

STATE OF IOWA  
BEFORE THE DEPARTMENT OF COMMERCE  
ALCOHOLIC BEVERAGES DIVISION

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IN RE:

The Slipper, Inc., d/b/a  
Krystal Slipper Lounge  
4001 6<sup>th</sup> Avenue  
Des Moines, IA 50313

Docket No. A-2007-00009  
DIA No. 07DOCBL053

**PROPOSED DECISION**

New Liquor License Application

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The Slipper, Inc., d/b/a Krystal Slipper Lounge, appealed from a decision by the City of Des Moines (the City) to deny a class C liquor license application. The case came on for hearing at the Alcoholic Beverage Division (ABD) offices in Ankeny, Iowa on August 8, 2007. Tom Fisher represented applicant. Applicant's exhibits A-C were admitted into the record. Kristine Tielbur, who owns applicant, testified on behalf of her business. Douglas Philip represented the City. The City's exhibits 1-6 were admitted into the record. Diane Rauh, Matt Harkin, Ron Bjornson, Phil Delafield, and Phil Porman testified on the City's behalf. Per a discussion on the record, the City provided a copy of City ordinance 10-1 after the hearing. The additional submission was marked and admitted as exhibit 7.

**FINDINGS OF FACT**

Kristine Tielbur is the sole shareholder of The Slipper, Inc. She previously operated an establishment know as the Krystal Slipper Lounge at 1716 Beaver Avenue in Des Moines for approximately one year beginning in July of 2005. During this time the Krystal Slipper applied for and held a liquor license from the City of Des Moines. The City awarded that liquor license based on the premise that applicant's business was a restaurant, and thus was a permissible use for a C-1 zoned district. The City required Ms. Tielbur to sign an agreement (Testimony of Tielbur, Harkin; Ex. 4).

Approximately five months after the license was issued at the Beaver Avenue location, Officer Matt Harkin from the Des Moines Police Department did a compliance check of the premises. The inspection occurred over the noon hour. The establishment was open, but no one was eating. The officer found no menus in the establishment. He asked an

employee for a menu, but the employee could not produce one.<sup>1</sup> The officer found that the kitchen was adequate to support a restaurant, containing an oven and hood. (Testimony of Harkin).

The officer requested information regarding the amount of sales of food versus alcohol from the owner. He testified that he had difficulty getting that information from Ms. Tielbur. Before he received all information requested, the Beaver Avenue location closed its doors. (Testimony of Harkin).

Ms. Tielbur testified that she closed the Beaver Avenue location because she knew she could not make a restaurant work at that location. She stated that the business was not as strong as she had planned because of the small size of the building and a lack of parking. Officer Harkin testified that Ms. Tielbur told him that the reason that she closed the establishment was because she could not meet the necessary food versus alcohol requirements to operate as a restaurant. (Testimony of Tielbur, Harkin).

Applicant showed a one-month and six-month income statement for the period ending June 30, 2006. The income statement shows sales of food and pop of \$4,996.23 for the first half of 2006, sales of \$6,134.91 in beer and liquor sales for the same time period, and sales from machines of \$26,580.89. Ms. Tielbur testified that the machines consist of lottery pull tab machines, table top games, and jukeboxes. (Testimony of Tielbur; Exhibit C).

On January 20, 2007, Ms. Tielbur signed an application for a liquor license for a new establishment located at 4001 6<sup>th</sup> Avenue in Des Moines. The application listed The Slipper, Inc. at the owner, and the establishment was to be known as the Krystal Slipper Lounge. She hired an architect to draft plans for the design of her restaurant, to ensure that her plan was proper according to building codes. The City eventually approved the plans and issued a certificate of occupancy to operate the establishment as a restaurant/bar. (Testimony of Tielbur, Delafield; Exhibit B).

The plans contained areas for billiards, booths, and a large lounge seating area. A small kitchen was designated behind the serving bar. There was not a full wall separating the kitchen from the areas open to the patrons. The kitchen plans did not contain any stove, oven, or friars. The plans showed locations for two microwaves and two three-compartment sinks. (Testimony of Ms. Tielbur; Exhibits 3, 5).

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<sup>1</sup> Ms. Tielbur testified that the business had menus, so she does not know why the employee could not locate one.

Ms. Tielbur testified she has made approximately \$50,000 to \$60,000 in improvements at the new location, including landscaping, enlarging the restrooms, and changes to the parking lot. She testified that she wants the establishment to primarily be a restaurant. She claimed she would cook food by microwave, and sell sandwiches, chips, and similar items. She also intends to prepare barbeque food outside the building for sale on premises. Ms. Tielbur admitted that she has not opened her restaurant, notwithstanding the certificate of occupancy, because she is waiting for a determination on her liquor license. (Testimony of Tielbur).

The location for the new Krystal Slipper Lounge is zoned as a C-1 district. On June 18, 2007, the application came before the Des Moines City Council for consideration. The City Council denied the liquor license application for lack of good moral character stating that it believed that “applicant will not follow all alcoholic beverage rules and regulations...” Ms. Tielbur filed a timely appeal of the matter. (Exhibit 6).

### **CONCLUSIONS OF LAW**

The State of Iowa has adopted a two-level licensing system. A prospective licensee must first file its application with the local jurisdiction in which it will operate.<sup>2</sup> The local authority may approve or deny the application. If the local authority approves the application, it is forwarded to ABD. ABD then conducts its own investigation to determine whether the applicant has complied with the statutory and regulatory requirements. If the local authority denies the application, the applicant may file an appeal with ABD. Through this means, each application is reviewed on local and state levels.

Notwithstanding the City’s role in the licensing process, the City’s role is circumscribed by statute. If a local authority denies an application for a permit, the applicant has the right to a hearing before ABD to show compliance with all requirements for holding the permit.<sup>3</sup> So, while the City has the authority to deny an application based on an ordinance, ABD has the responsibility to review the City’s rationale to determine whether it is correct.

The City relied on a combination of City Ordinance sections 134-842 and 134-954 as a basis for its denial. Section 134-842 provides the permitted uses for businesses in a C-1 district. One permitted use is a restaurant.<sup>4</sup> A restaurant is not specifically defined in that section, but the City generally defines a restaurant as “any establishment at which the

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<sup>2</sup> Iowa Code section 123.32.

<sup>3</sup> Iowa Code section 123.32(6).

<sup>4</sup> City Ordinance section 134-842(2)(jj).

*primary* business is to sell food for consumption on the premises, generally to persons seated within an enclosed building which includes kitchen facilities for the preparation and service of that food.”<sup>5</sup> (emphasis added). “Primary” is not defined, but the ordinary dictionary definition of primary is “being first or best in degree, quality, or importance.”<sup>6</sup> The courts prefer an ordinary interpretation of terms, unless otherwise defined.<sup>7</sup> The use of the word “primary” does not expressly and specifically fit the City’s interpretation that more than 50 percent of sales must be in food, but it does support the City’s interpretation.

The City further points to City Ordinance section 134-954, pertaining to the selling of liquor, wine and beer in C-2 districts. That section restricts businesses who hold a liquor licenses from operating in a C-2 district, unless the business is a grocery store, pharmacy, or restaurant. With regard to a restaurant, the ordinance states that at least half of the gross income must be derived from the sale of prepared food and food-related businesses. Section 134-954 does not directly control this case, because applicant is located in a C-1 district. However, the combination of the language in section 10-1 and 134-954 supports the City’s interpretation that a restaurant must make more than 50 percent of its sales from food to meet the zoning requirements for a restaurant.

The City’s interpretation was clearly set out in the liquor license application process. Applicants for liquor licenses in the C-1 district were required to sign an agreement that at least half of its gross income derive from sales of food and food-related services. (Exhibits 4-5). Ms. Tielbur signed the agreement twice: once for the Beaver Avenue location, and the second for the Sixth Avenue location. While Ms. Tielbur can argue that the City’s interpretation is not correct, it has been clear set out to her and other licensees.

I find that the City’s interpretation is correct. The use of the word “primary” in section 10-1 indicates that most of the sales should be in food to meet the definition of a restaurant. The City has more fully expressed this position in section 134-842, concerning C-2 zoning. While 134-842 does not directly apply to the C-1 zoning question in this case, it supports the definition of restaurant in section 10-1. There is no apparent or logical reason to apply a different requirement for restaurants in C-1 and C-2 districts.

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<sup>5</sup> Des Moines Municipal Code section 10-1.

<sup>6</sup> American Heritage Dictionary, p. 983 (2<sup>nd</sup> Ed. 1985).

<sup>7</sup> *Mason v. Schweizer Aircraft Corp.*, 653 N.W.2d 543, 548 (Iowa 2002) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”).

Assuming the City's definition to be correct, it clearly had good grounds to deny the application. Applicant failed to meet the 50 percent threshold at its Beaver Avenue location. The income statement shows that the vast majority of the business resulted from machines such as lottery pull-tab machines, table top games, a pool table, and a jukebox, as well as beer and liquor. Only 13.25 percent of its sales were from food and pop. The information from the income statement is supported by testimony from Officer Harkin, who personally inspected the facility. Officer Harkin testified that when he visited the Krystal Slipper location at lunchtime, several months after it opened, he found no diners and no menus.

The evidence pertaining to the Beaver Avenue location is material, despite applicant's argument to the contrary. Ms. Tielbur owned both establishments, under the same corporate and trade name. She closed the Beaver Avenue operation to make a second attempt at the business at the 6<sup>th</sup> Avenue location. While it is possible that her business operation might change, the evidence regarding the Beaver Avenue operation is clearly relevant to consider how she might operate the same business at the Sixth Avenue location.

When reviewing the plans for the 6<sup>th</sup> Avenue operation, it is very difficult to believe that half the sales will be from food or food-related services. The establishment does not have a kitchen that is separate from the patron area. The kitchen consists of two microwaves that are positioned behind the bar. There is no stove, oven, or friars. Applicant did not submit any credible information showing how she intends to make the half of her sales through the use of microwave food, sandwiches, and chips. The City justifiably reached a conclusion that she would not meet its 50 percent requirement. The City's action must be affirmed.

### **ORDER**

The City of Des Moines' decision to deny The Slipper, Inc.'s application for a class C liquor license is affirmed.

An adversely affected party may appeal a proposed decision to the administrator of the Alcoholic Beverages Division.<sup>8</sup> An appeal must be filed within 30 days from the date this decision is issued. Also, the administrator may initiate review on his own motion. Any appeal shall be sent to the Alcoholic Beverages Division's offices at 1918 S.E. Hulsizer, Ankeny, IA 50021.

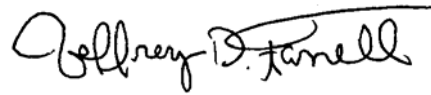
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<sup>8</sup> 185 IAC 10.27.

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Dated this 7<sup>th</sup> day of September, 2007.

A handwritten signature in black ink that reads "Jeffrey D. Farrell". The signature is written in a cursive style with a long horizontal flourish extending from the top of the "F".

Jeffrey D. Farrell  
Administrative Law Judge  
Department of Inspections and Appeals  
Lucas State Office Building-Third Floor  
Des Moines, Iowa 50319

cc: See attached mailing list

Copies to:

Jeffrey Farrell  
Administrative Law Judge  
Department of Inspections & Appeals  
Lucas State Office Building  
Des Moines, Iowa 50319

John Lundquist  
Assistant Attorney General  
Department of Justice  
Hoover State Office Building  
Des Moines, Iowa 50319

Lt. Douglas Mollenhauer  
ISP, District #1  
260 N.W. 48th Place  
Des Moines, Iowa 50313-2299

Diane Rauh  
City Clerk - City Hall  
400 Robert D Ray Drive  
Des Moines, Iowa 50309

Chief Judy Bradshaw  
Des Moines Police Dept.  
25 E. 1<sup>st</sup> Street  
Des Moines, Iowa 50309

Officer Rahn Bjornson  
Des Moines Police Department  
25 E. 1<sup>st</sup> Street  
Des Moines, Iowa 50309

Douglas P. Philip  
Assistant City Attorney  
Des Moines Police Dept.  
25 E. 1<sup>st</sup> Street  
Des Moines, Iowa 50309

John Henry Ellison, Chief Investigator  
Iowa Lottery  
2323 Grand Avenue  
Des Moines, Iowa 50312

Sherry Hopkins  
Social Gaming Unit  
Lucas State Office Bldg.  
Des Moines, Iowa 50319

Gayle Collins  
Commissioner  
Iowa Alcoholic Beverages Division  
1918 SE Hulsizer  
Ankeny, Iowa 50021

Thomas G. Fisher Jr.  
Attorney at Law  
2910 Grand Avenue  
Des Moines, Iowa 50312