Re: 5 North Square, Inc.
Premises: 5-7A North Square
City: Boston, MA 02113

DECISION

This is an appeal of the action of the Boston Licensing Board ("Board") in modifying the M.G.L. c. 138, §12 malt and wine license of 5 North Square, Inc. ("Licensee").

The Licensee timely appealed the Board's decision to the Alcoholic Beverages Control Commission ("Commission") and a hearing was held on May 19, 2010.

The following exhibits are in evidence:

1. North End/Waterfront Residents' Association letter dated December 16, 2008;

2. North End/Waterfront Residents' Association letter dated February 5, 2009;

3. Renewal Application of Five Associates, Inc.[1] for 2009; and,

4. Boston Licensing Board Docket for the license location.

There is one (1) tape of this hearing.

Facts

The Commission makes the following findings, based on the evidence presented at the hearing:

1. In 1986, the Board granted a malt and wine license to Five North Square, Inc. with conditions that included "No Bar." The licensee agreed to the imposition of the conditions. The licensee operated as a full service restaurant without a violation until January 8, 2009.

[1] "Five Associates, Inc." is the predecessor license holder who transferred the license to the current license holder "5 North Square, Inc."

2. On January 8, 2009 the Board voted to grant a transfer of the license to 5 North Square, Inc. A vote on a petition to remove the "No Bar" condition, filed with the license application, was deferred.

3. The Licensee's position is that no facts exist which justify the imposition of the conditions placed on its license in that:

    a. The license has operated for decades without incident and the principal of its new owner is a proven operator who has also run several establishments with full alcoholic beverages licenses without a violation and,
    b. Since the imposition of the "No Bar" condition, numerous restaurants have been allowed to open in the North End with bars at which patrons are allowed to eat and drink.

4. The Board requires that all applicants contact and meet with the respective civic/neighborhood association in the area where a licensed premises is located. The Board's feeling is that those most affected by the granting of a new license or a change to an existing license should be afforded an opportunity to weigh-in on a petition.

5. At the hearing on January 8, 2009, a representative from the North End/Waterfront Residents' Association ("Association") informed the Board that the Applicant had met with the group regarding the transfer and that the group was in support. However, the Association was concerned because the Applicant had not presented their plan to petition to remove the condition.

6. The Board had deferred their vote on the petition to remove the condition so the Licensee could present it to the Association.

7. The Licensee failed to contact and meet with the Association.

8. Subsequently to the January hearing, the Board began receiving complaints about the operation, specifically the fact that a bar existed in the premises, in direct violation of the condition, and that patrons were observed utilizing said bar.

9. The Board scheduled a violation hearing after receiving the complaints.

10. On November 10, 2009, the Board held a hearing on an alleged licensed premises violation for failure to comply with the "No Bar" condition.

11. On November 12, 2009, the Board voted two (2) to one (1), that 5 North Square could have a service bar only, with no seats, and permitting no more than one drink served to patrons while waiting to be seated. No sanction of suspension, modification, cancellation or revocation was imposed by the Board for this violation.

Discussion

The parties agreed that the Commission's determination herein is governed by M.G.L. c. 138, the rules and regulations of the Commission and the Board and the case law interpreting administrative actions.

The contested issue of law was identified as whether the Board can place a condition or restriction on a license without making adequate findings that the condition or restriction is designed to address an issue with respect to the operation of a particular license. The Licensee's position is that the Board's imposition of conditions on the Licensee's license without findings that the conditions are designed to address an issue with the Licensee's operation of its business constitutes arbitrary and capricious actions.

The Board's position on this issue is that in an effort to strike a compromise, the Board took into consideration the fact that the applicant never completed the neighborhood process but also that a bar had already been installed on the premises prior to receiving Board approval and amended the condition allowing for limited use of the bar. The Board noted that the licensee is free to re-apply to completely remove the condition but as with all applicants would be expected to contact the neighborhood association and present the petition to the neighborhood before the Board votes.

The facts are clear that a condition was validly placed on the license that prohibited a bar on the premises. The current licensee sought, was granted and accepted the transfer of the license that clearly carried this condition modifying the legal activities under this license. The facts are not substantially disputed that the current licensee operated a bar with this license contrary to the conditions restricting and prohibiting this sort of operation.

The action taken by the Board was finding that the licensee violated the terms and conditions of its license. See M.G.L. c. 138, §23, ¶4. While the Board found a violation, it did not impose any sanction of modifying, suspending, revoking or canceling the license. The Board also did not issue any statement of reasons required by M.G.L. c. 138, §23, ¶4 ("[w]henever the local licensing authorities deny … modify, suspend, revoke or cancel a license, the licensing authorities shall mail a notice of such action to the … licensee, stating the reasons for such action and shall at the same time mail a copy of such notice to the commission.")

M.G.L. c. 138, §67 provides, in pertinent part, that "any person who is aggrieved by the action of such [local licensing] authorities in modifying, suspending, canceling [sic], revoking or declaring forfeited the same, may appeal therefrom to the commission." The Commission has determined that a warning by the local licensing authorities is not an action of modifying, suspending, canceling, revoking or declaring forfeited a license. A warning by the local licensing authorities does not establish any prejudice to the substantial rights of a license holder that would establish the license holder as aggrieved within the meaning of M.G.L. c. 138, §67.

In determining whether the issuance of a warning from the licensing authorities under chapter 138 is an action that prejudices a license holder's substantial rights and thus may be appealed, the Superior Court has previously ruled that:

> the burden of proof is on the party aggrieved by the action of [a licensing authority] to show that its substantial rights have been prejudiced, and that it has been aggrieved in a legal sense. Caitlin v. Board of Registration of Architects, 414 Mass. 1, 7 (1992); Group Insurance Commission v. Labor Relations Commission, 381 Mass. 199, 203 (1980). Speculative, remote, and indirect injuries are insufficient to confer standing to appeal an administrative decision. Gentler v. Commission of Insurance, 427 Mass. 319, 323 (1998). The [license holder] has been given a warning. It has not been required to perform any specific action nor has it been required to refrain from acting. It can continue to sell alcohol. The [license holder] does not allege any criminal or pecuniary loss. The only allegation of hardship asserted by [the license holder] is that the warning may impact future license transactions before the ABCC and similar local boards. These allegations are not enough to warrant judicial review of the [licensing authority's] decision. An allegation of a remote and speculative injury without more, is insufficient to raise a claim of judicial review under M.G.L. c. 30A. Group Insurance Commission, supra at 204-207.

Costco Atlantic Liquors Inc. v. Griffin, et al., Essex Superior Court, C.A. No. ESCV2002-009-A (Lowy, J.). Since an action of a warning may not be appealed, the Board's decision not to take any action of modifying, suspending, revoking or canceling the license, not even issuing a warning, may not be appealed to this Commission.

Conclusion

The Commission finds the lack of statement of reasons from then Local Board to be a procedural defect, but understandable since the Local Board did not take any action of modifying, suspending, revoking or canceling the license, not even issuing a warning.

The Commission finds that there is no jurisdiction in this Commission to hear an appeal in this matter since the Local Board did not take any action of modifying, suspending, revoking or canceling the license.

Therefore, the Commission remands the matter back to the Boston Licensing Board with the recommendation that upon an appropriate application by 5 North Square, Inc. the Board give strong consideration to granting with reasonable conditions tailored to address issues created by this Licensee.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Robert H. Cronin, Commissioner _____

Susan Corcoran, Commissioner _____

Dated in Boston, Massachusetts this 7th day of July 2010.

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 days of receipt of this decision.

cc: Boston Licensing Board, Jean M. Lorizio, Esq.
Carolyn M. Conway, Esq.
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