



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

RAW RESTAURANT GROUP LLC DBA MIJA MEXICAN CANTINA
1 FANEUIL HALL PLACE
BOSTON, MA 02126
LICENSE#: 011600072
HEARD: OCTOBER 24, 2012

This is an appeal of the action of the Licensing Board for the City of Boston (the "Local Board") in suspending the M.G.L. c. 138, §12 license of Raw Restaurant Group LLC d/b/a Mija Mexican Cantina (the "Licensee" or "Mija") located at 1 Faneuil Hall Place, Boston, MA. On June 26, 2012, the Local Board held a hearing that resulted in a one (1) day suspension. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission"), and a hearing was held on Wednesday, October 24, 2012.

The following documents are in evidence as exhibits:

1. Local Board's Pre-hearing Memorandum dated October 23, 2012 (2 pages);
2. Inspection Violation Notice Citation no. 29960 dated May 5, 2012 (1 page) and Boston Police Department Incident Report no. 120268133 dated May 5, 2012 (2 pages);
3. Local Board Decision and Statement of Reasons, dated July 10, 2012 (3 pages);
4. 2012 Common Victualler 7-Day All Alcoholic Beverage License for Mija dated November 25, 2011 (1 page);
5. Boston Fire Department Assembly Permit no. BFD0228088 Issued May 25, 2012 (1 page); and
6. Boston Inspectional Services Department Certificate of Inspection no. 75766 Issued May 17, 2011 (1 page).

A. Layout of the Licensed Premises.

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

FACTS

1. Raw Restaurant, LLC, d/b/a Mija, is the holder of Common Victualler 7- Day All alcoholic Beverage license, (also known as a 'Cordials' license) under M.G.L. chapter 138, section 12. The licensed premises are located in Boston, Massachusetts, with a closing hour of 1:00 a. m. (Exhibit 4)
2. The Local Board held a violation hearing on June 26, 2012. After the hearing the Local Board issued a one (1) day suspension against Mija. The Local Board issued a one-day suspension for the overcrowding violation. Mija timely appealed the Local Board's decision to the Commission. (Exhibit 3)

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3. On May 5, 2012 , Boston Police Sergeant Robert Mulvey and Detective William Gallagher inspected the licensed premises of Mija and found it to be overcrowded. (Exhibits 2, 3, 4, 5, 6, Testimony)
4. Detective Gallagher and Sergeant Mulvey entered the establishment and observed that it appeared to be very crowded. Detective Gallagher stated that he conducted an inspection of Mija and observed there to be a line out front as they approached. The capacity on the license was two hundred and twenty-four (224). One hundred and sixteen (116) person seating, thirty-four (34) person standing, and seventy-four (74) person seating on a seasonal patio. (Exhibits 2, 3, 4, 5, 6, Testimony)
5. Detective Gallagher testified that as they made their way through the establishment, they found it hard to move about due to the large size of the crowd. Sergeant Mulvey conducted a mechanical count of the premise which resulted in two hundred thirty one (231) persons being found inside the premises. (Exhibits 2, 3, 4, 5, 6, Testimony)
6. The Licensee testified that his establishment may have looked overcrowded because people were standing due to the removal of tables and chairs for the Cinco de Mayo event.¹ (Exhibit 3, Testimony)
7. The licensee testified that he kept the patio confined as he always does during the night, but perhaps on the night in question, some customers tried to get into the interior area when the events of the night commenced unbeknownst to him. (Testimony)
8. The Licensee further testified that the overcrowding could have occurred when his manager, who keeps count of customers went to respond to police , abandoning his area of security, thus allowing customers to access the inner area of the establishment. (Exhibit 3, Testimony)

¹ The Licensee removed tables and chairs from the interior of the premises without prior approval from the Local Board. Although the Licensee was not cited for this, during the Local Board's hearing the Licensee was admonished for it. The Rules clearly state that the Licensee must operate within the confines of the floor plan approved by the Local Board. It cannot remove any of the furniture without prior approval from the Local Board.

DISCUSSION

Pursuant to M.G.L. Ch. 138, section 67, “[t]he ABCC is required to offer a de novo hearing, that is to hear evidence and find the facts afresh. United Food Corp v. Alcoholic Beverages Control Commission, 375 Mass. 240 (1978). As a general rule the concept of a hearing de novo precludes giving evidentiary weight to the findings of the tribunal from whose decision an appeal was claimed. See, e.g. Devine v. Zoning Bd. of Appeal of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 295 (1972); Dolphino Corp. v. Alcoholic Beverages Control Com’n, 29 Mass. App. Ct. 954, 955 (1990) (rescript). The findings of a local licensing board are ‘viewed as hearsay evidence, [and] they are second-level, or totem pole hearsay, analogous to the non-eyewitness police reports in Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 473 – 476 (1989).’ Dolphino Corp. v. Alcoholic Beverages Control Commission, 29 Mass. App. Ct. 954, 955 (1990) (rescript).

M.G.L. Ch. 138 gives the local board and commission the authority to grant, revoke and suspend licenses. Chapter 138 was “enacted to serve the public need and... to protect the common good.” M.G.L. Ch. 138, section 23, as amended through St. 1977, c.929, Section 7. “[T]he purpose of discipline is not retribution but the protection of the public.” Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 317 (1981). The Commission is given ‘comprehensive powers of supervision over licensees,’ Connolly v. Alcoholic Beverages Control Comm., 334 Mass. 613, 617 (1956), as well as broad authority to issue regulations. The Local Board has authority to enforce Commission regulations. New Palm Gardens, Inc. v. Alcoholic Beverages Control Commission, 11 Mass. App. Ct. 785, 788 (1981).

Overcrowding: General Laws Ch. 138, section 12, provides in pertinent part, that “[n]o license issued under this section shall be subject to any condition or requirement varying the occupancy of the licensed premises as certified by any person or state or local agency charged with the administration or enforcement of the state building code or any of its rules or regulations”. The Local Board argued, and the Commission finds, that, the Inspectional Services Department (“ISD”) is the building authority in the City of Boston which is allowed to set or assign an occupancy limit to the premises. The Local Board argued that ISD is the only agency authorized to assign an occupancy limit to the licensed premises. The capacity certified by ISD was two hundred and twenty-four (224) patrons at the time of the violation. The Commission heard evidence and finds that on the evening of the incident, there were two hundred and thirty-one (231) patrons inside the premises, and the legal capacity set by ISD at that time was two hundred and twenty-four (224), one hundred and sixteen (116) persons seating area, thirty-four (34) persons standing area, seventy-four (74) persons in the outdoor area.

The Licensee argued that due to unforeseen circumstances, the interior premises of the establishment may have been “temporarily” over the limit due to the lack of security. However, the conflicting testimony from the Licensee and the detective as to the length of time the officers were in the establishment leads the Commission to believe that the officers made observations immediately upon entering and continued to make said observations when approaching security. In other words, when the security guard left his post, the officers had ample time to observe that the Licensee was well over the maximum capacity for his establishment. The Licensee gave several scenarios as to why the overcrowding could have taken place but did not offer solid evidence in support of one theory. Also, he admitted that when the detectives arrived, he was over the capacity allowed on his certificate.

The Commission, after a hearing, finds that there was sufficient evidence presented that the premises were overcrowded. The Commission approves the action of the Local Board in finding that the Licensee committed these violations of M.G.L. chapter 138. The Commission approves the action of the Local Board in ordering a one (1) day suspension of the license.

CONCLUSION

The Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in finding the violation was committed by the Licensee. The Commission approves the action of the Local Board in **SUSPENDING** the License of Raw Restaurant Group LLC d/b/a Mija Mexican Cantina for one (1) day. The penalty is a reasonable, if not generous, exercise of the Local Board's lawful discretion.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Susan Corcoran, Commissioner *Susan Corcoran*

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

Kathleen McNally, Commissioner *Kathleen McNally*

Dated: November, 6, 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: Jean Lorizio, Esq., via Facsimile 617-635-4742
Kevin Kilduff, Esq., via Facsimile 781-556-1048
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration
File