

VILLAGE OF OAK PARK, COOK COUNTY, ILLINOIS

In Re:

)

No. 2017-09

RECEIVED

AUSTIN PANTRY,

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SEP 28 2017

LAW DEPARTMENT

NOTICE OF APPEAL

Respondent Austin Pantry, through its attorney Scott J. Frankel, hereby appeals the September 18, 2017 decision by the Oak Park Village Manager ordering the revocation of its business license. In support of this appeal, the Respondent states as follows:

Background Facts

On August 30, 2017, Edgar Lucas, a former employee of Austin Pantry, was arrested for selling heroin from the store. The arrest came after the Oak Park Police Department conducted a two-month investigation during which Mr. Lucas allegedly sold heroin to an undercover police officer on six separate occasions. Transcript, pp. 10-12, 16, 17.

The store owners have not been charged with a crime related to the drug sales, and the Village introduced no evidence at the revocation hearing indicating that the store owners knew about the sales. Indeed, the owners, who work as truck drivers when they are not at the store, presented work records indicating that they were at their other jobs when the drug sales took place. They further testified that to maintain their truck driving jobs, they have to pass random drug tests. Transcript, pp. 38, 39, 41, 43-46, 56, 57.

Austin Pantry has been owned and operated by Azzam 'Sam' Mohammad since January of 1999. More recently, his friend Maher 'Mike' Haw became a co-owner of the business. Their store, located at 1 Chicago Avenue, sells food, drinks and other items to customers from Oak Park and Austin. Transcript, pp. 37, 56. Over the years, the owners of Austin Pantry have

developed good relationships with their customers. Part of the reason for this is that when customers in need of food and other necessities lack the money to pay for them, they are often allowed to take the items they need on the informal promise that they will repay the store when they can. This type of positive relationship between the store and its customers prompted sixty-five area residents to sign a petition asking that the store be reopened, which was presented at the hearing. Transcript, pp. 31, 38, 66, 67.

At the hearing, the owners of the business testified that they have always cooperated with the Police and other departments of Village government. Indeed, for the eighteen-year period before the August 30 arrest, the Village had not ticketed Austin Pantry for any code violations whatsoever. Transcript, pp. 38, 39, 41, 58.

Because of the store owners' familiarity with the neighborhood, they have been able to assist local police in two particularly noteworthy cases. In 2011, they provided critical information to the Chicago Police Department that helped solve the murder of an off-duty Chicago Police Officer on Division Street in the Austin neighborhood. And a few years earlier, they helped Oak Park Police identify and prosecute two masked men who had committed armed robberies at Austin Pantry and other nearby Oak Park businesses. Transcript, pp. 40, 41.

Argument

A. Introduction

To address the serious problem of heroin being sold from Austin Pantry, the Village should seek to apply justice within the confines of the Oak Park Village Code. Unfortunately, the Manager's decision fails to do this. First, the decision punishes the store owners for the misdeeds of their employee. In addition, the decision adopts a 'one strike and you're out' policy for Austin Pantry's business license, choosing to close the store after its first problem with village

government in the store's eighteen-year history. Finally, in pursuing this matter, the Village failed to comply with key sections of the Village's own nuisance code, making it more difficult for store owners to address the drug sale problem on a timely basis. For these reasons, the revocation of Austin Pantry's business license should be overturned.

B. Discussion

The Manager, in justifying her decision, cites various provisions of the Village Code and Illinois law. Each of these provisions will be addressed in turn.

1. The employee broke the law; the business owners did not.

The Village Manager has the authority to revoke a business license under Section 8-1-14 (C) of the Village code, which provides five separate reasons that would allow for a revocation. One such reason involves a "[c]onviction *of the licensee* or permittee of any felony or of a misdemeanor involving moral turpitude." Oak Park Village Code, Sec. 8-1-14 (C3) [emphasis added].

A business license can also be revoked for "[a]ny violation *by the licensee* of the ordinance provisions relating to the license or permit, the subject matter of the license or permit, or the premises occupied..." Code, Sec. 8-1-14 (C2) [emphasis added].

The evidence introduced at the hearing indicated that employee Edgar Lucas, who stands charged but not convicted of selling drugs at the store, may have committed multiple felonies while also endangering public safety. But Mr. Lucas is an employee and not the owner of Austin Pantry, and he did not apply for the store's business license. The store owners have not been charged with any crime, and there is no allegation that the owners were involved in Mr. Lucas' alleged activities.

Revocation of a business license is a serious matter, as it can mean the loss of a person's

business, investment, or livelihood. The Village Board, through its ordinances, has determined that a licensee who commits a felony or violates Village ordinances may have to suffer the losses associated with license revocation. But the Board has not authorized the revocation of a business license because of the illegal and unauthorized acts of a business' employees.

2. There can be no violation of the nuisance ordinance unless the business owners are first given a chance to correct the nuisance.

The Village's effort to revoke Respondent's business license is primarily based on alleged violations of the nuisance code. The Manager notes in her written decision that selling drugs from the store is a nuisance because it violates the law in a way that can "annoy, injure or endanger the safety or health of the public." Code, Sec. 16-1-1 (a). Repeated violations of the law are "declared a nuisance and subject to abatement as provided herein." Code, Sec. 16-1-6. See also Manager's Decision, par. 19, 22.

Putting aside the issue of whether the employee or the business owners are responsible for the nuisance, the owners agree that selling drugs from their store endangers public health and safety. But they disagree with the Village's application of the nuisance ordinance in this case.

a. Notice must be given when the Village seeks to enforce the nuisance rules.

The section on nuisances in the Village Code is corrective, not punitive. The Code defines several types of nuisances, and lays out a process for correcting them. Code, Sec. 16-1-1 et. seq. The procedure set forth in the Village Code requires proper notice:

"It shall be the duty of the Village Manager or his agent to serve notice, in writing, upon the owner, occupant, agent, or person in possession ... of any ... building ... in or upon which any nuisance may be found, ... requiring such person to abate the same in such manner as the Manager shall prescribe, within a reasonable time." Code, Sec. 16-1-2.

In this case, the Manager did not provide the proper notice required by the nuisance ordinance. As a result, the store owners, who were unaware of the drug sales, did not have an opportunity to solve the problem on their own. Had the Manager provided the required notice, the store owners would have abated the nuisance immediately by firing Mr. Lucas. This would have resolved the drug sale problem and prevented the “repeated violations of the Illinois Controlled Substances Act” complained of by the Manager. Manager’s decision, par. 23.

b. Legal action can only be taken after notice is given. Under the nuisance code, legal action is a last resort.

If a responsible party is notified of a nuisance and does not correct it, then the matter “shall be referred to the Village Attorney for court action.” Code, Sec. 16-1-2. By failing to provide the required notice, the legal action taken by the Village Attorney to revoke Austin Pantry’s license was not the last resort contemplated by the code, but instead represented the first time the Village informed the store owners that drug sales were taking place at Austin Pantry. Moreover, the legal action did not ask the store owners to fix the nuisance, but instead sought to punish them for not taking action to address a nuisance they knew nothing about.

The nuisance ordinance can be violated only if there is a refusal to abate the nuisance after receiving notice of it. Since the Village never gave Austin Pantry notice of the nuisance, it cannot revoke Austin Pantry’s license by claiming that there has been a violation of the ordinance.

3. The Manager’s decision confuses drug use with drug sales.

At the hearing, the store owners indicated that they suspected Mr. Lucas used drugs, but stated that he had worked for them for several years, and that his suspected drug use had not occurred in the store and had not affected his job performance. Transcript, pp. 50, 51, 57, 58, 61,

62, 66. In this respect, the position of the owners is similar to that of many employers who might think an employee has a personal problem with drugs or other issues: if the problem does not affect the work place, the employer generally does not get involved. Based on the owners' suspicion of drug use, however, the Village Manager reached the unfounded conclusion that the owners had made "the building available for delivering a controlled substance in violation of state law," citing 720 ILCS 570/406.1. Manager's decision, par. 24. But the store owners have not been charged with the crime cited by the Manager. This is because it is not a crime to know or suspect that someone is *using* drugs. It is only a crime if someone "[k]nowingly grants, permits or makes the building available for use for the purpose of unlawfully *manufacturing or delivering* a controlled substance." 720 ILCS 570/406.1 [emphasis added].

There is no evidence that the store owners knew the building was being used for drug sales, and therefore no basis for concluding that the law cited by the Manager was violated.

4. Claims regarding negligence in hiring do not justify license revocation.

Finally, the Manager says the store owners were "negligent, reckless and careless in allowing their business to be used for the sale of illegal narcotics..." Manager's decision, par. 21. In hindsight, it is obvious that the store owners made a mistake in allowing Mr. Lucas to work at their store. But the mistake made by the store owners was not knowing, not intentional, and not even negligent. The owners testified that Mr. Lucas had worked for them without incident for several years. It appears that something in Mr. Lucas' life may have changed recently, which may have led him to start selling drugs from the store. Transcript, pp. 52, 53, 61, 62.

The Manager concludes that the negligence of the owners in hiring Mr. Lucas means that "the operation of the business is a nuisance." Manager's decision, par. 21. But a nuisance is a temporary condition, not a permanent one. When dangerous conditions arise, a nuisance exists,

but when the conditions dissipate, the nuisance disappears.

While Mr. Lucas' alleged actions were arguably a nuisance, Mr. Lucas' arrest and imprisonment abated the nuisance. The store's eighteen-year history without any problems demonstrates clearly that Mr. Lucas' alleged encounter with law enforcement was an anomaly and not the norm.

The owners of Austin Pantry, like most business owners, do not want illegal activity to occur at their place of business. But in spite of their best intentions, employers sometimes hire bad employees. In addition, some employees change for the worse during the course of their employment, as happened with Mr. Lucas.

Short of extensive and expensive drug testing, it can be very difficult for an employer in a small business such as Austin Pantry to know the extent of drug or alcohol use among its employees, and to know whether such employees have engaged in illegal activities on the premises at some point during their employment. If it comes to light that employees may have broken the law on store premises, the correct response is to remove them from employment. This is what happened here.

5. Planned changes in store practices if Austin Pantry is allowed to reopen.

At the hearing, store owner Azzam Mohammad indicated that if he is allowed to reopen his store, he would install new security cameras that would allow him to monitor the store while he is away. He also indicated that he would be willing to allow the Police to monitor the new cameras. Transcript, p. 43.

Since the revocation hearing, Mr. Mohammad and building owner Ali ElSaffar have discussed further measures that could be taken to ensure that the problem of drug sales does not recur. Mr. ElSaffar noted that after taking a job as a truck driver, Mr. Mohammad was not at the

store as frequently as he used to be. In the absence of the boss, ElSaffar suggested, it was easier for an employee like Mr. Lucas to act inappropriately. Mr. Mohammad concurred, and committed to spending considerably more time working in the store if it is permitted to reopen. In addition, Mr. ElSaffar suggested that there should be greater screening of any future employees hired by the store, and Mr. Mohammad agreed.

Although the drug sale problem took place for just a few months out of the eighteen-year history of the store, the store owner and the building owner believe that these new measures will ensure that drug sales never again take place at Austin Pantry.

Conclusion

For all of the above reasons, Austin Pantry, after having been a law-abiding, tax-paying business for eighteen years, should not have its license permanently revoked because of one episode involving one employee. This unfairness is magnified by the fact that the hearing did not produce a shred of evidence that the owners of Austin Pantry knew that drug sales were taking place in their store. 'One strike and you're out' is not the law in Oak Park, and is not the right way to treat a long-standing business in the community.

Respectfully Submitted,



Scott J. Frankel,
Attorney for Respondent

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VILLAGE OF OAK PARK, COOK COUNTY, ILLINOIS

In Re:

No. 2017-09


AUSTIN PANTRY,

AFFIDAVIT AND
NOTICE OF APPEAL


I, Azzam Mohammed, being first duly sworn under oath, state as follows:

1. I am the owner of Austin Pantry, a convenience store located at 1 Chicago Avenue in Oak Park.
2. I am appealing the September 18, 2017 decision by the Oak Park Village Manager that revoked my store's business license.
3. This appeal is made to the Village Board of Trustees in accord with Section 8-1-15 of the Oak Park Village Code.
4. My attorney, Scott J. Frankel, will represent me in the appeal, and will present the reasons in support of my appeal in a legal brief that he will submit.

The affiant states nothing further.

 9/26/17
Azzam Mohammed

Subscribed and sworn to before me,
A Notary Public in the State of Illinois

 Sept. 26, 2017
Notary Public

