IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

JAMES EDWARD GANT,

Appellant,

Vs.

Decatur Chancery No. 2676
C.A. No. 02A01-9701-CH-00007

KENNETH BROADWAY, COUNTY EXECUTIVE AND CHAIRMAN OF THE DECATUR COUNTY COMMISSION, and THE DECATUR COUNTY COMMISSION CONSISTING OF EIGHTEEN (18) MEMBERS AND INCLUDING: BARNEY BLASINGIM, FRANK MARTIN, GARY CREASY, JAMES C. MOODY, RANDA BRASHER, JIMMY KELLEY, GLENN BRASHER, MICKEY LARKINS, DAVID BOROUGH, WAYNE ODLE, PATTY BURKHEAD, BOBBY SWINDLE, BILLY GOODMAN, JAMES KING, DANNY ROBERTS, MARY ELLA TEAGUE, MIKE BOX AND PHILIP GULLEDGE,

Appellees.

FROM THE CHANCERY COURT AT DECATUR
THE HONORABLE J. WALTON WEST, CHANCELLOR

James E. Brockman of Parsons
For Appellant

J. Michael Ivey of Parsons
For Appellees, Broadway and Decatur County Commission

REVERSED AND REMANDED

Opinion filed:

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

HOLLY KIRBY LILLARD, JUDGE

HEWITT P. TOMLIN, JR., SENIOR JUDGE

Petitioner, James Edward Gant, appeals the judgment of the chancery court denying his application for a beer permit.

On December 5, 1995, Gant filed an application for a beer permit to sell beer for on

premises and off premises consumption at a location on Highway 412 approximately three miles east of Parsons, Decatur County, Tennessee. The Decatur County Commission acts as the beer board, and on January 22, 1996, denied the application.

Pursuant to the provisions of T.C.A. § 57-5-108(d) (Supp. 1997), Gant filed a petition for statutory writ of certiorari to obtain a trial *de novo*. The petition was granted, and a nonjury trial was held September 3, 1996.

At the conclusion of the proof, the trial court found that "the sale of beer at the proposed location of applicant's business will cause congestion of traffic and will otherwise interfere with public safety within the definition of T.C.A. § 57-5-105 (b)(1)" and denied the application. Gant has appealed, and the only issue for review is whether the trial court erred in denying petitioner's application.

The criteria for obtaining a beer permit is set out in T.C.A. § 57-5-101 (Supp. 1997), and as pertinent to the instant case, provides:

> (b) In order to receive a permit, an applicant must establish that: (1) No beer will be sold except at places where such sale will not cause congestion of traffic or interference with schools, churches, or other places of public gathering, or otherwise interfere with public health, safety and morals, the county legislative body having the right to forbid such storage, sale or manufacture at places within two thousand feet (2,000') of such places of public gatherings in its discretion. Nothing in this subdivision shall apply to places of business that are located in the terminal or main building at public airports serviced by commercial airlines with regularly scheduled flights;

Petitioner's proof established that traffic congestion and safety were not considered by the beer board in the denial of the application. Petitioner's building replaced a building that was destroyed by fire in 1984. Prior to that time, ten different persons at various times had beer permits at this location between 1961 and 1984. The petitioner's building is approximately 56 ½ feet from the edge of U.S. Highway 412. Proof was introduced that several establishments selling beer along Highway 412 have approximately the same set-back and are located on sites with similar terrain.

Petitioner's location is on the south side of the highway, and for vehicles traveling east, the location is on an upgrade with the crest of the hill farther east of the location. The County's primary proof was from John Reinhardt, a traffic accident reconstruction engineer, qualified as an expert. He relied upon guidelines furnished by the American Association of State Highway

Transportation Officials (AASHTO) and the Manual of Uniform Traffic Control Devices (MUTCD) as to recommended safe stopping distances, which he testified that experts in the area generally use. According to the AASHTO, the recommended sight distance for a 55 m.p.h. vehicle in the passing zone is 1,800 feet, and MUTCD recommends 800 feet under the same circumstances. He testified that for the location in question the sight distance east of the area was between 294 feet and 468 feet. He also testified that for the purposes of stopping, the guidelines suggest 450 to 550 feet and that the sight distance for the area in question was 349 to 522 feet. He concluded by stating that the location in question is unacceptable for passing and marginal with respect to stopping.

The testimony of the expert was confusing at best. The expert should have been able to give an opinion as to whether a vehicle proceeding at the speed limit in a westerly direction would be able to stop after topping the hill and observing a vehicle pulling from the proposed location into the highway to proceed west. This was never clearly brought out. However, the expert did opine that for stopping purposes the location did provide marginal safety. Neither the expert nor any other witness offered any testimony concerning traffic count or any other evidence of traffic congestion, either with or without a beer selling establishment at the proposed location.

The county also introduced proof concerning two other accidents near this location, but it is significant that these accidents did not occur over the crest of the hill, but rather, occurred on the crest of the hill. At least one of the accidents involved a head-on collision when one vehicle went across the centerline of the road. Apparently, one or both of the accidents involved alcohol consumption.

We think that it is rather significant that there is no evidence of a history of prior accidents or traffic congestion when it is undisputed that at this same location there have been ten previous establishments that served beer. Since the location had been utilized for the sale of beer to such a great extent and no evidence of a traffic problem existed, the obvious perception is that this location is not unsafe, or at least not any more unsafe for the sale of beer than it would be for a retail establishment of another kind. Moreover, the record establishes that in 1983, in a beer application proceeding, the chancery court found that the location was unsafe and denied the applicant a beer permit. Some several months later, the county beer board granted an

application for a beer permit for this location. Thus, it appears that the perception by the county authorities at that time was that this was a proper location insofar as traffic is concerned.

In ***Hinkle v. Montgomery***, 596 S.W.2d 800 (Tenn. 1980), the Court said:

> Moreover, as we noted in ***Lones v. Blount County Beer Board,*** Tenn., 538 S.W.2d 386, 390 (1976), in order for traffic congestion to constitute a valid basis for denying a permit to sell beer in the package it must be shown that the issuance of a permit would cause traffic to be *more* congested and *more* hazardous than it was prior to the issuance of the permit, a fact most difficult to establish with respect to a location at which beer has not been sold previously.

Id. at 801 (emphasis supplied).

In the case before us, beer had been sold at this location previously, and as we noted, no proof whatsoever was introduced that traffic was more congested and hazardous during the periods of time that the ten previous beer permits were in existence. Moreover, there was no proof, as required by ***Lones*** and ***Hinkle,*** that traffic will be more congested and unsafe *after* issuance of the permit than it was *before* issuance.

Since this case was tried by the court sitting without a jury, we review the case ***de novo*** upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13 (d).

From a review of the entire body of proof in this case, we conclude that the evidence does preponderate against the trial court's finding that the sale of beer at this location would cause congestion of traffic and would interfere with public safety. The trial court specifically stated in his oral ruling from the bench that except for this finding the petitioner would be entitled to the permit.

Accordingly, the judgment of the trial court is reversed, and the case is remanded to the chancery court for entry of an order directing the Decatur County Beer Board to issue a permit to the petitioner in accordance with his application. Costs of the appeal are assessed against the appellees.

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

HOLLY KIRBY LILLARD, JUDGE

_____

HEWITT P. TOMLIN, JR.
SENIOR JUDGE