

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-9894

File: 20-592186; Reg: 20090101

ISSAM ALSHAER,
Appellant/Protestant

v.

CIRCLE K STORES, INC.,
dba Circle K
Avenue K & Division Street
Lancaster, CA 93535
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: April 9, 2021
Telephonic

ISSUED APRIL 9, 2021

Appearances: *Appellant/Protestant:* Issam Alshaer, in propria persona,

Respondents: Joshua Kaplan, as counsel for applicant Circle K Stores, Inc.; and Sean Klein, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Issam Alshaer (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ granting the application of Circle K Stores, Inc., doing business as Circle K (applicant), for an off-sale beer and wine license.

¹ The decision of the Department, dated October 29, 2020, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On March 22, 2018, the applicant petitioned for issuance of an off-sale beer and wine license. A protest against the issuance of the license was filed by the appellant, and an administrative hearing was held via video conference on August 12, 2020. Oral and documentary evidence was presented by Department Licensing Representative Angelica Rivera; the applicant's Regional Director of Operations, Jorge Parra; and appellant/protestant Issam Alshaer, the owner of Bootleggers 2, a licensed premises located 250 feet north of the proposed premises. (Findings of Fact, ¶ 14.)

Testimony established that the proposed premises has not been previously licensed through the Department and there have been no complaints or accusations against it. The Lancaster Police Department did not oppose or object to the issuance of the license. When completed, the proposed premises will include a gas station, convenience store, and car wash. Only the convenience store will have an alcoholic beverage license.

The issues considered at the administrative hearing were whether issuance of the applied-for license would be contrary to public welfare or morals on the basis that: the applied-for premises is located near various consideration points and other sensitive uses, and the applied-for premises is not properly zoned. (Decision, at p. 1.)

The premises was required to obtain a Conditional Use Permit (CUP) prior to applying for an alcoholic beverage license. The Planning Commission initially denied the CUP, but that decision was appealed to the Lancaster City Council. The City Council overruled the Planning Commission and the CUP was issued.

The appellant then sought to overturn the City Council's decision by seeking a writ of mandate in Superior Court, but the writ was denied. That decision was

subsequently appealed to the 2nd Circuit Court of Appeals, where the lower court's decision was affirmed.

Following the Department's administrative hearing, the administrative law judge (ALJ) issued a proposed decision on September 10, 2020, recommending that the Department deny appellant's protest and allow the license to issue. The Department adopted the proposed decision in its entirety on October 27, 2020, and a certificate of decision was issued on October 29, 2020.

Appellant then filed a timely appeal contending the Department's decision should be reversed because: (1) the investigation by the Department was inadequate and fails to properly address the premises' proximity to consideration points,² (2) it fails to

² A consideration point is, in Department terminology, a church, school, hospital, play ground, youth facility, or residence. These are singled out for special consideration when they are located within a specified proximity to a proposed premises.

Business and Professions Code § 23789 provides:

(a) The department is specifically authorized to refuse the issuance, other than renewal or ownership transfer, of any retail license for premises located within the immediate vicinity of churches and hospitals.

(b) The department is specifically authorized to refuse the issuance, other than renewal or ownership transfer, of any retail licenses for premises located within at least 600 feet of schools and public playgrounds or non-profit youth facilities, including, but not limited to, facilities serving girl scouts, boy scouts, or campfire girls. This distance shall be measured pursuant to rules of the department.

In addition, Department rule 61.4 provides, in pertinent part:

No original issuance of a retail license or premises-to-premises transfer of a retail license shall be approved for premises at which either of the following conditions exist:

(a) The premises are located within 100 feet of a residence.

(Cont.)

adequately address the issue of high crime in the area, (3) the license would exceed the number of licenses permitted in the census tract by Business and Professions Code section 23958.4, and (4) the finding of convenience and necessity is not supported by substantial evidence.

The issues are closely related, and will be treated as a single issue — i.e., was there substantial evidence in the record to support the Department’s determination that a type-20 off-sale beer and wine license should be issued to the applicant?

DISCUSSION

This Board is bound by the factual findings in the Department’s decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department’s findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department’s determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department’s factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for

³ cont.

(b) The parking lot or parking area which is maintained for the benefit of patrons of the premises, or operated in conjunction with the premises, is located within 100 feet of a residence. . . .

¶ . . . ¶

Notwithstanding the provisions of this rule, the department may issue an original retail license or transfer a retail license premises-to-premises where the applicant establishes that the operation of the business would not interfere with the quiet enjoyment of the property by residents.

(Cal.Code Regs, tit. 4, § 61.4.)

consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004)

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision.

(Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101

Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board (1963) 212*

Cal.App.2d 106, 112 [28 Cal.Rptr.74].)

Therefore, the issue of substantial evidence when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; Harris, supra, at p. 114.*)

When an application for a new alcoholic beverage license is submitted, Business and Professions Code section 23958 directs the Department to conduct an investigation to determine whether that license should issue:

Upon receipt of an application for a license or for a transfer of a license and the applicable fee, the department shall make a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license and whether the provisions of this division have been complied with, and shall investigate all matters connected therewith which may affect the public welfare and morals. The department shall deny an application for a license or for a transfer of a license if either the applicant or the premises for which a license is applied do not qualify for a license under this division.

The department further shall deny an application for a license if issuance of that license would tend to create a law enforcement problem, or if issuance would result in or add to an undue concentration of licenses, *except as provided in Section 23958.4.*

(Bus and Prof. Code § 23958, emphasis added.)

The exception contained in section 23958.4 provides that a license may still be issued, despite the existence of undue concentration, if public convenience and necessity would be served. The determination of public convenience and necessity is made by the local governing body — in this case the Lancaster City Council — rather than by the Department:

Nothing in the plain language of either section 23958 or section 23958.4 requires the Department to independently determine whether issuing the license would serve public convenience or necessity if the local governing body already made that determination.

(*Nick v. Department of Alcoholic Beverage Control* (2014) 233 Cal.App.4th 194, 205 [182 Cal.Rptr.3d 182].)

The Department conducted an investigation in this matter, pursuant to section 23958, as part of its licensing procedure. That investigation determined that issuance of the license would not have an adverse effect on the surrounding area and that no consideration points prohibited its issuance. The investigation also noted that the Lancaster Police Department did not object to the issuance, that a CUP had been issued, and that public convenience and necessity had been determined by the local

authority — supporting the investigator’s finding that issuance was recommended.
(Exh. 2.)

In a protest matter, “the applicant bears the burden of proof regarding the applicant's eligibility for a liquor license from the start of the application process until the Department makes a final determination.” (*Coffin v. Alcoholic Beverage Control Appeals Bd.* (2006) 139 Cal.App.4th 471 [43 Cal.Rptr.3d 420].) The ALJ determined that the applicant in this matter met this burden of proof.

In his opening brief, appellant asserts that the Department’s decision is in error. He cites no legal authority for his position, nor does he reference citations to the record in claiming error. We are presented only with his opinion.

To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. Where a point is merely asserted without any argument or support for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing authority. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72].)

The Department has been given broad discretion by the Legislature, as interpreted by the courts, with respect to the issuance or denial of a license. In *Koss*, that discretion was described this way:

[T]he Department exercises a discretion adherent to a standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject. If the decision is reached without reason under the evidence, the action of the Department is arbitrary, constitutes an abuse of discretion, and may be set aside. Where the decision is the subject of a choice within reason, the Department is vested with the discretion of making the selection which it

deems proper; its action constitutes a valid exercise of that discretion; and the Appeals Board or the court may not interfere therewith.

(*Koss v. Dept. of Alcoholic Bev. Control* (1963) 215 Cal.App.2d 489, 496 [30 Cal.Rptr.2d 219].)

The Department's decision lays out in great detail the evidence supporting the ALJ's recommendation that the license should be issued, and for the conclusions that: (1) issuance of the license would not be contrary to public welfare and morals, (2) that the applicant met its burden of proof, and (3) that the protest should be overruled. Appellant clearly favors different conclusions, but mere disagreement with a decision is not grounds for reversal, when, as here, it is a "choice within reason." (*Ibid.* at p. 496.)

To reach these conclusions, the ALJ considered evidence and testimony on whether there was proper zoning; whether a CUP was in place; whether there were consideration points in proximity to the premises, such as residences, playgrounds or churches; whether the local police department objected; whether crime and over-concentration had been properly considered; whether a law enforcement problem exists; and whether public convenience and necessity had been determined. We have carefully reviewed the entire record and find no error in the findings and conclusions reached by the ALJ. Appellant is asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. Appellant has not demonstrated that the decision was arbitrary or an abuse of discretion — accordingly, the Board is not empowered to reach a different result.

Disagreement with the findings and conclusions in the decision constitutes neither error nor an abuse of discretion. The applicant made its case: it met its burden of proof to show that the issuance of the license would not be contrary to public welfare

and morals and that the protest should be overruled. Having failed to rebut that case at the administrative hearing, and without establishing actual error — but merely criticizing the Department’s investigation and ultimate decision — appellant is essentially urging the Board to relitigate the facts of the underlying case. It is not within the Board’s authority to do so. (See Bus. & Prof. Code, § 23084, *supra*; *Boreta, supra*, at p. 94; *Harris, supra*, at p. 114; *Kirby, supra*, at p. 335.)

ORDER

The decision of the Department is affirmed.³

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
SHARLYNE PALACIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE PROTEST OF:

ISSAM ALSHAER

AGAINST THE ISSUANCE OF A LICENSE TO:

**CIRCLE K STORES, INC.
CIRCLE K
AVENUE K & DIVISION ST. SEC
LANCASTER, CA 93535**

OFF-SALE BEER AND WINE - LICENSE

VAN NUYS DISTRICT OFFICE

File: 20-592186

Reg: 20090101

CERTIFICATE OF DECISION

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on October 27, 2020. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after December 8, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: October 29, 2020



Matthew D. Botting
General Counsel

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE PROTEST OF:

Issam Alshaer

**AGAINST THE PERSON-TO-PERSON AND
PREMISES-TO-PREMISES TRANSFER OF AN
OFF-SALE BEER AND WINE LICENSE TO:**

Circle K Stores, Inc.
dba Circle K
SEC Avenue K & Division St.
Lancaster, California 93535

Under the Alcoholic Beverage Control Act

} File: 20-592186

} Reg.: 20090101

} License Type: 20

} Word Count: 25,500

} Reporter:

} Marceline Novel

} Idepo Reporters

} **PROPOSED DECISION**

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Van Nuys, California, on August 12, 2020.

Angela L. Cash, Attorney, represented the Department of Alcoholic Beverage Control.

Joshua Kaplan, attorney-at-law, represented applicant Circle K Stores, Inc.

Protestant Issam Alshaer personally appeared and represented himself. The protestant was allowed to appear and participate in the hearing as a party pursuant to Government Code section 11500(b).

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on August 12, 2020.

ISSUES

The issues to be determined are whether issuance of the applied-for license would be contrary to public welfare or morals on the basis that (1) the applied-for premises is located near various consideration points and other sensitive uses and (2) the applied-for premises is not properly zoned.

FINDINGS OF FACT

1. The pending application was filed with the Department on March 22, 2018. It seeks issuance of a type 20, off-sale beer and wine license for premises located on the southeast corner of Avenue K and Division St. in Lancaster, California (the Proposed Premises). Both Avenue K and Division St. are major thoroughfares.
2. The Proposed Premises is currently under construction. It will consist of a gas station, a convenience store, and a car wash when completed. The convenience store is the only part of the operation which will be licensed and will comport to the licensed premises diagram (exhibit 3) submitted by the Applicant. The convenience store will be located on the lot as set forth in the supplemental diagram (exhibit 4) submitted by the Applicant.
3. The convenience store will carry groceries, fresh fruit, fresh prepared foods, cigarettes, tobacco, lottery tickets, and propane tanks. It will have exterior signs prohibiting loitering and the consumption of alcoholic beverages on the premises. Security will include video surveillance of the Proposed Premises. The video can be monitored by the Regional Director of Operations, the on-site manager, and a centralized corporate office.
4. The Applicant requires all new employees to undergo 40 hours of training, eight of which involve modules which cover the sale of age-restricted products. The register system used by the Applicant at its other locations, which also will be used at the Proposed Premises, prompts employees to ask for and scan ID. Once the register indicates that the ID is valid, employees are trained to verify that the ID belongs to the person presenting it.
5. The area in which the Proposed Premises is located is primarily commercial. There are no residences within 100 feet of the Proposed Premises.
6. The Department contacted the City of Lancaster to determine whether the Proposed Premises was properly zoned. The city indicated that it was. The conditional use permit for the Proposed Premises was approved by the City Council on May 9, 2017. (Exhibit B.)
7. There are two churches in the area, both of which share the same address. They are located approximately 800 feet away from the Proposed Premises. The first, Grace Reformed Church, was contacted by letter dated December 18, 2019 and advised of the application. They did not respond. The second, Iglesia de Dios Betel, was contacted by letter dated February 12, 2020 and advised of the application. They also did not respond.

8. Penny Lane, a nonprofit organization serving families and youths, is located next door to the Proposed Premises. The Department contacted Penny Lane twice about the application. Both times they indicated that they did not object to issuance of the applied-for license.

9. A variety of government offices are located in the general area. To the north are juvenile probation offices, to the west are parole offices, and to the south are probation offices. (Exhibit III.)

10. The Department contacted the Lancaster Station of the Los Angeles County Sheriff's Department when the application was first filed. On December 10, 2019, the Department notified Dep. L. Jordan, LASD Lancaster Station, by e-mail. LASD did not respond nor did it file a protest.

11. The Proposed Premises is located in LASD's crime reporting district 1134. The average number of offenses per district is 246. Reporting district 1134 had 339 offenses, 137.8% of average.

12. The Proposed Premises is located in census tract 9005.01. Using the formula specified in Business and Professions Code section 23958.4,¹ three off-sale licenses are permitted within this census tract. At the time the application was filed, four such licenses existed. The applied-for license, if issued, would be the fifth.

13. As part of its approval of the conditional use permit, the City of Lancaster determined that public convenience or necessity would be satisfied by issuance of the applied-for license. (Exhibit B.)

14. Only one protest was received in connection with this application, from Issam Alshaer. Alshaer holds an alcoholic beverage license for a business located 250 feet north of the Proposed Premises in the same census tract.

15. Alshaer testified that he did not believe the city's approval of the conditional use permit for the Proposed Premises complied with the city's own procedures. He noted that the Zoning Department and the Planning Commission both denied the application for a conditional use permit for the Proposed Premises. (Exhibits I-II.) After the City Council overruled the Zoning Department and the Planning Commission and approved the conditional use permit, Alshaer filed a petition for writ of mandate challenging this approval. The writ of mandate was ultimately denied. (Exhibit C.)

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

16. Alshaer's business opened in 1972. He testified that there was no crime problem in the general area until after the various government offices described above opened. Since then, crime in the area has increased, including a recent break-in at his business. (Exhibit IV.) He also noted that LASD had public safety concerns with a conditional use permit being issued unless certain conditions were attached to it. (Exhibit V.) Alshaer has worked with the City of Lancaster for the past three years to deal with alcohol-related problems in the area. In his opinion, crime continues to be a problem and an additional license will only aggravate it.

17. The licensing representative who conducted the investigation into this application recommended that it be approved. The Department adopted this recommendation.

18. Except as set forth in this decision, all other allegations in the protest and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution delegates the exclusive power to license the sale of alcoholic beverages in this state to the Department of Alcoholic Beverage Control.

2. Section 23958 requires that the Department conduct a thorough investigation to determine, among other things, if the applicant and the Proposed Premises qualify for a license, if the provisions of the Alcoholic Beverage Control Act have been complied with, and if there are any matters connected with the application which may affect public welfare or morals. It provides, in part, that the Department shall deny an application for a license if the applicant or the Proposed Premises do not qualify for a license under the Act. It further provides that the Department shall deny an application for a license if issuance of the license (a) would tend to create a law enforcement problem or (b) would result in or add to an undue concentration of licenses, except as provided in section 23958.4.

3. In a protest matter, the applicant bears the burden of establishing that it is entitled to a liquor license from the start of the application process until the Department makes a final determination.²

4. Section 23958.4 sets forth a two-prong test for determining whether an area has an overconcentration of licenses. The first prong relates to the number of reported crimes in the relevant reporting district, while the second relates to the number of licenses within the relevant census tract. An area is over-concentrated if either prong is met. Even if an

² *Coffin v. Alcoholic Beverage Control Appeals Board*, 139 Cal. App. 4th 471, 43 Cal. Rptr. 3d 420, (2006).

area is over-concentrated, the license may still issue if the applicant demonstrates that public convenience or necessity would be served.

5. Examining the first prong of section 23958.4, a reporting district is overconcentrated if the reporting district in which the applied-for premises is located has a 20% greater number of crimes, as defined, than the average number of crimes from all reporting districts. The reporting district in which the Proposed Premises is located has a crime rate 37.8% higher. (Finding of Fact ¶ 11.)

6. Examining the second prong of section 23958.4, the census tract in which the Proposed Premises is located is overconcentrated. Using the formula set forth in that section, only three off-sale licenses are permitted in census tract 9005.01. At present, four off-sale licenses exist. The applied-for license, if issued, would be the fifth. (Finding of Fact ¶ 12.)

7. Since both prongs of section 23958.4 have been met, a finding of public convenience or necessity must be made before a license can issue. In the present case, that responsibility rests with the City of Lancaster. The city made such a finding as part of its conditional use permit process. (Finding of Fact ¶ 13.)

8. Section 23789 provides that the Department is specifically authorized to refuse to issue any retail license for premises located (a) within the immediate vicinity of churches and hospitals or (b) within 600 feet of schools and public playgrounds or nonprofit youth facilities.

9. There are three consideration points in the present case, Penny Lane, Grace Reform Church, and Iglesia de Dios Betel. There is no evidence that issuance of the applied-for license or the operation of the Proposed Premises will interfere with any of the consideration points. In making this determination, great weight is given to fact that none of them objected to issuance of the license or file a protest. (Findings of Fact ¶¶ 7-8.)

10. The various government offices which are located in the general area of the Proposed Premises are not consideration points. There is no evidence that the operation of the Proposed Premises will interfere with any of those offices or the people they serve. (Finding of Fact ¶ 9.)

11. Section 23790 provides, in part, that “[n]o retail license shall be issued for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county or city.”

12. In the present case, the Proposed Premises is properly zoned based on the resolution adopted by the Lancaster City Council. It is irrelevant that the Zoning Department and

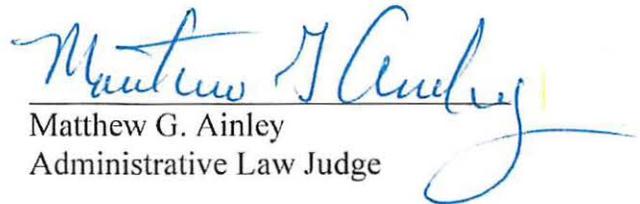
the Planning Commission denied the application for a conditional use permit at interim stages in the approval process—only the final decision is relevant. (Findings of Fact ¶¶ 6, 13 & 15.)

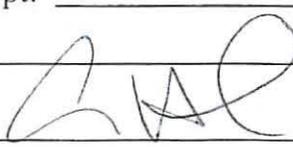
13. Although Issam Alshaer opined that crime levels in the area were high and testified about one incident which directly affected his business, there is no evidence of a law enforcement problem in the area. Although the area is statistically high crime as set forth above, the Los Angeles Sheriff's Department did not raise any objections when advised of the application the first time or the second time. Great weight is given to the absence of any identifiable law enforcement problem from the Sheriff's Department. (Finding of Fact ¶ 10.)

ORDER

The protest of Issam Alshaer is overruled and dismissed. The type 20, off-sale beer and wine license shall issue to Circle K Stores, Inc.

Dated: September 10, 2020


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>10/27/20</u>