



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

Steven Grossman
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

DECISION

45 Province Restaurant, LLC
45 Province Street
Boston, Massachusetts 02114
LICENSE#: 011600274
HEARING HELD: 10/12/2011

This is an Appeal from the decision of the Licensing Board for the City of Boston (the "Board") cancelling the All Alcoholic Beverages License issued to 45 Province Restaurant, LLC, ("Licensee") at the location of 45 Province Street, Boston, Massachusetts.

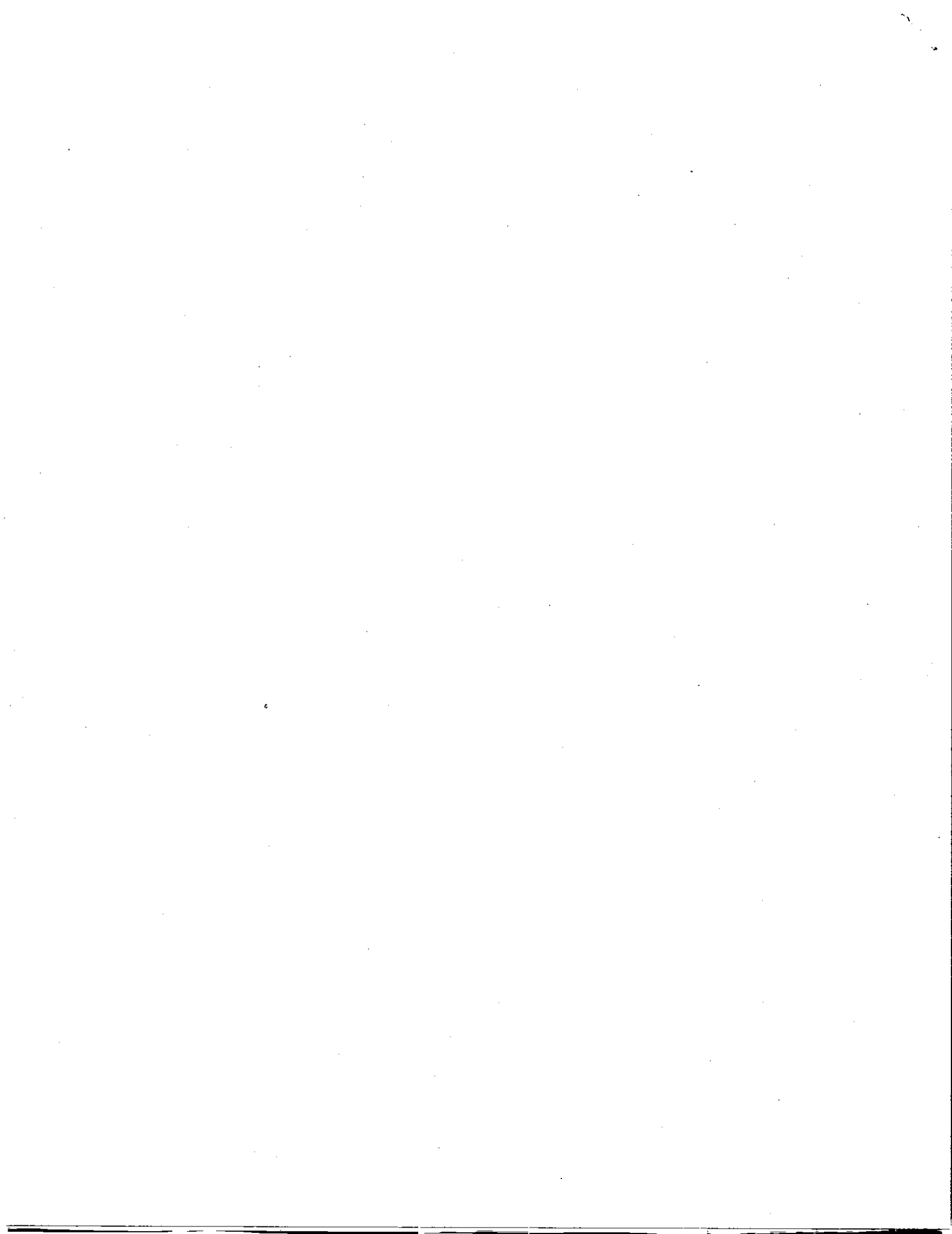
On March 10, 2011, the Licensing Board for the City of Boston voted to cancel the license for non-use, pursuant to M.G.L. c. 138, section 77. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC") and a hearing was held on Wednesday, October 12, 2011.

The following exhibits are in evidence:

Licensee's Exhibits:

1. Copy of September 24, 2009 Letter from Attorney Modica;
2. Copy of September 24, 2009 Letter from the Downtown Crossing Partnership;
3. Copy of September 25, 2009 Letter from Boston City Councilor Salvatore LaMattina;
4. Copy of December 14, 2009 Letter from Attorney Modica;
5. Copy of February 18, 2010 Letter from Attorney Modica;
6. Copy of November 8, 2010 Letter from Attorney Modica;
7. Copy of November 7, 2010 Letter from Boston City Councilor Salvatore LaMattina;
8. Copy of November 9, 2010 Letter from Downtown Crossing Partnership;
9. Copy of February 18, 2011 Letter from Attorney Modica;
10. Copy of March 8, 2011 Letter from the Downtown Crossing Partnership.

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Licensing Board for the City of Boston's Exhibits:

- A. Hearing Notice, dated August 20, 2009 re: Cancellation Hearing for non-use of license in violation of M.G.L. chapter 138, section 77;
- B. Rescheduled Hearing Notice, dated September 8, 2009, re: Cancellation Hearing for non-use of license in violation of M.G.L. chapter 138, section 77;
- C. Board's letter, dated October 1, 2009, regarding decision;
- D. Hearing Notice, dated October 1, 2009 re: status hearing in violation of M.G.L. chapter 138, section 77;
- E. Rescheduled Hearing Notice, dated January 7, 2010, re: status hearing in violation of M.G.L. chapter 138, section 77;
- F. Board's Letter dated March 8, 2010, regarding decision;
- G. Hearing Notice, dated October 19, 2010, re: non-use of license in violation of M.G.L. chapter 138, sections 23 and 77;
- H. Board's letter, dated November 9, 2010, regarding decision;
- I. Hearing Notice, dated January 26, 2011, re: cancellation hearing for non-use in violation of M.G.L. chapter 138, section 77;
- J. Rescheduled Hearing Notice, dated February 18, 2011, re: cancellation hearing for non-use in violation of M.G.L. chapter 138, section 77;
- K. "Letter of Intent" submitted at Board's Hearing on March 8, 2011;
- L. Board's letter, dated March 11, 2011, regarding decision to cancel License;
- M. Board's Statement of Reasons.

There is one (1) audio recording of this hearing.

FACTS

1. The licensee, 45 Province Restaurant, LLC is the holder of a section 12, 7-Day All Alcoholic Beverages License at 45 Province Street. The Board voted on September 10, 2008 to grant the application to transfer ownership of the license and the location of the license from Cheers, Inc. located at 290 Congress Street, Boston, MA to 45 Province Restaurant, LLC. The ABCC approved said transfer on November 13, 2008.
2. In August of 2009, the Board became aware, upon review of its records, that the licensee was not utilizing its license, and had never opened for business.
3. On August 20, 2009, the Local Board scheduled a hearing to cancel this license for non-use.
4. The Board received a letter from Attorney Modica, previous counsel for the licensee, dated September 24, 2009, informing the Board of the licensee's "efforts and due diligence" to utilize the license by operating the premises.



5. On October 1, 2009, the Board voted to schedule a status hearing on January 12, 2010.
6. The Board received another letter from Attorney Modica, dated December 11, 2009, providing the Board with an update regarding the licensee's efforts since September, 2009, and requesting that the status hearing scheduled for January 12, 2010 be continued for 90 days.
7. The Board rescheduled the status hearing to February 23, 2010.
8. Attorney Modica sent the Board another letter informing the Board of the licensee's efforts to utilize the license.
9. The Board voted, after the February 23, 2010 hearing, to schedule a further status hearing in three (3) months, for May, 2010.
10. The Board became aware in October, 2010, that the status hearing for May, 2010 was never scheduled, nor held.
11. The Board scheduled the matter for a non-use hearing for November 9, 2010.
12. The Board received another letter from Attorney Modica, dated November 8, 2010, updating the Board regarding the licensee's actions regarding the license.
13. On November 9, 2010, the Board voted that the licensee has ninety (90) days to file a transfer application.
14. The hearing was rescheduled to March 8, 2011.
15. Attorney Modica sent another letter notifying the Board about the licensee's efforts to open and operate the license.
16. The Board held a hearing on March 8, 2011. The licensee testified at the Board's hearing that they have been trying for 2 years to open and utilize the license.
17. On March 10, 2011, the Board voted to cancel the license for non-use, pursuant to M.G.L. chapter 138, section 77.

ISSUE

Whether the Local Board's decision of March 10, 2011 to cancel the license for non-use pursuant to Massachusetts General Laws chapter 138, section 77 was reasonable, and should be approved by the Commission?



DISCUSSION

In the decision issued in the case of In Re: Turnpike @ Winona, LLC, Peabody (ABCC decision dated May 14, 2010) the Commission has previously decided what the legal requirements are for a Local Board when it seeks to exercise its authority to cancel a license under section 77. "Once a local board has determined that a license holder risks cancellation of its license under M.G.L. c. 138, §77 as a result of non-use of the license, this Commission evaluates the amount of time the board has given the licensee to cure the non-use to ensure its reasonableness. The Commission's practice of granting a reasonable time to transfer a license is in step with the Board of Selectmen of Saugus v. Alcoholic Beverages Control Commission, 32 Mass. App. Ct. 915 (1992). "Under the authority of M.G.L. c. 138, §77, this statute explicitly gives the Commission the authority to review the license cancellation by the Local Board." Id. In Saugus, this Commission gave this Licensee six (6) months to transfer the license once he received notice of the risk of cancellation. Id."

"It is this Commission's practice to allow the licensee six (6) months from the date of the notice of the risk cancellation to cure the non-use by either operating its premises or filing the appropriate application to transfer the license. Id. The Commission's sense of fairness is forward looking and the time within which the licensee must act does not begin to run until the licensee is first put on notice that there is a potential enforcement of Massachusetts General Laws chapter 138, §77. In re: Empresas Guanacas, Inc. dba Mango Grill Fine Latin Cuisine, (Watertown) (ABCC Decision dated March 13, 2009)." In Re Turnpike @ Winona, LLC, Id.

In this case, the Local Board first became aware of the non-use in August 2009. The Local Board immediately put the license at risk by issuing the hearing notice dated August 20, 2009. The Local Board failed to allow the licensee a six month period of time, from the date it first notified the licensee of the risk of cancellation for non-use in violation of M.G.L. 138, section 77, and the action required to be taken - within a fair time period within which to complete one of the following transactions, or face the risk of cancellation of the license:

- (a) begin operating the license;
- (b) file an appropriate application to transfer the location of the license where the licensee will conduct the licensed business; or
- (c) file an appropriate application to transfer the ownership of the license to a licensee that will conduct the licensed business.

The Commission finds that the Local Board did not specifically notify the licensee of the consequences for its failure to complete one of the aforementioned three actions, and did not allow the licensee a six (6) month period of time within which to comply before initiating the hearing process to cancel the license for non-use.



CONCLUSION

The Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Licensing Board for the City of Boston in cancelling the license for non-use, and remands the matter to the Local Board with the recommendation that the Local Board give the licensee a reasonable period (six (6) months) of time within which to comply, which time period begins to run at the time in which the Local Board specifically notifies the licensee that it must do one of the following:

- (a) begin operating the license;
- (b) file an appropriate application to transfer the location of the license where the licensee will conduct the licensed business; or
- (c) file an appropriate application to transfer the ownership of the license to a licensee that will conduct the licensed business;

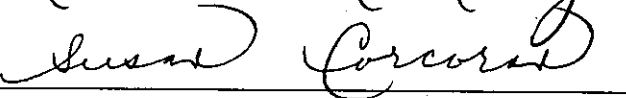
or, risk cancellation of its license for non-use pursuant to M.G.L. chapter 138, Section 77.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner,



Susan Corcoran, Commissioner



Dated: February 22, 2012

You have the right to appeal this decision to the Superior Courts under the provisions of Chapter 30A of the Massachusetts General Laws within thirty (30) days of receipt of this decision.

cc: Local Licensing Board

Karen Simão, Esq.

Jean Lorizio, Esq.

File

Administration

