outlets. The area has barber shops, nail salons, convenience stores and one hardware store. People in the Shawnee Neighborhood have to leave the area to shop. The closest grocery store is at Bank and 35th Streets across the North Western Parkway. There are no sit-down restaurants in the area.

Mr. El-Khoury has a history of not maintaining his commercial properties. The exterior of a storefront affects the perception of what it is going to look like inside. It can be assumed that if the exterior is unkempt so also is the inside. Ms. Dunherly conducted an informal market study in March 2007 at a Shawnee Neighborhood

Committee Meeting at the Shawnee Golf Course Club House to see what type of business people wanted in the area. The results of the study showed that close to seventy percent (70%) of the residents were looking for someplace to eat, a family-style restaurant that does not serve alcohol. The study also indicated a strong interest in retail stores such as apparel, retail, groceries, restaurants, etc. Any retail business except another retail alcohol outlet.

Ms. Dunherly testified that the Shawnee Neighborhood is adequately served by existing retail beer and retail package liquor stores. Ms. Dunherly listed some close retail package stores as Freddy's Liquors at 34th and Broadway, Vermont Liquors at 34th and Vermont, The Bottle Shop at 28th and Market, an outlet at 46th and Market Street, and several retail beer outlets. Ms. Dunherly had observed people standing around outside the front of Vermont Liquors and drinking from small brown paper bags. There are no bars in the Shawnee Neighborhood so people purchase liquor inside Vermont Liquors then stand outside the liquor store and congregate. When they finish drinking, they go back inside and repurchase and go back outside. Traffic in front of Vermont Liquors is a big problem in the area. People turning right into Vermont Liquors will block traffic on the two-way street. People standing outside Vermont Liquors become loud and behave as if they were in a bar.

The Shawnee Neighborhood wants businesses that will attract other businesses. A retail package liquor store would not attract other good businesses.

Pastor Lester Turner, Jr. resides in the Shawnee Neighborhood, and his church is 1.5 mile from the proposed premises location. Pastor Turner presented a letter from the Shawnee Neighborhood Association, Rudy Davidson President, in opposition to the

application. Pastor Turner stated there are four (4) stages a community will experience: 1) growth; 2) stabilization; 3) decline; and 4) renovation. Pastor Tuner has seen the first three of these factors occur in the Shawnee Neighborhood. However, a new vision for the Shawnee Neighborhood is to revitalize itself. The community wants to bring the community back to what it used to be by: renovating the neighborhood and bring families back together; and, alleviating crime, drugs, prostitution. Before the wet/dry vote in September 2007 Shawnee Neighborhood experienced a high crime rate and loitering in the neighborhood. Before the vote, Pastor Turner drove the Shawnee Neighborhood streets and personally observed a lot of traffic, people loitering on corners, people standing around drinking, teenagers on corners, etc. Since the vote, robbery and break-ins have declined and traffic is totally different. People in the Shawnee Neighborhood who purchase alcohol usually purchase drinks within walking distance of their homes, stay and drink in the general area where they purchase the alcohol, so they can repurchase as soon as possible. Pastor Turner did think people standing outside a liquor store act as if they are in a bar. Pastor Turner did not think the area needs another liquor store.

Mr. Derrick Wilson, Pastor of the Spirit of Love Center, located in the Shively Neighborhood, and several other ministers and councilmen and residents spearheaded the wet/dry vote in 2007. Pastor Wilson observed crime in the area and observed depreciation of people's values and observed the depreciation of the quality of life in the community. Pastor Wilson and the others came together initially as a result of several liquor stores wanting to move to the Shawnee Neighborhood, one next door to his church and another a block away. Both proposed liquor stores would have been

adjacent to the Shawnee High School. Pastor Wilson campaigned and spoke about the wet/dry issue. Pastor Wilson spoke primarily at Community meetings held every Saturday. Pastor Wilson told of observing mayhem on the corners because of people buying alcohol and drinking it outside, and drug dealers plying their trade on the corners. One of the reasons for the wet/dry vote was the proliferation of liquor stores coming into the community. The community's only recourse was a wet/dry vote.

Initially the wet/dry vote was to be in Precincts 104 and 105 but the vote spread to Precincts 107 and 109. At the time, no one in Precinct 106 wanted to participate in the vote. On the day of the election several people from Precinct 106 came to the polls to vote and were turned away – they assumed the vote was for Precinct 106 also. People from Precinct 106 were very irate.

The contingency of Pastors and Shawnee Neighborhood residents want positive economic investments in the community. After the vote, a health center expressed an interest in coming to the area; an organization called the Fuller Center House for Development is giving them houses. Residents are revitalizing the houses and allowing residents who are renting to purchase the houses. By so doing, the Shawnee Neighborhood will have property owners who will have an investment in the community. The Shawnee Neighborhood community is involved in the Weed and Seed Program. Pastor Turner has received calls from people interested in moving back into the community. Pastor Turner stressed that public sentiment in the community is against the application of Bakos, Inc.

The Board notes that the Applicant has no disqualifying convictions, has complied with and met all alcohol application requirements as set forth in KRS 243.390,

and has not violated any of the conditions set forth in KRS 243.450(1). However, KRS 243.450(2) provides in pertinent part that:

A license that might be issued under KRS 243.020 to 243.670 may be refused by a state administrator for **any reason** which the administrator, in the exercise of his or her sound discretion, deems sufficient. Among those factors that the administrator **shall consider** in the exercise of his or her discretion are: **public sentiment in the area; number of licensed outlets in the area; potential for future growth; type of area involved; type of transportation available; and financial potential of the area.**

Id. (emphasis added).

In Moberly v. King, Ky. App., 355 S.W.2d 309 (1962), Kentucky's highest Court explained that KRS 243.450(2) grants to an administrator the discretion to deny a license for **any** reason which he, in the exercise of his sound discretion, deems sufficient.

KRS 243.450(2) mandates that the Board consider public sentiment, number of licensed outlets in the area, potential for future growth, type of area involved, type of transportation available, and financial potential of the area in deciding whether to grant or deny a license. The Board finds that there is strong and considerable public sentiment against issuance of a retail beer license to Bakos, Inc.

Based upon the testimony and evidence presented at the hearing, the record herein, and being otherwise sufficiently advised, the Board, in the exercise of sound discretion pursuant to KRS 243.450(2), upholds Mr. Schreck's letter of denial and finds that the application of Bakos, Inc., DBA Bakos Liquor, for a retail package liquor license, retail beer license, and extended hours license, for the premises to be located at 3400 West Market Street, Louisville, Kentucky, should be denied. Further, on September 11, 2007, Shawnee Neighborhood Precincts 104, 105, 107, and 109 all voted in **favor** of

going dry. Although the proposed premises location of the Applicant's premises lies in Precinct 106, located directly across the street of the former Bakos Liquors in now dry Precinct 105, expressed public sentiment is greatly against the issuance of another liquor store in the Shawnee Neighborhood. As such, the Board further finds that due to strong public sentiment against issuance of the license, and the totality of the circumstances in this appeal, Louisville/Jefferson County Metro Alcoholic Beverage Control Administrator William P. Schreck's denial of the Applicant's, Bakos, Inc., DBA Bakos Liquors', application should be affirmed.

Disposition


IT IS THEREFORE ORDERED that:

1. Louisville/Jefferson County Metro Alcoholic Beverage Control Administrator William P. Schreck's denial of the Applicant's, Bakos, Inc., DBA Bakos Liquors, application for a retail package liquor license, retail beer license, and extended hours license, be and is hereby AFFIRMED.

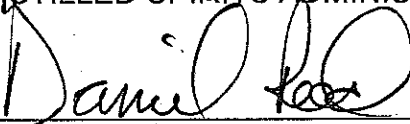
2. The application of Bakos, Inc., DBA Bakos Liquors, for a retail package liquor license, retail beer license, and extended hours license for premises located at 3400 West Market Street, Louisville, Kentucky, be and is hereby DENIED.

SO ORDERED this the 10th day of October, 2008.

ALCOHOLIC BEVERAGE CONTROL BOARD




 JEFF MIDDENDORF
 DISTILLED SPIRITS ADMINISTRATOR



 DANNY REED
 MALT BEVERAGE ADMINISTRATOR

ATTEST:



 ANGELA F. DONAHUE
 BOARD SECRETARY

Appellate Rights

All final orders of the Board may be appealed to Franklin Circuit Court in accordance with KRS 13B.140(1). To appeal, you should file a petition in Franklin Circuit Court within thirty (30) days after the mailing date of this Final Order. Copies of the petition must be served upon the Department and all parties of record in this proceeding. The petition shall include the names and addresses of all parties of record in this proceeding, including the Department. The petition shall also present a statement of the grounds upon which the review is requested. A copy of this Final Order shall accompany the petition.

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