

BEFORE THE IOWA DEPARTMENT OF COMMERCE
ALCOHOLIC BEVERAGES DIVISION

IN RE:

DOCKET NO. A-2007-00016
DIA NO. 07DOCBL065

Carpe Diem I LLC
d/b/a 11th Street Precinct
Bar & Grill
2108 E. 11th Street
Davenport, IA 52803

PROPOSED DECISION

Liquor License No. LC-35285

On or about August 14, 2007, the Iowa Alcoholic Beverages Division (Division) denied the application filed by Carpe Diem I LLC (licensee) for a premises update for 11th Street Precinct Bar and Grill, Liquor License LC-35285, located at 2108 E. 11th Street in Davenport, Iowa. The licensee filed a timely Notice of Appeal with the Iowa Alcoholic Beverages Division (division). The hearing was held by telephone before the undersigned administrative law judge on September 20, 2007 at 9:30 a.m. Assistant Attorney General John Lundquist represented the Division. Attorney R. Douglas Wells represented the licensee. The hearing was recorded. The record was held open for four days to allow the licensee to submit its exhibits D and E.

THE RECORD

The record includes the testimony of the witnesses and the following exhibits:

State Exhibit 1:	Premises Update Application
State Exhibit 2:	Letter Supporting Application, 6/5/07
State Exhibit 3:	Denial of Premises Update Application, 8/14/07
State Exhibit 4:	Notice of Appeal
Licensee Exhibit A:	Letter, 9/10/07 (Alderman Frink)
Licensee Exhibit B:	Letter, 9/13/07 (Schnell)
Licensee Exhibit C:	Letter, 9/18/07 (Mayor Winborn)
Licensee Exhibit D:	Title Opinion, 3/28/07

Licensee Exhibit E: Plat Map

FINDINGS OF FACT

1. John Wisor is the 100% owner and manager of Carpe Diem I, LLC. In January 2007, Mr. Wisor purchased a vacant building located at 1107 Mound Street (hereinafter, "Mound St. Building") in the historic village of East Davenport. In April 2007, Mr. Wisor purchased an existing ongoing bar and grill located at 2108 East 11th Street (hereinafter, "11th St. Building"). Following the purchase, Carpe Diem I, LLC, d/b/a 11th Street Precinct Bar and Grill (licensee) was issued Liquor License No. LC-35285 for the business located in the 11th St. Building.

The Mound St. Building is located on the same block but around the corner from the 11th St. Building.¹ An alley and an empty lot, which is used as a park, are located on the property immediately to the west of the 11th St. Building and south of the Mound St. Building. The licensee purchased the two buildings with the intention of using both as part of a single bar and restaurant business to be operated as the 11th Street Precinct Bar and Grill. The 11th St. Building was intended to house the bar and common beer cooler and to serve as a smoking dining area. The Mound St. Building was intended to serve as a more family oriented, non-smoking dining area.

There is a fenced outdoor service area connected to the northeast corner of the 11th St. Building. There is an alley immediately adjacent to the outdoor service area that runs behind both the 11th St. and the Mound St. Buildings. While the Davenport city clerk told the Division that this is a municipal alley, Mr. Wisor maintains that he owns the alley. This appears to be true because the plat map submitted by the licensee does not show a public alley behind the licensee's two buildings. (Testimony of John Wisor; State Exhibits 2, 4; Licensee Exhibits D, E)

2. Construction plans were prepared to renovate both buildings and to add a new addition to northwest corner of the 11th St. Building. The addition would house a new common kitchen, which would also serve as connector between the two buildings. The licensee's construction plans have been approved by the local building inspector and by the

¹ See State Exhibit 4-3 for a useful sketch of the area's layout.

Davenport Health Department, Fire Department and Police Department but were not submitted to the Alcoholic Beverages Division for input prior to construction.

Construction started on the non-smoking dining room in January 2007. Construction was largely completed in the kitchen addition at the end of August 2007. The licensee closed the 11th St. Building in mid-August for remodeling, which was expected to take about six weeks. (Testimony of John Wisor; Judy Seib; State Exhibits 2; 4-3)

3. The licensee planned to operate both dining rooms under a single liquor license and to have a single staff of employees. The licensee intended to purchase, store, and account for all food and alcohol for both dining rooms as one unit. Customers could be served food and alcoholic beverages in either dining room, although the licensee anticipates that customers in the non-smoking dining room would be more likely to order non-alcoholic beverages, beer, or wine, rather than liquor, with their meal. The non-smoking dining room does not have a separate bar or liquor storage area, but wait staff would be able to obtain drinks containing liquor from the bar area and serve them in the non-smoking dining room. Employees would pass from one dining room to the other through the common kitchen.

The plans and eventual construction did not include an interior passage or hall between the two dining rooms for use by the public. The Mound St. Building and the 11th St. Building each has its own separate outside entrance, and customers would have to walk outside if they wanted to go from the bar area/smoking dining room to the non-smoking dining room or vice-versa. The public entrance to the smoking dining room is the original entrance on 11th Street. The public entrance to the non-smoking dining room is through a small porch facing Mound Street that is accessed from the alley behind the Mound St. Building. Customers would either have to walk on the public sidewalk between the two buildings or else they could exit the 11th St. Building through the outside service area and walk down the alley to the entrance for the Mound St. Building. (Testimony of Judy Seib; John Wisor; State Exhibits 2, 4)

4. Sometime prior to June 5, 2007, representatives of the licensee spoke to two Division employees - Judy Seib and Karen Freund - and were surprised to learn that the Division likely would not approve an application to operate

the two dining rooms under a single liquor license because the plans did not include an interior connection allowing customers access to all common areas of the business without going outside. Judy Seib and Karen Freund have each been employed by the Division for more than twenty-five years and neither was aware of any case where a similar configuration had been approved by the Division for a single liquor license. (Testimony of John Wisor; Judy Seib; Karen Freund)

5. On June 5, 2007, the owner and the manager of Carpe Diem I, LLC sent a letter to the Administrator of the Alcoholic Beverages Division, explaining the business' plans to add a kitchen to connect the two buildings and attaching a sketch and a GIS photo depicting the plans. The licensee later filed a Premises Update Application. The licensee was aware of the Division's concerns about the configuration of the premises before construction was completed but did not think it was practical to add an interior hallway to join the two dining rooms. (State Exhibit 2; Testimony of John Wisor)

6. On August 14, 2007, the Administrator of the Iowa Alcoholic Beverages Division sent a letter denying the licensee's premises update application and provided the following reason for the denial:

A review of the sketch that you provided to the Division reflects that the two dining rooms are not contiguous for the purpose of patron traffic. Long-standing and well-reasoned agency precedent dictates that a single licensed premises be configured in a manner that allows patrons to move freely throughout the licensed premises without having to go outside to do so. The precedent is in place because of public safety concerns.

(State Exhibit 3)

7. Division employee Judy Seib was asked to explain the long-standing precedent relied upon by the Division in denying the application. Ms. Seib cited to two prior applications that did not result in contested cases:

a. Sometime in the 1980's, Spaghetti Works, which was a liquor licensee in the Court Avenue District of Des

Moines, purchased a second business (Julio's), which was next door to it in the same building, and asked to operate the two businesses under a single liquor license. The two businesses were separated by a solid wall and customers would have had to go outside on the public sidewalk to go from Spaghetti Works to Julio's. The Division advised the licensee that it could only operate under a single liquor license if an interior door was added to connect the two businesses. The licensee complied and added an interior door.

b. Somewhat more recently, the owner of the Hotel Fort Des Moines asked to license the Raccoon River Brew Pub under the same liquor license as the hotel. The hotel and the Brew Pub were in the same building and shared a common kitchen, but customers and guests would have to walk outside in order to pass from the hotel to the Brew Pub. The hotel's owner was advised that in order for both businesses to operate under a single liquor license, he would have to open an interior door to allow customers to go back and forth between the two businesses without going outside. The owner declined and chose to operate the two businesses under separate liquor licenses.

Ms. Seib explained that the Division's public safety concern, as she understood it, is that customers may attempt to carry alcoholic beverages out onto the public sidewalk or street as they traveled from one dining room to the other and that customers who had been drinking may wander into traffic.² (Testimony of Judy Seib)

8. The licensee estimates that a second liquor license could cost him an additional \$10,000 annually for the license fee, separate dram shop insurance, storage costs, and a separate accounting system. The licensee did not intend for customers to carry alcoholic beverages from the 11th St. Building to the Mound St. Building and assumed that alcoholic beverages would be consumed in the dining room where they were ordered. The licensee is willing to take steps to discourage/preclude customers from carrying

² As noted by Ms. Seib, Iowa Code section 123.46(2) prohibits the use or consumption of alcoholic liquor, wine or beer upon the public streets or highways and further prohibits the use or consumption of alcoholic liquor in any public place except premises covered by a liquor control license. As a practical matter, this means that liquor is more closely regulated than wine and beer, and it would be illegal for patrons to carry liquor outside of the licensed premises.

alcoholic beverages from one building to the other, such as posting signs stating "no alcoholic beverages beyond this point" and instructing its employees to stop customers attempting to walk outside with alcoholic beverages. (Testimony of John Wisor)

9. The licensee submitted letters of support for his application for a single liquor license from the mayor, an alderman, and an owner of a nearby business. (Testimony of John Wisor; Licensee Exhibits A-C)

CONCLUSIONS OF LAW

I. Applicable Statutes and Rules

Iowa Code section 123.32(5)(b)(2007) provides, in relevant part:

5. Action by administrator.

...

b. Upon receipt of an application having been approved by the local authority, the division shall make an investigation as the administrator deems necessary to determine that the applicant complies with all requirements for holding a license or permit... The administrator may appoint an administrative law judge of the department of inspections and appeals to receive the testimony under oath and evidence, and to issue a proposed decision to approve or disapprove the application for a license or a permit. The administrator may affirm, reverse, or modify the proposed decision to approve or disapprove the application for a license or a permit...

Iowa Code section 123.30(2)(2007) provides, in relevant part, that no liquor control license shall be issued for premises which do not conform to all applicable laws, ordinances, resolutions, and health and fire regulations.

Iowa Code section 123.31(2007) provides, in relevant part:

123.31 Application contents.

Except as otherwise provided in section 123.35, verified applications for the original issuance or renewal of liquor control license shall be

filed at the time and in the number of copies as the administrator shall prescribe, on forms prescribed by the administrator, and shall set forth under oath the following information:

...

2. The precise location of the premises for which the license is sought.

...

4. When required by the administrator, a sketch or drawing of the premises proposed to be licensed, in such form and containing such information as the administrator may require.

Iowa Code section 123.3(20)(2007) provides that "Licensed premises" or "premises" means all rooms, enclosures, contiguous areas, or places susceptible of precise description satisfactory to the administrator where alcoholic beverages, wine, or beer is sold or consumed under authority of a liquor license, wine permit, or beer permit. A single licensed premises may consist of multiple rooms, enclosures, areas or places if they are wholly within the confines of a single building or contiguous grounds.

185 IAC 4.4 provides:

185-4.4(123) Licensed premises. The following criteria must be met before a "place" (as used in Iowa Code section 123.3(20)) may be licensed as a "place susceptible of precise description satisfactory to the administrator."

4.4(1) The "place" must be owned by or under the control of the prospective licensee.

4.4(2) The "place" must be solely within the jurisdiction of one approving authority.

4.4(3) The "place" must be described by a sketch of the "premise" as defined in Iowa code section 23.3(20) and showing the boundaries of the proposed "place"; showing the locations of selling/serving areas within the confines of the "place," and all entrances and exits; and indicating the measurements of the "place," and distances between selling/serving areas.

4.4(4) The "place" must satisfy the health, safety, fire and seating requirements of the division, local authorities and Iowa department of agriculture and land stewardship.

II. Discussion

Except for the parties' disagreement over whether the alley located behind the two buildings is owned by the licensee or municipally owned, the facts are not in dispute. The licensee purchased two buildings on different but adjacent streets and provided an interior connection between the two buildings by constructing a new, common kitchen. The licensee's employees now have interior access to both dining rooms without venturing outside, but customers will have to walk outside and around a corner if they want to go from one dining room (building) to another. The Division denied the premises update application because the "two dining rooms are not contiguous for the purpose of patron traffic." In testimony, the Division's witness explained that this requirement is due to a public safety concern that customers may carry their alcoholic beverages from one dining room to the other and wander into traffic or otherwise encounter conditions hazardous to their safety.

The parties agree that the applicable statutes nor the rules do not explicitly prohibit the premises configuration proposed by the licensee or specifically require that all areas of a single licensed premises must be "contiguous for purposes of patron traffic." Iowa Code section 123.3(20) explicitly permits a single licensed premises to consist of multiple rooms, enclosures, area or places if they are solely within the confines of a single building or contiguous grounds.

While the 11th St and Mound St. Buildings have different street addresses and separate entrances, the new addition arguably makes them part of a single building. The statute and rules do not define "contiguous grounds." In the absence of a legislative definition or a peculiar meaning in law, statutory terms are given their ordinary meaning. See State v. Ahitow, 544 N.W.2d 270, 272 (Iowa 1996). (finding that it is appropriate to examine the dictionary definition of a term that is not defined by the legislature). The dictionary defines "contiguous" as "1. Sharing an edge or boundary; touching. 2. Nearby; neighboring; adjacent." "Grounds" is defined as "...An area of land designated for a particular purpose: *burial grounds*...The land surrounding or forming part of a house or other building..." The American Heritage Dictionary, Second College Edition. The licensee's post construction

configuration, as depicted in State Exhibit 4-3, certainly appears to fit within the ordinary meaning of contiguous grounds.

The Division contends that through the following statutory language, the legislature has delegated wide discretion to the Administrator to approve or disapprove a particular configuration of a licensed premises:

*"Licensed premises" or "premises" means all rooms, enclosures, contiguous areas, or places susceptible of precise description **satisfactory to the administrator...***

Iowa Code section 123.3(20)(2005)(emphasis added)

However, the words "satisfactory to the administrator" appear to modify "places susceptible of precise description" not the entire definition. The premises proposed by the licensee are clearly and precisely described.

The Division asserts that consistent past agency precedent supports its interpretation of the statute and the denial on grounds of public safety. The licensee responds that it is arbitrary and capricious to deny the application based on unpublished agency precedent that does not put the public on notice of the applicable standards. The licensee further argues that requiring two separate licenses will not alleviate the specific public safety concern cited by the Division's representatives at the hearing, since the potential concern of customers trying to take alcoholic beverages from one dining room to another would still exist and arguably exists for all licensed liquor establishments, regardless of whether the business is operated under one liquor license or two liquor licenses.

The preponderance of the evidence established that the licensee's premises update application should be granted. While the configuration proposed by the licensee is awkward, nothing in the statutes or rules specifically proscribes it, and the Division has not articulated a sufficient rationale to support the denial. The two dining rooms, connected by the common kitchen, are in contiguous areas and/or multiple rooms wholly within contiguous grounds. The licensee intends to operate the two dining rooms as part of a single identifiable business; not under

two separate business names as in the past precedents cited by the agency. Alcoholic beverages will be served in both dining rooms through the common service areas accessible to the employees. While there is a risk that customers may try to carry alcoholic beverages from one dining room to the other, the licensee plans to discourage them from doing so, and that same risk exists even if there are two separate liquor licenses. Requiring two separate liquor licenses does not alleviate any identifiable public safety concern and is overly burdensome to the licensee.

ORDER

IT IS THEREFORE ORDERED that the initial decision of the Iowa Alcoholic Beverages Division denying the premise update application filed by Carpe Diem I, LLC, d/b/a 11th St. Bar and Grill, is hereby REVERSED.

Pursuant to the administrative rules of the division, any adversely affected party may appeal a proposed decision to the Administrator of the Alcoholic Beverages Division within thirty (30) days after issuance of the proposed decision. In addition, the Administrator may initiate review of a proposed decision on the Administrator's own motion at any time within thirty (30) days following the issuance of a proposed decision. 185 IAC 10.27(1) and (2).

Requests for review shall be sent to the Administrator of the Alcoholic Beverages Division, 1918 S.E. Hulsizer, Ankeny, IA 50021. Unless otherwise ordered, each appealing party may file exceptions and briefs within thirty (30) days of the notice of appeal or order for review. Within thirty (30) days thereafter, any party may file a responsive brief. The Administrator may shorten or extend the briefing period as appropriate. The Administrator may resolve the appeal on the briefs or provide an opportunity for oral argument. 185 IAC 10.27(6). The administrator may affirm, reverse or modify the proposed decision.

A party who is adversely affected by the proposed decision shall not be deemed to have exhausted administrative remedies unless the adversely affected party files a request for review of the proposed decision within the time provided and the Administrator has reviewed the proposed decision and has affirmed, reversed, or modified the proposed decision.

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Dated this 16th day of October, 2007.

Margaret LaMarche

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CC: See Attached Mailing List

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