



*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150*

Jean M. Lorizio, Esq.
Chair

DECISION

**BRAINTREE BREW HOUSE LLC D/B/A THE BREW HOUSE
703 GRANITE STREET
BRAINTREE, MA 02184
LICENSE#: 0130-00089
HEARD: 6/27/2019**

This is an appeal of the action of the Licensing Board of the Town of Braintree (the "Local Board" or "Braintree") for suspending the M.G.L. c. 138, § 12 all alcoholic beverages license of Braintree Brew House LLC d/b/a The Brew House ("Licensee" or "Brew House") located at 703 Granite Street, Braintree, Massachusetts, for one (1) day to be held in abeyance for six (6) months. 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 Thursday, June 27, 2019.

The following documents are in evidence as exhibits:

1. Local Board's Notice of Hearing, 1/17/2019;
2. Local Board's Decision, 3/26/2019;
3. Brew House Receipt, 12/20/18;
4. Braintree Police Department's Incident Report No. 2018000022764, 12/21/2018;
5. Licensee's Petition for Appeal, 3/18/2019;
6. Local Board's Policies and Regulations Governing Liquor Licenses; and
7. Joint Pre-Hearing Memorandum.

There is one (1) audio recording of this hearing and six (6) witnesses testified.

FINDINGS OF FACT

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

1. The Braintree Brew House LLC d/b/a The Brew House holds an all alcoholic beverages license and is located at 703 Granite Street, Braintree. Mr. Alex Kesaris is a Member of the Licensee LLC and Manager of Record (Testimony, Exhibits 1, 2)
2. On December 21, 2018, at approximately 12:30 A.M., Officer Pond of the Braintree Police Department was on patrol and observed a female in the parking lot shared by the licensee and several other businesses. She appeared to be unsteady on her feet while attempting to get into

a motor vehicle. The female was swaying back and forth as she got into the driver's seat of a motor vehicle. (Testimony, Exhibit 4)

3. Officer Pond followed the motor vehicle and observed the operator of the vehicle twice drive over the fog line. While using his cruiser mounted radar, Officer Pond estimated that the vehicle was traveling at an excessive rate of speed in a residential area and as a result, conducted a motor vehicle stop. (Testimony, Exhibits 2, 4)
4. As Officer Pond approached the vehicle on the driver's side, he detected an odor of alcohol coming from the open window. (Testimony, Exhibit 4)
5. The female operating the motor vehicle was the same woman Officer Pond observed in the parking lot of the licensed premise. (Testimony, Exhibit 4)
6. Officer Pond observed the female's eyes to be glassy and noticed she had a difficult time focusing. The female had slurred speech and stated she was coming from a work holiday party. (Testimony, Exhibit 4)
7. Upon questioning from Officer Pond, the female stated that she had had five drinks. She declined to submit to a field sobriety test and was placed under arrest. (Testimony, Exhibit 4)
8. Braintree Police Officer Brendan McLaughlin conducted a follow-up investigation. Officer McLaughlin contacted the Licensee and obtained the receipt for the female's party on the night of the incident and the names of the two bartenders on duty that night. (Testimony, Exhibits 3, 4)
9. Officer McLaughlin spoke with both bartenders who recalled the female patron and her group. (Testimony, Exhibit 4)
10. The group of coworkers ordered their first drink at approximately 9:41 P.M. and paid their bill at approximately 11:36 P.M. They left the premise by Midnight. (Testimony, Exhibits 3, 4)
11. The female patron was served two glasses of wine.¹ The 2nd glass of wine was not fully consumed. (Testimony, Exhibits 3, 4)
12. Bartender #1 served the female patron and her group when they entered the premise. She took the female patron's order for her 1st glass of wine. She spoke with the party approximately one hour later when she walked by and checked on them. Bartender #1 did not observe any signs of intoxication. (Testimony)
13. Bartender #2 recognized the female patron as someone who had previously come into the licensed premise. She approached the patron soon after she arrived and said hello. Bartender #2 checked on the group approximately one-half hour later and the female patron ordered a soda water. Bartender #2 went back to check on the group approximately one-half hour after that and the female patron ordered a 2nd glass of wine. Bartender #2 did not observe any signs of intoxication. (Testimony, Exhibit 4)

¹ The employees referred to glasses of wine but Mr. Kesaris later clarified that wine is served in single-serving sized bottles. (Testimony, Exhibit 3)

14. Mr. Kesaris was working on the night of the incident and did not observe anyone exhibiting signs of intoxication. (Testimony)
15. Approximately 30 minutes elapsed between the time the female patron left the licensed premises and was first observed by Officer Pond in the parking lot. (Testimony, Exhibit 4)
16. There are other alcohol licensed establishments within the mall where the Licensee is located. (Testimony)
17. On January 17, 2019, the Local Board notified Brew House that it would hold a hearing regarding an alleged violation of M.G.L. c. 138, § 69, service of alcoholic beverages to an intoxicated person, which occurred on December 21, 2018. (Exhibit 1)
18. A hearing was held before the Local Board on March 12, 2019. The Local Board found the Licensee in violation of M.G.L. c. 138, § 69, service of alcoholic beverages to an intoxicated person. (Testimony, Exhibits 1, 2)
19. By decision dated March 26, 2019, the Local Board imposed a penalty of a one-day suspension to be held in abeyance for a period of six months. In addition, staff members of the Brew House were required to retake ServeSafe Training within 30 days and/or show documentation that such training was completed within the last 30 days. (Testimony, Exhibit 2)
20. The Licensee timely appealed the Local Board's decision to the ABCC. (Exhibit 5)

DISCUSSION

Pursuant to M.G.L. Ch. 138, § 67, “[t]he ABCC is required to offer a de novo hearing, that is to hear evidence and find the facts afresh. 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.” Dolphino Corp. v. Alcoholic Beverages Control Comm’n, 29 Mass. App. Ct. 954, 955 (1990) (citing United Food Corp. V. Alcoholic Beverages Control Comm’n, 375 Mass. 240 (1978); Devine v. Zoning Bd. of Appeal of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Bd. of Appeals of Brookline, 362 Mass. 290, 295 (1972)). 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).” Id.

Both the Local Board and the Commission have the authority to grant, revoke, and suspend licenses. Their powers were authorized “to serve the public need and . . . to protect the common good.” M.G.L. c. 138, § 23. “[T]he purpose of discipline is not retribution but the protection of the public.” Arthurs v. Bd. 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’n, 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 Comm’n, 11 Mass. App. Ct. 785, 788 (1981).

The law is well-settled that “the responsibility of the licensee is to exercise sufficiently close supervision so that there is compliance with the law on the premises. A vendor who sells alcohol is “bound at his own peril to keep within the condition of his license.” Rico’s of the Berkshires,

Inc. v. Alcoholic Beverages Control Comm'n, 19 Mass. App. Ct. 1026, 1027 (1985) (quoting Commonwealth v. Gould, 158 Mass. 499, 507 (1893), and citing Burlington Package Liquors, Inc. v. Alcoholic Beverages Control Comm'n, 7 Mass. App. Ct. 186, 190 (1979)).

In order for the Commission to make a finding, there must be substantial evidence that a violation has occurred. "Substantial evidence of a violation is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consol. Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 229 (1938); accord Charlesbank Rest. Inc. v. Alcoholic Beverages Control Comm'n, 12 Mass. App. Ct. 879 (1981).

The Licensee's obligation under 204 C.M.R. 2.05(2) to maintain control over the premises and to comply with Chapter 138 and local regulations is well-settled. The responsibility of the Licensee is to "exercise sufficiently close supervision so that there is compliance with the law on the premises." Rico's of the Berkshires, Inc. v. Alcoholic Beverages Control Comm'n, 19 Mass. App. Ct. 1026, 1027 (1985) (table). A licensee who sells alcohol is "bound at his own peril to keep within the condition of his license." Burlington Package Store, Inc. v. Alcoholic Beverages Control Comm'n, 7 Mass. App. Ct. 186, 190 (1979); accord Commonwealth v. Gould, 158 Mass. 499, 507 (1893). "It is, thus, quite possible for a Licensee to offend the regulatory scheme without scienter." Rico's of the Berkshires, 19 Mass. App. Ct. at 1027.

"No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person." M.G.L. c. 138, § 69. "[A] tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated person unless the tavern keeper knows or reasonably should have known that the patron is intoxicated." Vickowski v. Polish Am. Citizens Club of Deerfield, Inc., 422 Mass. 606, 609 (1996) "The negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication." Id. at 610; accord McGuigan v. New England Tel. & Tel. Co., 398 Mass. 152, 161 (1986).

The Local Board has the burden of producing satisfactory proof that the Licensee committed the violation that is alleged to have occurred on December 21, 2018.

To prove this violation, the following must be shown: (1) that an individual was intoxicated on the licensed premises; (2) that an employee of the licensed premises knew or reasonably should have known that the individual was intoxicated; and (3) that after the employee knew or reasonably should have known the individual was intoxicated, the employee sold or delivered an alcoholic beverage to the intoxicated individual. Vickowski, 422 Mass. at 609.

To meet that burden, "a plaintiff must come forward with some evidence that the patron's intoxication was apparent at the time he was served by the defendant." Douillard v. LMR, Inc., 433 Mass. 162, 164-165 (2001).

Here, the Local Board presented evidence at the Commission hearing only as to the female patron being inside the licensed premises and being served alcohol. Through evidence obtained from the Licensee, the Braintree police were able to establish that the female had been a patron on the night of the incident and had been served 2 glasses of wine. (Testimony, Exhibits 3, 4) The Local Board failed to present any evidence of the female patron exhibiting signs of intoxication while inside the licensed premise, and no evidence that the Licensee knew or should have known that the female patron was intoxicated prior to serving her alcohol.

While the Braintree Police Officers who testified before the Commission were found to be professional and credible, they were not inside the licensed premise on the night of the incident. (Testimony, Exhibit 4) They did not witness the female patron being served alcohol, but only encountered her in the parking lot approximately one-half hour after she left the licensed premise. (Testimony, Exhibit 4) As a result, the officers had no firsthand knowledge of any of the elements necessary to support a finding of a violation of M.G.L. c. 138, s. 69.

The Licensee, on the other hand, offered direct evidence through the testimony of Mr. Kesaris and the two bartenders who had been on duty the night of the incident. (Testimony) The bartenders testified as to the female being at the premises as a patron, her condition while inside the licensed premise, and her condition when served her last drink. Both employees remembered the woman being served two glasses of wine. (Testimony) They both engaged with the female patron on two or more occasions during the approximately two hours she was at the establishment. (Testimony) The Bartenders both testified that the 2nd serving of wine was not fully consumed by the patron. They also stated that they conversed with the female patron and had no concerns about her condition, and that she and her friends left the premise by Midnight. (Testimony)

The Commission is persuaded and finds that the Local Board has not proved by legally competent evidence that the Licensee violated M.G.L. c. 138, § 69.

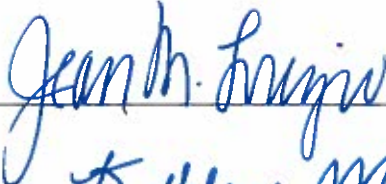
CONCLUSION

The Alcoholic Beverages Control Commission ("Commission") **DISAPPROVES** the action of the Licensing Board of the Town of Braintree in finding that Braintree Brew House LLC d/b/a The Brew House, committed a violation of M.G.L. c. 138, § 69.

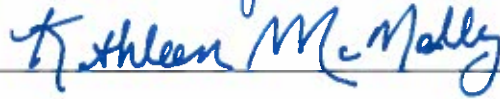
The Commission **DISAPPROVES** the action of the Town of Braintree for imposing a penalty of a one (1) day suspension to be held in abeyance for six (6) months.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman



Kathleen McNally, Commissioner



Dated: October 22, 2019

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.

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cc: Thomas J. Cavanaugh, Esq.
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Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration, File