

LOCAL VIEWPOINT

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Toward Liquor Control: Back to the Future with Alcohol Policy

by Paul Pisano

The regulation of alcohol by states and local governments has been a bedrock of alcohol policy since the ratification of the 21st Amendment. Recently, various attempts to change alcohol regulation have surfaced in various states and local areas. Debates over state controlled alcohol sales to local “dry vs. wet” elections continue to this day. However, not much attention has been paid to the origins of the system that is being used.

Since its original publication in 1933, *Toward Liquor Control* has greatly influenced how alcohol is regulated in the United States of America. The Center for Alcohol Policy has recently republished *Toward Liquor Control* and reintroduced it into the public debate at a time when certain groups are questioning alcohol regulation in general.

The debate about alcohol policy and the role of alcohol in society has been a part of American life since the earliest days of our country. While the Public Broadcasting Service and Ken Burns’ recent documentary on Prohibition concentrates on the period from 1917 to 1933 when alcohol was illegal, the issues surrounding alcohol and how to create a system that regulates this socially sensitive product continues to this day.

Why do I in Virginia have to go to a state ABC store to buy bourbon? Why is it easier to get a bottle of wine than a bottle of tequila in Connecticut? Why are some parts of Texas “dry” while others are “wet?” The explanation for each of these laws can all be traced to the research of Raymond Fosdick and Albert Scott and their seminal work *Toward Liquor Control*.

Daniel Okrent, author of *Last Call*, has noted that *Toward Liquor Control* is just as relevant today as it was when it was published in 1933. Why is that? The relevance is a function of the scholarly research and prescience exhibited by the researchers in their efforts.

Fosdick and Scott undertook the research and writing of this book at the behest of John D. Rockefeller Jr. In a preface to *Toward Liquor Control*, Rockefeller notes that while he was a proud teetotaler, he recognized that the “regrettable failure of the 18th amendment has demonstrated that the majority of people of this country are not yet ready for total abstinence, at least when it is attempted through legal coercion.”

The importance of Rockefeller to American alcohol policy cannot be underestimated. He was a leading voice

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Message from the Chair

by Meredith Ladd

Welcome to the 2011 State and Local Government Relations Section Newsletter!

I would like to take a moment to introduce myself. My name is Meredith Ladd and I have worked with or for local governments for approximately 13 years. I started my career working in-house as an assistant city attorney. For the past 9.5 years, I have worked for a private firm representing numerous municipalities. Working with municipalities offers daily variety and the opportunity to work directly with the employees of firm clients that is both challenging and rewarding.

It is an honor to serve as the chair of the State and Local Government Relations Section. Prior to beginning my tenure in October, I had the fortune to attend the 2011 Federal Bar Association Annual Convention in Chicago. This experience provided me with the opportunity to develop relationships with other Federal Bar Association section and division chairs and chair-elects. I am working with these members to help develop and promote this section.

State and local government attorneys advise clients in a wide variety of areas. Our practices can range from daily

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and funder of efforts to pass National Prohibition. He actively campaigned for and is associated with passage of the 18th Amendment, yet his published letter to the *New York Times* in 1932 saying Prohibition does not work is viewed by many as a key turning point in the effort to repeal the 18th Amendment.

However, Rockefeller did not simply say “I was wrong” and disappear from the issue. Instead he put his money into an effort to make sure the return of legal alcohol would be done properly. In 1933, he hired Raymond Fosdick, an expert on law enforcement matters, and Albert Scott, an expert on engineering solutions, to do a comprehensive study of how alcohol was regulated across the world to help prepare the United States.

The timing of this effort was important. In early 1933, 3.2 beer had already been made legal. The rush to legalize alcohol again was moving quicker but serious study was necessary to discuss alcohol regulation. As Senator Capper was quoted in this book, “We may repeal Prohibition, but we cannot repeal the Liquor Problem.” Rockefeller’s study was a serious and successful effort to turn the national conversation to the question of “what next?” How will we regulate alcohol again? Do we want bootleggers? How will we stop them? Do we want saloons? Should we heavily tax alcohol? Most importantly, how do we create a political solution that can prevent a return of the vacillation between periods where the “drys” win and then the “wets” win like a metronome?

Toward Liquor Control represents the work product of Fosdick and Scott and contains several strong principles that have guided alcohol regulation in America ever since. Fosdick and Scott recognized that a one-size-fits-all approach such as Prohibition was a failure; “the forty-eight states will constitute a social science laboratory in which different ideas and methods can be tested.” A state-based system, accountable to local needs, was identified as the preferable option to the one-size-fits-all federal policy.

The 21st Amendment did not simply stop at Section 1 and repeal the

18th Amendment which would have reinstated the pre Prohibition rules. Rather, it added the critical section 2. “The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” The specific reference to state powers and state authority is remarkable when you consider what was happening in this time period.

President Roosevelt had just been elected and was starting to implement the New Deal. The Depression was weighing heavily on the American psyche. With breathtaking speed, huge portions of the economy and aspects of the daily life of Americans were being moved under the control of the federal government. The effort to make the federal government the “problem solver” was at its peak. However, at the very same time, the nation said loudly, “Except alcohol.” Instead, this issue was to be left to the states.

To help ensure success for the next stages of alcohol regulation, Fosdick and Scott recommend several positions that a new regulatory system for alcohol should possess:

1. The strongest possible state control over the system. The authors had a clear preference for the authority/control plan. This is the system that has survived in 18 states across the country in which state governments run the alcohol systems that sell liquor. The authors were very skeptical about licensed systems because they predicted the alcohol industry would get too large, powerful and persuasive in its continued attempts to loosen alcohol regulations
2. The authors strongly articulate reasons to separate those making alcohol from those selling alcohol to prevent a return to the pre-Prohibition issues of the saloon. The saloon with its absentee ownership and incentives to push large volumes of alcohol into society was to be discouraged at all costs.
3. The authors push to make higher

alcoholic products more regulated than lower alcoholic products. They maintain society’s interests are best served by promotion of more moderate drinks and more regulation of liquor.

4. Any system of alcohol regulation must have the support of the governed. “In the last analysis, there is but one fundamental rule to be followed- and all other rules are corollaries: If the new system is not rooted in what the people of each state sincerely desire at the moment, it makes no difference how logical and complete it may appear as a statute- it cannot succeed.”

The authors discuss other aspects of alcohol control including the need for education to help society understand the special nature of alcohol.

After publication of this book, many states adopted the ideas of the book in whole or in part. And these concepts have guided much of alcohol policy in the states and city councils to the present date. There are some who question whether a 1933 book should have any place in debates in 2011, but a quick read of this short book shows the timeless importance of *Toward Liquor Control*. For those interested in history, state and local governments, public administration, and, of course, alcohol, *Toward Liquor Control* must be added to your bookshelf.

Toward Liquor Control is available at www.centerforalcoholpolicy.org and Amazon.com in paperback and various ebook formats.

Paul Pisano is senior vice president and counsel for the National Beer Wholesalers Association and is the editor of Toward Liquor Control.



Asking for Trouble When Turning History Into Rubble: How Dallas Razed Cain

by Christopher D. Bowers

Introduction

Occasionally an owner of a historic landmark decides for financial or other reasons to demolish it without complying with a local preservation ordinance. If the government ignores the violation, other owners may be tempted to demolish their landmarks. But what can (and should) the government do? After all, the landmark sometimes can't or shouldn't be reconstructed. In a recent case, the city of Dallas and the Texas Historical Commission fought back in a way that hopefully has sent a message to that owner as well as others.

This article describes that demolition and the litigation that is ongoing. It then concludes with a list of questions you should ask to determine if your governmental entity is prepared for an illegal demolition of a landmark.

The Demolition

The Missouri-Kansas-Texas (MKT) Freight Station was a 30,000 square foot brick building located in the West End of downtown Dallas. The building was built around 1925 and was a key part of Dallas' emergence as a rail center. The West End is Dallas' second oldest historic district, having been designated in 1976. In addition, it was designated as a National Register district in 1978.

A land use consultant told Transcontinental Realty Investors, a real estate investment company, that it needed approval from the Dallas landmark commission to demolish the building and that it was not likely to obtain that approval. Thereafter, Transcontinental set up TCI West End Inc., a single-asset subsidiary, and transferred the property to it in February 2006. TCI soon filed an application for a demolition permit with the building official, describing the building as a 500 square foot structure and not checking the box to indicate it was a landmark.

A Dallas plans examiner relied on the application when issuing the permit. When Dallas officials discovered the permit had been issued in error, they immediately called two demolition

contractors hired by TCI and verbally revoked the permit. In addition, a building inspector placed a red tag on the building. However, TCI found another contractor named Weir Industries Inc., which demolished the building on April 29, 2006, without landmark commission approval or a demolition permit from the building official authorizing the work.

The Lawsuit

Dallas sued TCI and Weir three weeks after the demolition. Dallas also filed a document known as a "lis pendens" in the deed records, which put the world on notice of the lawsuit and ensured that the property would be subject to the outcome of the lawsuit. The Texas Historical Commission, represented by the Attorney General's Office, joined the lawsuit and filed its own claims about six months later.

Ultimately, Dallas made six claims in its lawsuit: First, Dallas alleged that TCI failed to obtain a certificate of demolition from its landmark commission as required by its code. Second, Dallas asserted TCI failed to obtain a demolition permit from its building official. Dallas sought \$1,000 in civil penalties for each day that TCI did not obtain either approval. Third, Dallas requested a court order establishing a constructive trust on the property for the benefit of Dallas and its citizens. This claim was based on an Illinois case titled *City of Chicago v. Roppolo*, 447 N.E.2d 870 (Ill. App. Ct. 1983). As a part of this request, Dallas sought a court order requiring TCI to reconstruct the Freight Station using as many original materials as possible. Alternatively, Dallas sought an order requiring TCI to pay it the increase in the market value of the property due to the demolition (which Dallas' appraiser testified was \$1.9 million) and punitive damages for TCI's fraud in obtaining the permit. Fourth, Dallas sought a permanent injunction requiring TCI to rebuild the Freight Station. Fifth, Dallas claimed that TCI fraudulently

transferred the property during the lawsuit. And sixth, Dallas alleged that TCI had several other code violations on the property.

The Historical Commission made similar claims in its lawsuit, but with three important differences: First, the commission sought damages equal to the replacement value of the Freight Station (which the commission's cost estimator testified was \$4.6 million) under a state law that authorized the commission to file suit when there is an illegal demolition of a historic structure and the city where the demolition occurs does not file suit under that law. Second, the commission sought only money damages when it requested a court order establishing a constructive trust. Third, the commission did not make any claims for city code violations.

The Lis Pendens

Soon after Dallas sued, TCI requested the trial judge to cancel the lis pendens. When he refused, TCI requested both the Dallas Court of Appeals and the Texas Supreme Court to order the trial judge to cancel the lis pendens. Both courts declined to do so. *See In re TCI West End Inc.*, No. 05-07-00197-CV, 2007 WL 852891 (Tex. App.—Dallas Mar. 22, 2007, orig. proceeding [mand. denied]).

TCI thereafter sold the property to a third party, which in turn sold it to another for \$8.6 million. TCI and Transcontinental agreed to indemnify the purchaser for all its expenses incurred as a result of the litigation.

The Countersuit

TCI also sued Dallas and the Historical Commission, claiming that the two governmental entities had taken its property without compensation and had conspired to take its property. TCI sought about \$10 million in damages. Dallas and the Historical Commission requested the trial court to dismiss the claims, arguing it lacked jurisdiction to

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consider them. The court agreed and dismissed TCI's claims.

TCI immediately appealed, but the Dallas Court of Appeals upheld the dismissal, ruling that the Historical Commission's mere filing of a lawsuit seeking damages and penalties for an unlawful demolition did not result in a taking of property rights. *See TCI West End Inc. v. City of Dallas*, 274 S.W.3d 913, 918-19 (Tex. App.—Dallas 2008, no pet.). That court also held that the owner's taking claim against Dallas was not ripe for adjudication because it had not appealed Dallas' revocation of the demolition permit. *Id.* at 920-21. To the best of my knowledge, both of these issues had never been addressed by an appellate court in any state before now.

The Other Pre-trial Matters

Before trial, TCI filed a motion for summary judgment, which sought the dismissal of Dallas' and the Historical Commission's claims. The judge denied most of the motion, but dismissed Dallas' request for an injunction requiring the rebuilding of the structure.

In addition, Dallas and Weir reached a global settlement of this dispute and three other unrelated disputes, which resulted in Dallas (but not the Historical Commission) dismissing its claim against Weir.

The Trial

The trial began on Aug. 16, 2010. As the plaintiffs, Dallas and the Historical Commission put on their cases first. But both plaintiffs had to deal with unusual facts and arguments. First, Dallas had issued another demolition permit to Transcontinental in 1997 for the newer part of the building. Second, Dallas had issued a demolition permit to TCI. Third, although Dallas had revoked this permit, it had not done so in writing as TCI alleged the city code required. When questioned, city officials said they were concerned that, since the building could be demolished at any time, they should call to try to stop the demolition. Fourth, Dallas had not recorded the current ordinance for the district in the deed records as TCI

alleged the city code required, though the previous ordinance had been recorded. TCI argued that the failure to record the current ordinance meant that it hadn't taken effect. Dallas responded by asserting that: (1) the purpose of the requirement was to provide notice and here TCI had actual knowledge; (2) the failure to record was at most a procedural irregularity, which a state validation statute had cured; and (3) the ordinance itself stated it took effect upon its publication in the newspaper and all persons are responsible for knowing the law. Fifth, the building official had not forwarded the demolition application to the landmark commission as TCI alleged the city code required.

A key question was whether TCI's failures to obtain a certificate of demolition from the landmark commission and a demolition permit from the building official were one-time violations or on-going violations. The city code stated that a failure to obtain these approvals was a violation and the code also stated that each day that a violation continued was a separate violation. As expected, TCI argued that these were one-time violations if indeed it had violated the code. Dallas responded by arguing that when one builds a structure without a permit, each day was a separate violation, and the law should be no different if one tears down a structure without a permit. In this case, TCI never applied for either approval.

The Outcome

After a two-week trial, the judge dismissed the Historical Commission's claim against Weir, ruling that it was the wrong Weir corporate entity. The jury then found that TCI did not have the appropriate forms of city permission to demolish the Freight Station. In addition, the jury's answers awarded Dallas \$750,000 in civil penalties and \$619.50 in punitive damages. To award Dallas that amount in civil penalties meant that the jury appeared to conclude that TCI had failed to obtain the landmark commission's approval for 750 days. In addition, the

jury's answers awarded the Historical Commission \$500,000 in actual damages and \$1 million in exemplary damages. In addition, the jury found that TCI obtained the demolition permit through fraud.

Both sides filed motions to disregard certain jury answers and requested the court to enter a judgment favorable to its side. The judge thereafter signed a judgment ordering TCI to pay \$750,000 to Dallas and \$500,000 to the Historical Commission.

The Significance of the Case

This is by far the largest amount that Dallas has been awarded for an illegal demolition of a historic landmark and it is probably the largest amount ever awarded in Texas for an illegal demolition of a landmark. It might even be one of the largest amounts ever awarded in the country for such a demolition.

The Dallas real estate community has been watching this case to see if TCI would pay a price. Hopefully that question has now been answered. In addition, the case has had a statewide impact because the Historical Commission and the attorney general have sent a strong message that they can provide significant help to a community that has lost a landmark due to an unlawful demolition. I also have spread the word by publishing this article and by participating in a teleconference sponsored by the International Municipal Lawyer's Association (IMLA), so perhaps this outcome will have some effect nationally.

The Future of the Case and the Site

TCI has appealed. Dallas and the Historical Commission have filed cross-appeals. The appeals were still pending when this article was submitted for publication. In addition, TCI told the jury during the trial that it had no money, so it may file for bankruptcy at some point. If the judgment survives the appeal and/or the bankruptcy proceeding, it appears that Dallas and the Historical Commission will have to sue Transcontinental under a fraudulent

transfer theory.

As for the property, it is now owned by a different owner, which has indicated it will comply with Dallas' preservation ordinances. Currently the property is being used as a parking lot. Any new construction will be reviewed by the landmark commission and it must be compatible with the rest of the district.

The Questions to Determine if Your Governmental Entity is Ready

There are several questions you should ask to determine if you are prepared for an illegal alteration or demolition. First, check your internal procedures. Are the addresses of all your landmarks properly reflected in your building official's database? Does your building official forward *all* applications for demolitions in historic districts to your preservation commission's staff? What steps do you take to inform all property owners in historic districts about the historic designation and the accompanying regulations? You may want to record the ordinance (or a summary of it) in the deed records even if not required by law. Does your attorney have a fill-in-the-blank lawsuit already drafted that seeks a temporary restraining order if you discover an illegal alteration or demolition in progress?

Second, examine your ordinance. Has your government followed all required procedures when creating each historic district? Does your ordinance provide that each day a required permit is not obtained is a separate violation? Does your ordinance mandate stiff penalties for an illegal demolition? Some cities have creative penalties, such as prohibiting the issuance of a building permit and/or a certificate of occupancy for that property for a certain time, such as five years.

Third, analyze your state laws (with your attorney, if possible). Can you seek an injunction requiring reconstruction of an illegally-destroyed landmark? What about civil penalties or punitive damages? Or a constructive trust? Do not be surprised if you learn that your state's laws are weak. In that case, you may want to consider urging lawmakers to strengthen them.

Thanks

Dallas deeply appreciates the invaluable assistance provided by Mark Wolfe, the executive director of the Texas Historical Commission, and Assistant Attorney General Joe Thrash and former Assistant Attorney General John Langley. In addition, former Assistant City Attorney Janet Spugnardi

and Assistant City Attorney Chris Caso did a superb job before and during trial, respectively.

Christopher D. Bowers is first assistant city attorney for the city of Dallas. An earlier version of this article was published in the January/February 2011 issue of The Alliance Review, which is published by the National Alliance of Preservation Commissions (NAPC). This republication is with the NAPC's permission.



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transactional functions to litigation involving state and federal statutory claims. It is my goal to provide a forum to share the wealth of knowledge that each of you practicing in these areas possess.

I hope that you will find this newsletter informative. Please let me know if there are any topics you would like to see covered in a future publication or if you have an article to submit. Further, working with members of this section, I hope to implement local activities for

career development and networking; please let me know if you are interested in hosting an event to achieve this goal in your area. In addition, I hope that you will invite your colleagues to join this section and become part of the knowledge bank we are striving to develop.

All the best,
Meredith Ladd

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