

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

DECISION

AKURIGU ENTERPRISES INC. d/b/a 7-ELEVEN
584 WASHINGTON STREET
BOSTON, MA 02135
LICENSE#: 011601291
HEARING DATE: MARCH 27, 2013

This is an appeal of the action of the Licensing Board for the City of Boston (the "Local Board") in cancelling the M.G.L. c. 138, §15 wine and malt beverages retail package store alcoholic beverages license of Akurigu Enterprises Inc. d/b/a 7-Eleven (the "Licensee"). The licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, March 27, 2013.

The following documents are in evidence as exhibits:

1. Licensing Board for the City of Boston Decision and Statement of Reasons dated September 27, 2011 (2 pages);
- 2A. Licensee's Notice of Appeal dated September 21, 2011, with attached notice (2 pages);
- 2B. Decision from the Commission dismissing the Appeal, dated January 25, 2012 (2 pages);
- 2C. Licensee's Appeal of Commission dismissal dated January 7, 2013 (2 pages);
3. Notice of Appearance of Attorney Jean Lorizio, on behalf of the Licensing Board for the City of Boston (1 page);
4. Notice of Appearance of Attorney Patrick Rahilly, on behalf of the Akurigu Enterprises, Inc. and Mr. Francis Maltiby (1 page);
5. Notice of Appearance of Mr. Francis Maltiby, appellant (1 page);
6. Copy of check dated November 29, 2012, payable to the City of Boston for the amount of \$1500.00 (fifteen hundred dollars) (1 page);
7. Copies of Local Board's docket sheets for Akurigu Enterprises, 584 Washington Street, Brighton, Massachusetts. (3 pages).

There is one (1) audio recording of this hearing, and one witness testified.

FACTS

1. Akurigu Enterprises, Inc., Mr. Francis Maltiby, license manager, operated a section 15 wine and malt beverages license at 584 Washington Street, Brighton, Massachusetts. (Exhibits 1, 7, Testimony)

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2. Mr. Francis Maltiby testified before the Commission that the Licensee had been operating a section 15 license at this location from 2005 until 2009, in conjunction with a franchise from 7-Eleven. (Exhibit 1, Testimony)
3. In 2009, 7-Eleven took the physical location of the store from the Licensee. (Exhibit 1, Testimony)
4. The Licensee retained possession of the section 15 license. (Exhibit 1, Testimony)
5. Mr. Maltiby was trying to secure another location at which to exercise this license. (Exhibit 1, Testimony)
6. This license has not been exercised at a physical premises since 2009. (Exhibits 1, 7, Testimony)
7. The Licensee has been unable to find another location at which to exercise this license. (Exhibit 1, Testimony)
8. In September of 2011, the Local Board held a hearing for non-use of this license. (Exhibits 1, 7, Testimony)
9. After the hearing, the Local Board voted to cancel this license for non-use pursuant to M.G.L. c. 138, §77. (Exhibits 1, 7, Testimony)
10. The license was cancelled in September of 2011. (Exhibits 1, 7, Testimony)
11. The Licensee timely appealed the decision of the Local Board to the Commission. A hearing was held in December of 2011. (Exhibits 2A, 2C, Testimony)
12. The Licensee did not appear at the hearing as it did not receive notice. The notice of that hearing was sent to the address of the Licensee, at the licensed premises.
13. Upon the request of the Licensee, after it failed to appear at the first scheduled hearing, this second hearing was scheduled and held.
14. Mr. Maltiby testified before the Commission that the Licensee currently does not have a location at which to exercise this license. (Testimony)
15. Mr. Maltiby claimed that the Local Board allowed the Licensee to renew this license for calendar years 2012 and 2013. (Testimony)
16. Mr. Maltiby presented a photocopy of a bank check payable to the City of Boston, dated November 29, 2012. (Exhibit 6, Testimony)
17. The Local Board refutes the license renewal for these calendar years 2012 and 2013. (Exhibits 1, 7)
18. The Local Board records indicate that this license was cancelled and remains cancelled, since September of 2011. (Exhibits 1, 7)
19. The Licensee did not present any documentary evidence to the Commission to support its claim that the Local Board renewed this license for both calendar year 2012 and calendar year 2013. (Exhibits 1 through 7)
20. The record in this matter remained open until May 1, 2013 at 5:00 p.m. for the Licensee to submit additional documentary evidence supporting its assertions of Local Board license renewals for calendar years 2012 and 2013. No additional evidence was received by the Commission.
21. The Local Board has within its quota of licenses set by M.G.L. c. 138, §17 wine and malt beverages section 15 licenses available for application.

DISCUSSION

M.G.L. Chapter 138 section 77 states, in pertinent part: “The licensing authorities may, after hearing or reasonable opportunity therefore, cancel any license issued under this chapter if the licensee ceases to conduct the licensed business.” A license must be exercised on an approved premises and cannot exist as a roving license. A license is not valid separate and apart from the premises to which it attaches. Opinion of the Justices, 349 Mass 794, 798 (1965). The Appeals Court has held that a renewal application may be denied where the applicant has not been operating and no longer has a right to occupy the premises. Board of Selectmen of Sudbury v. ABCC, 25 Mass. App. Ct. 470 (1988).

General Laws chapter 138, section 23 provides, in pertinent part, that “[e]very license ... granted under the provisions of this chapter, unless otherwise provided in such provisions, shall expire on December thirty-first of the year of issue, subject, however, to revocation or cancellation within its term.” General Laws chapter 138, section 16A provides, in pertinent part, that “Licenses issued under section twelve or fifteen shall be automatically renewed for the next annual license period upon application by the holder thereof during the month of November ... provided that said license ... covers the same licensed premises ... If the application does not meet the conditions hereunder, it shall be treated as an application for a new license and all the procedures set forth under section fifteen A shall be applicable thereto.”

The Licensee argued that the Local Board renewed this license for calendar years 2012 and 2013. The Licensee did not submit any evidence to support this claim, and was even afforded additional time within which to do so.

No documentary evidence was submitted by the Licensee to show that in fact it complied with M.G.L. c. 138, §16A and timely filed written applications for renewal of the license for both calendar year 2012 and calendar year 2013. Thus, with this state of the evidence, the Commission is persuaded and finds that the license has ceased to exist by operation of law since December 31, 2011. Two renewals cycles, for 2012 and 2013, have passed without any documentary evidence that the Licensee applied for, qualified for, and was granted renewal of its license. Due to this serious shortfall of the evidence in which there is no documented evidence that the license was renewed in compliance with General Laws chapter 138, the Commission concluded that this appeal by the Licensee is now moot.

The Commission notes that the Licensee, through its own admissions, admitted to the Commission that it has not had a physical premises at which to exercise this license since 2009. This failure by the Licensee can be good cause to deny renewal by the Local Board. Board of Selectmen of Sudbury v. ABCC, 25 Mass. App. Ct. 470 (1988). The Commission notes further that the Licensee does not have a legal right of possession to a physical location at which to exercise this license, and since 2009 has not had a legal right to possess the physical location where the license was last approved to be located. The Commission finds that the Licensee was afforded a generous amount of time by the Local Board within which to find a location to re-locate and exercise the license, and failed to do so. If the Commission were faced with this issue, which it is not given the mootness created by the Licensee’s failure to document timely renewal of the license for both 2012 and 2013, the Commission might conclude that the Local Board properly cancelled the license of Akurigu Enterprises, Inc.

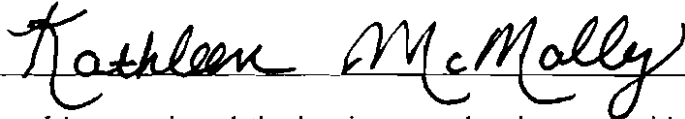
Furthermore, because the undisputed evidence shows that there are currently wine and malt beverage licenses under M.G.L. Chapter 138, section 15 available for application before the Local Board, if this case were not moot, the Commission would be hard-pressed to find that the Licensee in this case is legally aggrieved within the meaning of M.G.L. c. 138, §67. The Licensee lost its legal right to possess the premises where the license was last-approved to be located and thus would be required to file a new license application under the plain language of M.G.L. c. 138, §16A. Since there are licenses available upon the filing of a new license application, the Commission would be challenged to see how this Licensee is aggrieved.

CONCLUSION

The Commission finds that this current appeal is now moot because there is no documentary evidence that the license has legally existed after December 31, 2011. If the Commission were to reach the issue, which it does not, the Commission may be inclined to approve the action of the Local Board in **CANCELLING** the M.G.L. c. 138, §15 wine and malt beverages retail package store alcoholic beverages license of Akurigu, Enterprises, Inc. d/b/a 7-Eleven.

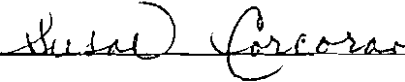
ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



I, the undersigned, hereby certify that I have reviewed the hearing record and concur with the above decision.

Susan Corcoran, Commissioner



Dated: August 9, 2013

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: Patrick Rahilly, Esq. via Facsimile and First Class Mail
Jean Lorzio, Esq. via Facsimile
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Mr. Francis Maltiby, 13 Chauncey Street, Dedham, MA 02026
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