

The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Steven Grossman
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

January 31, 2013

VIA HAND-DELIVERY

Steven T. James
House Clerk
Office of the Clerk of the House
24 Beacon Street
State House, Room 145
Boston, MA 02133

RE: REPORT OF THE ALCOHOLIC BEVERAGES CONTROL COMMISSION
TO THE GOVERNOR, THE TREASURER, THE SENATE AND THE HOUSE OF
REPRESENTATIVES PURSUANT TO SECTION 106 OF CHAPTER 194 OF THE ACTS OF 2011.

Dear Mr. James:

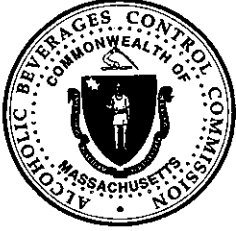
Enclosed please find the *Report of the Alcoholic Beverages Control Commission to The Governor, The Treasurer, The Senate and The House of Representatives Pursuant to Section 106 of Chapter 194 of the Acts of 2011*. Section 106 Of Chapter 194 of the Acts Of 2011 directed the Alcoholic Beverages Control Commission (the "Commission") to study whether certain provisions of the Gaming Act would result in unfair competition with holders of alcoholic beverages licenses issued pursuant to the Liquor Control Act such that the Happy Hour Regulation should be amended.

This report is the culmination of a process that occurred over seven months and involved many hours of time and many resources of this agency. As you will see, upon the conclusion of the process that is described in detail in the enclosed report, the Commission concluded that the record of comments shows a clear and convincing concern that any change to the Happy Hour Regulation will have a deleterious impact on the public safety in the Commonwealth as well as the on-premises segment of the retail tier of the beverage alcohol industry in Massachusetts.

Therefore, the Commission recommends no update or amendment to the Happy Hour Regulation and will not initiate any hearing process to update or amend the Happy Hour Regulation.

Respectfully submitted,


Kim S. Gainsboro, Chairman



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January 31, 2013

VIA HAND-DELIVERY

The Honorable Deval Patrick
Governor of Massachusetts
Office of the Governor
24 Beacon Street
State House, Room 280
Boston, MA 02133

RE: REPORT OF THE ALCOHOLIC BEVERAGES CONTROL COMMISSION
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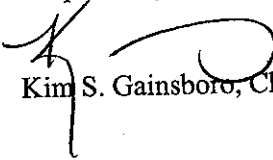
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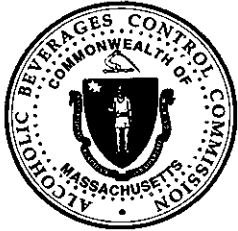
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January 31, 2013

VIA HAND-DELIVERY

William F. Welch
Senate Clerk
Office of the Clerk of the Senate
24 Beacon Street
State House, Room 335
Boston, MA 02133

RE: REPORT OF THE ALCOHOLIC BEVERAGES CONTROL COMMISSION
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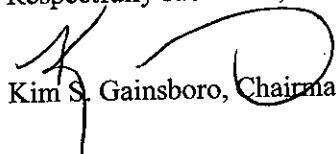
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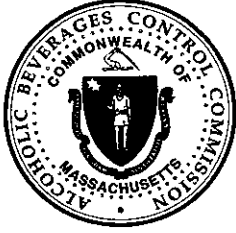
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Treasurer and Receiver General

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January 31, 2013

VIA HAND-DELIVERY

The Honorable Steven Grossman
Treasurer and Receiver General of Massachusetts
State House, Room 227
Boston, MA 02133

RE: REPORT OF THE ALCOHOLIC BEVERAGES CONTROL COMMISSION
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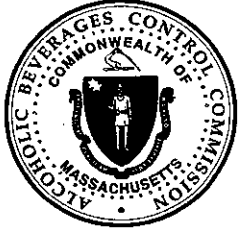
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**REPORT OF THE
ALCOHOLIC BEVERAGES CONTROL COMMISSION
TO THE GOVERNOR,
THE TREASURER,
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PURSUANT TO
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JANUARY 31, 2013

**JANUARY 31, 2013 REPORT OF THE ALCOHOLIC BEVERAGES CONTROL COMMISSION
TO THE GOVERNOR, ET AL.**

BACKGROUND

In 2011, the Massachusetts Legislature enacted General Laws Chapter 23K (the "Gaming Act"), a comprehensive statute authorizing casino gaming and a slots parlor in the Commonwealth. The Massachusetts Gaming Commission (the "MGC") is the regulatory agency that oversees all aspects of the Gaming Establishment. The Gaming Act allows Gaming Beverage Licensees to distribute alcoholic beverages free of charge. Although this practice is common in the gaming industry, it is a practice that is wholly prohibited by regulations promulgated under General Laws Chapter 138 (the "Liquor Control Act"). See 204 CMR 4.00, *et seq.*

Consequently, with the public interest of preventing unfair competition within the on-premises segment of the alcoholic beverages industry and individuals licensed pursuant to Section 12 of Chapter 138 in mind, the Legislature directed the Alcoholic Beverages Control Commission (the "Commission") to study whether certain provisions of the Gaming Act would result in unfair competition with holders of alcoholic beverages licenses issued pursuant to the Liquor Control Act (the "Licensee" or "Licensees"), such that the Happy Hour Regulation should be amended. See Section 106 of Chapter 194 of the Acts of 2011.¹

The Commission began its study by reviewing certain portions of the Gaming Act which differ from the Liquor Control Act. Specifically, General Laws Chapter 23K, §26(c) provides that "[n]otwithstanding any regulation to the contrary, a licensee under this section may distribute alcohol free of charge and for on-premises consumption to patrons in the gaming area or as a complimentary service or item in the gaming establishment..." General Laws Chapter 23K, §1, defines a "gaming establishment" as "the premises approved under a gaming license which includes a gaming area and any other nongaming structure related to the gaming area and may include, but shall not be limited to, hotels, restaurants or other amenities."

However, Section 107 of Chapter 194 of the Acts of 2011, substantially restricts the permission given in Chapter 23K, §26(c), and provides that "[n]otwithstanding any general or special law to the contrary, with respect to distribution of alcohol free of charge and for on-premises consumption to patrons, subsection (c) of Section 26 of Chapter 23K of the General Laws and the regulations promulgated thereunder shall be limited to the gaming area." Chapter 23K, §1 defines the gaming areas as "the portion of the premises of a gaming establishment in which or on which gaming is conducted." Thus, the permission given to gaming Licensees to distribute free alcohol is expressly restricted to the gaming area. To construe this provision, in harmony with the permission given in Chapter 23K, § 26(c), free alcohol may only be distributed to "patrons² in the gaming area."

Since the scope of the permission granted to the gaming Licensees to distribute free alcohol would necessarily determine the scope of potential unfair competition faced by the Licensees who are subject to the Commission's Happy Hour Regulation, this is the most significant factor for the Commission's review.³

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HAPPY HOUR REVIEW PROCESS

Location

The Gaming Act authorizes the MGC to approve up to three casino gaming licenses and one slot license. The Gaming Act divided the Commonwealth into three regions and authorized up to one casino gaming license in each of these regions. The slot license can be located anywhere in the Commonwealth.

The Commission was directed to hold at least two public hearings in locations across the Commonwealth. Because the Gaming Act carved the Commonwealth into regions for gaming licensure purposes, the Commission determined that hearings in each potential locality would provide better access for the Licensees and the public and result in a more informed and balanced process. As a result, the Commission held five public hearings for this Happy Hour review.

The actual locations of the four potential licensed gaming facilities could not be determined, as the MGC has only recently commenced its pre-approval process. Since the Commission's review of the Happy Hour Regulation was based on the economic impact of providing free drinks at potential gaming facilities in these regions, the Commission conducted the hearings in all three regions identified in the Gaming Act as possible locations for casinos. The Commission also held a fourth hearing in the City of Boston and a fifth hearing in Chelmsford, in the Northern Middlesex-Essex County region.

The Commission conducted the hearings at locations within the regions that were easily accessible, provided parking, and could accommodate large groups of individuals. The Commission determined that Tuesday mornings were the most convenient for on-premises Licensees, and therefore scheduled all of the hearings accordingly. These hearings were held for the purpose of comment and testimony concerning the Commission's study on whether the Happy Hour Regulation should be amended in order to protect on-premises alcoholic beverages Licensees from unfair competition with proposed gaming establishments. These hearings were held pursuant to General Laws Chapter 10 §70, §71 and §72, General Laws Chapter 138, §1 and §24, Chapter 30A, and Section 106 of Chapter 194 of the Acts of 2011. They were held at the following locations:

1. Tuesday, May 15, 2012, from 10:00 a.m. to 12:00 p.m.
Bridgewater State University,
Moakley Center in the Moakley Auditorium,
100 Burrill Avenue, Bridgewater, MA
2. Tuesday, June 19, 2012, from 10:00 a.m. to 12:00 p.m.
Chelmsford Police Station,
2 Olde North Road,
Chelmsford, MA
3. Tuesday, July 17, 2012, from 10:00 a.m. to 12:00 p.m.
Worcester City Hall,

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455 Main Street,
Worcester, MA

4. Tuesday, August 21, 2012, from 10:00 a.m. to 12:00 p.m.
McCormick Building,
One Ashburton Place (21st Floor Conference Room),
Boston, MA
5. Tuesday, September 18, 2012, from 10:30 a.m. to 12:30 p.m.
Northampton Senior Center,
67 Conz Street,
Northampton, MA

Notice

The Commission posted notice of each of the hearings and the corresponding agendas on its website and the Secretary of State's website. In addition, the Commission published legal advertisements in the Brockton Enterprise, the Lowell Sun, the Worcester Telegram, the Boston Herald, and the Springfield Sentinel. The Commission also sent notices of the hearings directly to all the Local Licensing Authorities, and requested that the Local Licensing Authorities notify all of their Licensees.

Record

The Commission recorded each hearing on audio tape, which served as the record of the hearing. The Commission provided all individuals who wished to offer comments or submit written statements an opportunity to do so.

HEARING ATTENDANCE

A varying number of individuals attended each hearing:

1. Bridgewater: Six persons attended⁴
2. Chelmsford: Ten persons attended⁵
3. Worcester: Seven persons attended⁶
4. Boston: Twenty-eight persons attended⁷
5. Northampton: Sixteen persons attended⁸

THE HISTORY OF THE HAPPY HOUR REGULATION

The Happy Hour prohibition is rooted in public safety. The genesis followed the tragic and untimely death of a young woman on September 9, 1983. The twenty year old victim was killed in the parking lot of a licensed restaurant in Braintree after being run over and dragged under a motor vehicle⁹ driven by her friend. The friend drove the vehicle after she had consumed at least seven beers during a promotional activity at the premises, which offered discounted Happy Hour drinks.

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Following this tragedy, the Commission researched the conduct of so-called "Happy Hours" in Massachusetts. The Commission conducted hearings in various locations across the Commonwealth, including Worcester, Barnstable, Brockton, Springfield, Pittsfield and Boston.¹⁰ The purpose of the hearings was to consider regulating certain practices, including offering discounted or free drinks by on-premises Licensees. During these hearings, city and town officials, trade organizations, individual license holders and members of the general public offered comments and testimony. The Commission heard testimony from many Licensees in support of this regulation. "[M]any license holders testified that they were 'sick of happy hours' and provided them solely because of competition."¹¹ All of the individuals who testified supported regulations restricting and prohibiting certain "Happy Hour" practices.

In 1984, as a result of the testimony during the hearings, the Commission promulgated 204 CMR 4.00, *et seq.* The regulation was adopted in order to prevent service to an intoxicated person,¹² to prevent an individual from operating a motor vehicle while under the influence of intoxicating liquor,¹³ and to maintain the orderly conduct of a licensed business¹⁴ by treating license holders similarly on a state-wide basis.¹⁵ The Commission's Happy Hour Regulation have remained unchanged since their original promulgation, and before the enactment of Section 106 of Chapter 194 of the Acts of 2011 there had been no request to amend them.

STATED POSITIONS AND ORAL COMMENTS AT THE HEARINGS

In each hearing, the Commission was present for the entire two -hour period thereby affording any individual who wished to comment the full opportunity to do so. In total fifty-seven individuals attended the hearings. Upon sign-in, twenty-two identified themselves as being opposed to any change to the Happy Hour regulation; two persons identified themselves as "open"; one individual identified his position as "clarity with the law/without changes that would promote binge drinking;" seven identified themselves as reporters; four (4) identified themselves as law enforcement; and four identified themselves as representatives for the Local Licensing Authorities. No individuals identified their position upon sign-in as being in support of any change to the Happy Hour Regulation. In addition, three individuals provided written comments voicing their opposition to any changes to the Happy Hour Regulation via the mail. In addition, three individuals provided written comments voicing their opposition to any changes to the Happy Hour Regulation via the mail.¹⁶

During these hearings, thirty-three individuals provided comments. Twenty-seven opposed any update or amendment to the Happy Hour Regulation. Four¹⁷ persons offered comments on the Happy Hour Regulation for actions other than authorizing "Happy Hours." Four persons asked questions or offered comments on casino gaming.

Among the twenty-seven persons commenting in opposition to any change to the Happy Hour Regulation were a large percentage of on-premises Licensees. These Licensees are subject to the Happy Hour Regulation's prohibited practices, which includes among other things, distributing alcohol free of charge. Among the individuals opposed to any change were:

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Douglas Bacon	owner and operator of six liquor license businesses that operate as restaurants and pubs, five of the venues operate in Allston-Brighton;
Richard Barrett	owner of Barrett Restaurant Group, which owns and operates four different licenses in Massachusetts;
Mark Beaton	works with Richard Barrett at the Charlie Horse in Kingston;
Mike Costa	of the Abington Ale House, with approximately fifteen years in the business;
Steve DeFilippo	owner of Davio's and Avila restaurants in Boston;
Jim Donoghue	proprietor of Tweeds Pub & Restaurant in Worcester, with thirty-three years in the business;
Philip Frattaroli	Ducali Pizzeria and, with family, owns seven restaurants in the Boston area, including Lucia's, Filippo's, Artu, and others;
Elaine Gailey	of the Devens Grill in Devens;
Jeffrey Gates	partner of the Aquitaine Group, owns and operates six restaurants in the greater Boston area: the Aquitaines, Union Bar and Grill, Gaslight, and Metropolis Café;
Claudio Guerra	of The Spoleto Restaurant Group, six restaurants in Western MA, employs over two hundred and fifty individuals;
Kevin Harron	of Burton's Grill Restaurant, has five properties in Massachusetts;
Bob McGovern	of Packard's, Northampton for thirty-five years, was in Boston prior to that, and on Cape Cod. selling food and beverages for almost forty years;
Austin O'Connor	owns The Briar Group restaurants in Boston: The Harp at the Garden, Ned Devine's, M.J. O'Connor's at Park Plaza and at the Westin, City Bar, City Table, Anthem and Green Briar;
Ed Stewart	of The Charlie Horse, West Bridgewater;

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In addition, three representatives of three trade organizations provided comments in opposition to changing the Happy Hour Regulation:

Stephen Clark	Director of Government Affairs for Massachusetts Restaurant Association, with 1,700 members representing 5,000 locations throughout the Commonwealth;
Elaine Gailey	Independent Restaurant Group, which is eleven locally independent restaurants in the [Chelmsford] area;
Vincent Errichetti	Executive Director of the Restaurant and Business Alliance.

One elected official gave comments in opposition to changing the Happy Hour Regulation in any way that would promote "binge drinking" but expressed concern that the laws are archaic:

State Senator Robert Hedlund¹⁸ of Weymouth

In addition, the Commission received comments from many public health advocates, alcohol industry activists and compliance service providers.

ANALYSIS

Any amendments to the Happy Hour Regulation would require a regulatory process. Therefore, the Commission chose to conduct this review in accordance with rules promulgated for regulatory hearings. Given the nature of the study and the potential impact to the Licensees, the Commission sought commentary from the stakeholders.

Over the course of the hearings, the Commission heard from a diverse group of on-premises Licensees. Some of the Licensees own several establishments, some have been in business for over forty years, others have inherited businesses that have been in their families for generations, and still others were new to the industry. The prevailing opinion echoed throughout each hearing was that the Licensees were vehemently opposed to any amendment to the Happy Hour Regulation. As a group, the Licensees consistently explained that Happy Hour practices are an unsound business method, which results in a negative image of this industry and creates a public safety hazard.

Many of the individuals who commented were Licensees when Happy Hour practices were permitted in the Commonwealth. As such, they offered an inside perspective on the economics of Happy Hour and the effect it has on their business model. They provided insight into the business practicalities facing the industry today, and disclosed that Happy Hour practices are not economically sound.

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There was general consensus among the Licensees that reviving Happy Hour practices will eventually cause what was commonly referred to as a "Race to the Bottom." A "Race to the Bottom" occurs when parties compete by making increasingly larger concessions. Although some parties may temporarily out-perform others, the concessions lead to adverse consequences that may go unnoticed until it is too late to change course. In the retail alcoholic beverages industry, a "Race to the Bottom" occurs when competitors discount their alcoholic beverages, forcing others to do the same. In the instance of Happy Hour practices, as the race continues, the prices continue to be discounted and the activities surrounding the discounted drinks go on for longer intervals, more frequently. For example, when Happy Hour practices were permitted in Massachusetts, at first they went from 4:00 p.m. to 6:00 p.m., then as the competitors followed suit, they went from 4:00 p.m. to 8:00 p.m., and eventually Happy Hour practices lasted all night.

As with other businesses, Licensees invest hundreds of thousands of dollars, and in some cases millions of dollars in their businesses. They try to create "a great venue with great food, great service, and a nice atmosphere." One owner lamented that, "[i]f happy hours are allowed to come back in Massachusetts, an inexperienced operator who's undercapitalized can take a former shoe store, set up a bar, and start selling \$2 drinks and undercut everyone else in the neighborhood, and it certainly will be a race to the bottom."¹⁹ Some Licensees recounted that when Happy Hour was permitted, operators desperate to gain market share were continuously giving away larger and larger quantities of alcoholic beverages. The more the Licensees gave away, the deeper the financial trouble they found themselves in, and the deeper the financial trouble they found themselves in, the more product they gave away.

The Licensees all communicated about how hard they work to fill their restaurants every night of the week, and believe the rules (i.e., the Happy Hour Regulation) are fair and promote a responsible way of operating.²⁰ "[a]s restaurateurs we want to lift up the profession, and not reward lazy and negligent operators who [sic] this [Happy Hour] would benefit." These Licensees expressed concern that the environment that existed when the Happy Hour practices were allowed, is going to come back and put "people like ourselves, people that have invested in our concepts, at a distinct disadvantage..."²¹ There was general consensus among the Licensees that if the Happy Hour Regulation is amended, price will become the primary competitive factor for many customers. The Massachusetts experience shows that this price competition in the retail sale of alcoholic beverages for on-premises consumption does not promote moderate or responsible consumption of alcoholic beverages. The Commission is charged with the statutory duty to promote "temperance in the use of [alcoholic] beverages."²² The promotion of "temperance" is a core power of the States under the 21st Amendment to the United States Constitution.²³

Moreover, the prevailing view among the Licensees is that a change in the Happy Hour Regulation would not put them in a competitive position with the gaming establishments. The business model of a gaming establishment varies greatly from that of an on-premises Licensee. A gaming establishment generates the majority of its revenue from people who are gambling. As a result, they offer complimentary services, including hotel rooms, food, and drinks. The complimentary services are used to generate customers for their primary business. The Commission is mindful that in Massachusetts today, a gaming establishment cannot legally offer or deliver free alcoholic beverages in hotel rooms or any other part of the gaming establishment

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that is not a "gaming area."

Conversely, an on-premises licensee generates the majority of its revenue from selling alcoholic beverages and food. They may offer complimentary services including music, dance floors, or movies. These complimentary services are also used to generate customers for their primary business. Just as the gaming establishments would not want to give their product away for free, neither do the alcoholic beverages Licensees want to give their product away for free.²⁵

The on-premises Licensees believe they are going to lose business to the gaming establishments. However, they do not believe that the solution is to allow Happy Hour practices. "We're not going to lose customers to the casino because they can drink for free. They're going to go there to gamble, and we cannot compete with that."²⁶ Another individual commented that the notion of returning to happy hour to compete with casinos is "ridiculous", and "not going to put us on the same playing field [as a Casino]." "If an individual has thirty, forty, fifty dollars, are they going to go to a restaurant that's giving away two- for-one drinks or are they going to go to a casino where they have the dream of winning \$5,000?"²⁷

The Licensees expressed anxiety that reintroducing Happy Hour would jeopardize the industry's hard earned reputation in the business community. Consistently, they described investing significant time, money and effort into changing the public's perception of their industry. One licensee described the struggle to change their image:

[b]ack in the '70s we were looked upon as bad people, not doing good jobs. And it was very hard to do a good job back then and now we pride ourselves on the way we serve liquor and how we try to control our customers and the amount that they drink. We don't do a perfect job, but I'll tell you, it's a hell of a lot easier to do a good job now than it was back in the '70s and '80s and I feel that the operators that are fighting for business will go as far as the state lets them go as far as how far they can discount it and how much they can give it away.²⁸

A representative of a trade organization expressed the industry's current reputation as follows:

[a]s industry data indicates, restaurants are thought of as economic engines today, employing nearly ten percent of the state's workforce and generating millions of dollars in tax revenue.²⁹ Restaurants are good neighbors and are instrumental to urban gentrification and lauded for the support they give to charitable institutions. For almost thirty years, the present public policy in Massachusetts has worked. Our Happy Hour Regulation work and should be left alone. It's good for the businesses and it's good for the Commonwealth.³⁰

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Public Safety

Although the Commission was directed to review the unfair competitive impact that complimentary drinks in the gaming area of the gaming establishments might have on Licensees, we would be remiss if we did not report the distress almost every single Licensee conveyed regarding any potential return to Happy Hour and its impact on public safety. Given the nature of the comments, this issue was clearly in the forefront of their collective thoughts.

These individuals stressed that they viewed themselves as having dual roles in society. They considered themselves to be business people as well as community members. As discussed previously, many of these individuals are in the unique position of having owned bars and restaurants back when Happy Hour practices were permitted. Some of the Licensees described the atmosphere in the '70s and '80s as a "bloodbath." There was simply poor control and even no control over the amount of liquor served or consumed.

Many stakeholders communicated the challenges they face today trying to manage the consumption of alcohol by young people with the Happy Hour Regulation in place. As a group, they opined that Happy Hour encourages over-consumption. One commented:

"[t]here is an economic impact when individuals drink and that helps regulate consumption of alcohol, certainly. The closer we get to free, the worse it is. If we allow Happy Hour practices, we are removing one of the very strong parts of my industry. One of the great places in this state left that's very safe and regulated is alcohol. So as a father, I'm not excited about seeing a return to Happy Hour. I'm opposed to this, to any changes in the laws."³¹

Many were extremely concerned about individuals driving after they had consumed too much alcohol as a result of Happy Hour practices. One individual commented on the irony of passing stricter drunk driving laws, and then potentially bringing back Happy Hours:

[f]orty (40) years ago we started this process and stricter drunk driving laws were passed. We want to get people off the road. If you go into a Happy Hour situation and get two rounds, you hit the streets, you're drunk. You're going to blow a 0.10. Four drinks in an hour, you're there. The citizens of the Commonwealth are going to suffer because they're going to be on the roads with these people that have drank [sic] to excess. It makes no sense; it's a disservice not only to us but to the whole Commonwealth of Massachusetts.³²

Yet another licensee described any return to Happy Hours as "a massive step backwards," and reported that his restaurant managers, bar managers, employees and customers were all in agreement.³³

Still another licensee's testimonial recounted the pre-regulation days:

[t]here's actually two pieces of me that I am every day. One piece of me is a businessman and the other piece is a father and a resident of Massachusetts. Now,

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when I was twenty, back when the drinking age was a little less, back in '78, I remember nights like Drink and Drown Night. That was a famous one that used to happen in a place over by the Channel. Quite a few fights in there. And then another one was Beat the Clock.I think that we're on the path. We have some really great numbers in this state for a lot of things, and one of them is the safety, and let's head in the same direction we've been going the last twenty-nine years.³⁴

The public safety aspect of Happy Hour also impacts the cost of liability insurance for on-premises Licensees, and other indirect costs associated with overconsumption, drunk driving, and the social cost to our community. Liquor liability insurance is now mandatory for the Licensees. There was commentary about how expensive and difficult liquor liability insurance was to obtain when Happy Hour was permitted. Many providers with liability insurance stopped selling it in the Massachusetts market. As a result, the industry sought legislative help with reforming liquor liability insurance and creating the liquor liability joint underwriters association as the provider of last resort. These days liquor liability insurance is relatively inexpensive and is mandated. A return to happy hour will result in skyrocketing costs for all.³⁵

The representatives of trade associations furnished the following comments regarding public safety consequences:

1. The laws were put in place to keep people safe. That isn't changing. Insurance will definitely go up. To compete with each other to give free drinks away is a silly way to compete. Already in Massachusetts you can discount liquor seven days and no one really does that because it's really bad business. So, you know, we already are given the opportunity and we don't do it now.³⁶
2. Some operators would have happy hours early in the evening, then again late at night when business slowed down just before people took to the road to head home. The results were devastating and all operators were lumped in together and the industry was continually on the defensive.³⁷
3. "The Restaurant and Business Alliance is against allowing happy hour for any drink special lasting only one or a few hours." They did suggest "a change to this rule to revise it to increase both safety and tax revenue" to the Commission. The change the Restaurant and Business Alliance suggested was that "instead of seven days, drink specials should be required to last two days. A two day special is certainly as safe as a seven day special and won't straddle weekends."³⁸

LAWS CONSIDERED IN THIS STUDY

Other provisions of the Gaming Act acknowledge the impact gaming license holders will have on communities. The Gaming Act identifies a "host community" as "a municipality in which a gaming establishment is located or in which an applicant has proposed locating a gaming establishment" and also identifies "surrounding communities" as "municipalities in proximity to a host community which the commission determines experience or are likely to experience

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impacts from the development or operation of a gaming establishment, including municipalities from which the transportation infrastructure provides ready access to an existing or proposed gaming establishment.” As of January 31, 2013, no applicant for a gaming license has yet been identified by the Gaming Commission as qualified to apply. See Massachusetts Gaming Commission/2012-11-23 Summary Schedule Update (<http://www.mass.gov/gaming/docs/timeline-9-25-2012.pdf>). Thus, as of January 31, 2013, there has not been any negative impact identified on any community as a consequence of the development or operation of a gaming establishment. Therefore, it follows that no unfair competition arising out of the distribution of free alcohol has yet been identified.

The Gaming Act also acknowledges that certain venues that present live entertainment may be impacted by gaming license holders. It is the experience of the Commission that food and beverage providers operating such venues generally seek and obtain licenses under the Liquor Control Act. An “impacted live entertainment venue” is defined by the Gaming Act to be “a not-for-profit or municipally-owned performance venue designed in whole or in part for the presentation of live concerts, comedy or theatrical performances, which the commission determines experiences, or is likely to experience, a negative impact from the development or operation of a gaming establishment.”

The Commission notes that the Gaming Act excludes from the definition of an “impacted live entertainment venue” a performance venue that is owned by an individual or a for-profit organization. As of January 31, 2013, no impacted live entertainment venue has been identified by the Gaming Commission. Thus, as of January 31, 2013, no impacts have been identified on any live entertainment venue as a consequence of the development or operation of a gaming establishment. It follows that no unfair competition arising out of the distribution of free alcohol has yet been identified to impact any live entertainment venue as defined in the Gaming Act or any performance venue that is owned by an individual or a for-profit organization.

For additional guidance on the breadth of potential unfair competition, no court decision, including those that resolved issues on the enforceability of non-compete contracts and non-compete clauses in contracts, was cited or otherwise identified to the Commission that would suggest that the Happy Hour regulation should be amended or updated in response to any unfair competition.

CONCLUSION

The Legislature has explicitly and succinctly established the public policy for alcoholic beverages licensing in Massachusetts: “[t]he provisions for the issue of licenses and permits [under Chapter 138 of the General Laws] ... are enacted with a view only to serve the public need and in such a manner as to protect the common good.”⁴⁰ The record of comments shows a clear and convincing concern that any change to the Happy Hour Regulation will have a negative impact on the public safety in the Commonwealth as well as on the Licensees.

Upon review and consideration of the oral and written comments provided during the five public hearings, the various provisions that control the sale of alcoholic beverages, and authorize the

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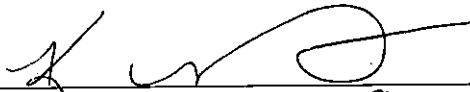
distribution of free alcohol by (at the most) four gaming license holders in narrowly-defined areas, the Commission has found no factual basis and no basis compelled by applicable law to amend 204 C.M.R. 4.00, et seq. in order to protect on-premises alcoholic beverages Licensees from unfair competition with proposed gaming establishments.

Therefore, the Alcoholic Beverages Control Commission recommends no update or amendment to the Happy Hour Regulation and will not initiate any hearing process in furtherance thereof.

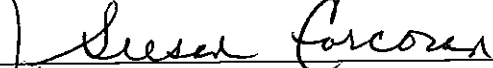
Respectfully submitted,

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman



Susan Corcoran, Commissioner



Kathleen McNally, Commissioner



Dated: January 31, 2013

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¹ During one of the hearings, State Senator Robert Hedlund described the legislative process that resulted in these hearings and volunteered comments on the legislative intent. "I was the lead sponsor of the original amendment to pass the Senate, which has led us to this process here, ...the legislative intent wasn't a referendum on happy hour, ... nor was it the intent of anyone in ...this discussion, speaking for my colleagues on the Senate, that we wanted to see restoration of, "happy hour" ... We're not suggesting, through this process we do exactly for the restaurants what's being done for the casinos. We understand there's a distinction. We just felt as though ... the whole landscape is going to change with the introduction of casinos in Massachusetts. Comments of Senator Hedlund, Hearing on August 21, 2012, Boston, Transcript p.25, lines 5-6, p.26 lines 8-17.

² The Commission notes that term "patrons" is not defined in the Gaming Act and that the common meaning of a "patron" is defined to be "one who buys the goods or uses the services offered especially by an establishment." Thus it appears that free alcohol may be distributed by gaming Licensees only in the gaming area and only to patrons who are using the services offered in the gaming area, viz., gaming.

³ The analysis in this study may change if the scope of the permission granted to gaming Licensees to distribute free alcohol were expanded in any way through legislative action in the Legislature or administrative action in the MGC.

⁴ Attendees of the Bridgewater Hearing:

Name	Affiliation	Position	Attachment
1. Stephen Clark	Massachusetts Restaurant Association ("MRA")	Opposed	Letter (1 page)
2. Richard Barrett	Barrett Restaurant Group	Opposed	
3. Michael Costa	Abington Alehouse	Opposed	
4. Ed Stewart	The Charlie Horse	Opposed	
5. Mark Beaton	The Charlie Horse	Opposed	
6. Elizabeth Lint	Cambridge License Board	No public position	

⁵ Attendees of the Chelmsford Hearing:

Name	Affiliation	Position
1. Stephen Clark	MRA	Opposed
2. Kevin Harron	Burttons Grill	Opposed
3. Becky Mosca	195 Main Street Maynard	Open
4. Troy Thissell	255 North Road Chelmsford	Open
5. Gerald Seymour	27 Village Dr. Marlborough	
6. Elaine Gailey	53 Lawton Rd. Shirley	Opposed
7. Manny Fenno	Lexington PD	
8. Mike McLean	Lexington PD	
9. Lynnea Thody	730 Main Street Millis	
10. John Harrington	10 Summer Street Chelmsford	
11. Kathy Haughton:		

⁶ Attendees of the Worcester Hearing:

Name	Affiliation	Position	Attachment
1. Bob Shaughnessy	71 Shrewsbury Street Boylston, MA		
2. Jim Donoghue	229 Grove Street Tweeds Pub & Rest. Ware		
3. Stephen Clark	MRA	Opposed	
4. Linda Bock	Worcester Telegram & Gazette		
5. Alexandra Haralambous	Worcester City Hall Law Dept.		
6. Karen Bain Morgado	34 W. Main Street Town of Westborough		
7. Brendan O'Connor	1160 West Boylston St Worcester		

⁷ Attendees of the Boston Hearing:

Name	Affiliation	Position	Attachment
1. Vincent Errichetti	Restaurant & Business Alliance		
2. Stephen Clark	MRA	Opposed	
3. Austin O'Connor	Briar Group	Opposed	
4. Steve Difillippo	75 Arlington Street	Opposed	
5. Allie Esielonis	51 Franklin Street	Opposed	
6. Alan Dempsey	One Seafood Way	Opposed	
7. Jim Short (sp)			

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8. Michael Dighton (sp)	320 Congress Street	
9. Douglas Bacon	116 Brighton Ave, Allston	Opposed
10. Courtney Sacco	Metro	
11. Max Ortwein	140 Comm. Ave Boston	
12. Dave E. Serberg	Reporter	
13. Andy Metzger	State House News	
14. Jeffery Gates	584 Tremont St	Opposed
15. Bill Rennie	RAM	
16. Cory Mashburn	50 Evergreen Ave Somerville	
17. Donna Goodieson	70 Fargo Suite 600 Boston	
18. Jim Malinn	Union Oyster House	
19. Donato Frattaroli	10 Harris Street Boston	Opposed
20. Philip Frattaroli	Ducali 289 Causeway Street	Opposed
21. Dante Ramos	Boston Globe	
22. John Mansfield	107 South Street	
23. Elliot White	107 South Street	
24. G. Dumiuier (Sp)	150 Mt. Vernon Street (Press)	
25. Frank Connelly	198 Fayerweather St Cambridge 02138	
26. Grace Lee	Two International	
27. Senator Robert Hedlund	State House 313-L	
28. Peter Brennan, Chief of Staff of Senator Robert Hedlund	State House 313-L	Clarity with the law/ without changes that would promote binge drinking

⁸ Attendees of the Northampton Hearing:

Name	Affiliation	Position	Attachment
1. Ray Redfern			
2. Mary L. Midura	Exec Sec. Northampton License Board		
3. Denise Carey	Westfield License Board		
4. Jamie Levelle	200 Whiting Farms Rd.		
5. Joyce Sabin Rescid	67 West St Northampton		
6. Chad Cain	Gazettenet.com		Article (3 pages)
7. Francis Johnson	669 West Hampton Rd.		
8. Mansour Ghalibad	36 King Street Northampton	Opposed	Attachment
9. Captain Joseph W. Koncas	Northampton PD		
10. Claudio Guerra	82 Industrial Drive	Opposed	
11. Bill Collins	82 Industrial Park	Opposed	
12. Stephen Clark	MRA	Opposed	
13. Heather Warner	115 Pine Street Florence	Opposed	
14. Robert McGovern	53 Main Street Hatfield, Packard's Restaurant	Opposed	
15. Meghan Sullivan	Joe's Café, 33 Market St, Northampton	Opposed	
16. Russell R. Sienkiewicz	Chief of PD Northampton	Opposed	Letter (1 page)

⁹ Commission records document the events that led to the promulgation of this regulation.

¹⁰ Opening Statement of George R. McCarthy, Chairman, Massachusetts Alcoholic Beverages Control Commission, at hearing held in Worcester.

¹¹ Annual Report of the Alcoholic Beverages Control Commission for Fiscal Year 1985, (June 30, 1985), p. 7. M.G.L. c.6, §44 provided, in pertinent part, that "[t]he commission shall submit to the governor and to the general court as soon as may be after the end of each state fiscal year a full report of its action and of the conduct and condition of traffic in alcoholic beverages during such year." General Laws Chapter 6, § 44 was repealed by the Acts 2003, Chapter 26, §5.

¹² General Laws Chapter 138, §69 currently provides that "[n]o alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person." Chapter 754, Section 69 was amended by the Acts of 1987, effective January 14, 1988, which prior thereto, provided that "[n]o alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to a person who is known to be a drunkard, to an intoxicated person, or to a person who is known to have been intoxicated within the six months last preceding."

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¹³ General Laws Chapter 90, §24.

¹⁴ General Laws Chapter 138, §24 provides, in pertinent part, that “[t]he commission shall ... make regulations not inconsistent with the provisions of this chapter for clarifying, carrying out, enforcing and preventing violation of, all and any of its provisions for inspection of the premises and method of carrying on the business of any licensee ... [and] for the proper and orderly conduct of the licensed business.”

¹⁵ Supreme Malt Products Co. v. Alcoholic Beverages Control Commission, 334 Mass. 59, 133 N.E. 2d 775 (1956)(sale and traffic in alcoholic beverages has long been recognized as a source of danger to public welfare, health and safety and regulations governing conduct of business, even going to the extent of prohibiting it altogether, have been sustained.); O’L & S, Inc. v. Alcoholic Beverages Control Commission, 26 Mass. App. Ct. 1023, 533 N.E. 2d 233 (1989)(rescript)(Commission may by regulation prescribe the means to assure compliance with the laws of the Commonwealth bearing on premises licensed to sell alcoholic beverages.).The Commission also promulgated similar regulations, 204 C.M.R. 19.00, *et seq.*, for holders of ship licenses under General Laws Chapter 138, §13.

¹⁶ Letters submitted by mail from Dahvy Tran, Greater Lowell Health Alliance and Kate Fitzpatrick, Town of Needham

¹⁷ Some of these persons stated a two-pronged position of being opposed to any change to the Happy Hour regulations while commenting on action other than authorizing “Happy Hours.”

¹⁸ Senator Hedlund began his comments by stating that he has a fifty (50) percent interest in a restaurant on the South Shore, in Braintree. Senator Hedlund stated this is a “very small establishment of [sic] which I derive no income” nor do I provide any management input. Senator Hedlund continued that he does “derive some, minor income from rent on the premises” and that he is “a sixty (60) percent owner” of the real estate.

¹⁹ Comments of Douglas Bacon, Hearing on August 21, 2012, Boston, Transcript p.12, lines 9-23, p.13, lines 1-5.

²⁰ Comments of Philip Frattaroli, Hearing on August 21, 2012, Boston, Transcript p.13, lines 13-23, p.14 lines 1-4.

²¹ Comments of Mark Beaton, Hearing on May 15, 2012, Bridgewater, Transcript p.6, lines 19-20, p. 7, lines 11-17, lines 22-23, p. 8, lines 1-7, lines 22-23, p. 9, lines 1-6, lines 16-21, p. 10, lines 1-3.

²² General Laws Chapter 10, §71.

²³ Granholt v. Heald, 544 U.S. 460 (2005); North Dakota v. United States, 495 U.S. 423, 433 (1990).

²⁴ One of the Licensees aptly used the following example to illustrate differences in business models among industries. “When I take my son to the dentist, balloons are given to him for free, and that’s great. He gets a free balloon every time he goes to the dentist. That same balloon at iParty costs a dollar. The reason why my dentist can afford to give away helium filled balloon to my son is because he’s offsetting that with \$110 teeth cleaning. iParty can’t give out free balloons because that is their income.” Comments of Jeffrey Gates, Hearing on August 21, 2012, Boston, Transcript p. 17 lines 2-23, p. 18 lines 1-23, p. 19 lines 1-5.

²⁵ Comments of Richard Barrett, Hearing on May 15, 2012, Bridgewater, Transcript p.5, lines 4-23.

²⁶ Comments of Ed Stewart, Hearing on May 15, 2012, Bridgewater, Transcript p.12, lines 11-17, lines 21-23, p. 13, lines 5-9.

²⁷ Comments of Richard Barrett, Hearing on May 15, 2012, Bridgewater, Transcript p.5, lines 4-23, p.6, lines 1-4.

²⁸ Comments of Steven Clark, Hearing on May 15, 2012, Bridgewater, Transcript p.3, lines 4-23, p.4, lines 1-18.

²⁹ Comments of Steven Clark, Hearing on May 15, 2012, Bridgewater, Transcript p.3, lines 4-23, p.4, lines 1-18.

³⁰ Comments of Jeffrey Gates, Hearing on August 21, 2012, Boston, Transcript p.8, lines 5-18, lines 22-23, p. 9, line 1, p.10, line 19-23, p. 11, lines 1-2.

³¹ Comments of Mark Beaton, Hearing on May 15, 2012, Bridgewater, Transcript p.6, lines 19-20, p. 7, lines 11-17, lines 22-23, p. 8, lines 1-7, lines 22-23, p. 9, lines 1-6, lines 16-21, p. 10, lines 1-3.

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³² Comments of Claudio Guerra, Hearing on September 18, 2012, Northampton, Transcript p.14, lines 7-12, p.15, lines 3-6.

³³ Comments of Jeffrey Gates, Hearing on August 21, 2012, Boston, Transcript p.8, lines 5-18, lines 22-23, p. 9, line 1, p.10, line 19-23, p. 11, lines 1-2.

³⁴ Comments of Steven Clark, Hearing on May 15, 2012, Bridgewater, Transcript p.3, lines 4-23, p.4, lines 1-18.

³⁵ Comments of Elaine Gailey, Hearing on June 19, 2012, Chelmsford, Transcript p. 4, lines 22-23, p.5, lines 1-6.

³⁶ Comments of Steven Clark, Hearing on May 15, 2012, Bridgewater, Transcript p.3, lines 4-23, p.4, lines 1-18.

³⁷ Comments of Vincent Errichetti, Hearing on August 21, 2012, Boston, Transcript p.2, lines 21-23, p. 3, line 4-8.

³⁸ In considering these comments, it was not apparent to the Commission how a period of two days would not "straddle weekends."