



**Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
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Jean M. Lorizio, Esq.
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DECISION

**JAMES T. CORREIA D/B/A WHITE'S LANDING
11 FISKDALE ROAD (ROUTE 148)
BROOKFIELD, MA 01506
LICENSE # 014600014
HEARD: 01/21/2017**

This is an appeal from the action of the Town of Brookfield Board of Selectmen (the "Local Board" or "Brookfield") in cancelling the M.G.L. c. 138, § 12 license of James T. Correia d/b/a White's Landing (the "Licensee" or "Correia") located at 11 Fiskdale Road, Brookfield, Massachusetts. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission ("ABCC" or "Commission") and a hearing was held on Wednesday, January 11, 2017.

The following documents are in evidence as exhibits:

1. Licensee's Application for Alteration of Premises 12/21/2011;
2. ABCC Decision 5/2/2013;
3. Letters from Brookfield Zoning Board's Town Counsel, 3/12/2013 and 6/11/2013;
4. Local Board's Hearing Notices 6/10/2013 and 11/20/2013;
5. Local Board's Notice of Taking by Eminent Domain 9/9/2013;
6. Licensee's Motion, 7/18/2014, for Speedy Trial, and Brookfield's Opposition 8/1/2014 in the matter before Worcester Superior Court, CA-14-0656A;
7. Local Board's Decision 7/31/2014;
8. ABCC Decision 3/24/2015;
9. Worcester Superior Court, Docket # 1485CV0655, Judgment of the Court, 2/28/2016;
10. Brookfield Zoning Board of Appeals Decision 3/26/2016;
11. Local Board's Permits (2016, 2017) to Operate a Food Establishment to Licensee;
12. Photos (7) of Licensed Premises;
13. Worcester Probate and Family Court Letters of Authority for Personal Representative to Anna P. White, 11/17/2016;
14. Photo of Interior of Licensed Premises;
15. Docket Sheet for Zoning Appeal, Docket # 1485CV00655; and
16. Licensee's Punch List of Outstanding Construction, 1/9/2017.

There is one (1) audio recording of this hearing and four (4) witnesses testified.

The Commission took Administrative Notice of the Licensee's Commission records.

FINDINGS OF FACT

1. James T. Correia, d/b/a White's Landing ("Licensee" or "Mr. Correia"), is located at 7 Fiskdale Road (Route 148), Brookfield, Massachusetts. Mr. Correia has held a § 12 on-premises all alcoholic beverages license since 2005. (Commission records)
2. This premises has operated as a restaurant since the 1980's. Mr. Correia began operating a restaurant at this location in 2005. (Testimony, Commission records, Exhibits 2, 8)
3. Mr. Correia began approved renovations on the licensed premises in 2009 with all the necessary permits issued by the local boards. (Testimony, Exhibits 2, 6, 8)
4. By December 2010, when he received his license renewal for 2011, he had stopped serving alcohol because of the renovations to the premises. (Testimony, Exhibits 2, 8)
5. In December 2012, the Local Board declined to renew Mr. Correia's license due to non-use. The ABCC disapproved of the Board's denial of the license renewal and recommended that the license be renewed *nunc pro tunc* to January 1, 2013, and held by the Board until such time as the previously approved renovations were completed. (Exhibit 2)
6. On or around March 12, 2013, counsel for the Town and its Zoning Enforcement Officer informed Mr. Correia that the premises in question lost its status as a pre-existing nonconforming structure. (Exhibit 3)
7. On June 4, 2013, the Local Board voted to put Mr. Correia on notice "as of today [June 4, 2013] to use the license within six months by either operating it on the premises or filing the appropriate application to transfer the license or it will be terminated." Mr. Correia received this notice on or around June 10, 2013. (Exhibit 4)
8. On or around September 9, 2013, Mr. Correia received notice from the Town of Brookfield of a taking of a portion of the premises by eminent domain. (Exhibit 5)
9. The Brookfield Zoning Board refused to issue the Licensee the building permits required to complete construction at the premises. (Exhibit 6)
10. The Licensee appealed the Brookfield Zoning Board's action before Worcester Superior Court, docket no. CA-14-0656A. (Exhibit 6)
11. On July 31, 2014, the Local Board sent Mr. Correia written notice of the cancellation of his § 12 wine and malt beverages restaurant license. The letter stated the reasons for cancellation were: (1) no alcohol had been sold under the license for several years; (2) the license was not exercised in 2013 and had not been exercised in 2014 and a transfer had not been applied for; (3) on December 17, 2013, the Board voted to put Mr. Correia on notice for six months; (4) the Board took a similar vote in June 2013 and gave Mr. Correia another six months' notice; and (5) the Board was informed by other Town boards and departments that the opening of a restaurant or other business use at the premises with which to exercise the license is not foreseeable, and may not even be available under applicable zoning and/or Board of Health regulations. (Exhibit 7)

12. Mr. Correia's alcohol license had been renewed by the Brookfield Board of Selectmen ("Local Board") every year since 2005, until its cancellation in 2014. (Commission file)
13. The Licensee appealed the Local Board's July 31, 2014, decision to the ABCC which held a hearing on January 21, 2015. By decision dated March 24, 2015, the ABCC approved the action of the Local Board in cancelling Correia's license for non-use. (Exhibit 8)
14. By decision dated February 26, 2016, the Worcester Superior Court ruled that "the decision of the Town of Brookfield Zoning Board of Appeals entered on March 19, 2014, is hereby REVERSED and the Board is directed to issue the special permit requested within 90 days." (Exhibit 9)
15. Superior Court Judge Wrenn found that "the defendant Zoning Board of Appeal's decision of March 19, 2014 was an arbitrary and capricious decision and the reasons articulated in the board's written decision were not the true reasons for the denial." (Exhibit 9, page 2)
16. Judge Wrenn further stated in his decision: "Thus the court finds that the real reason for Mr. Thomo's "no" vote was an improper motive of protecting the Town of Brookfield's financial interest in keeping the property value of "White's Landing" as a lesser amount, in furtherance of their eminent domain proceeding, rather than in going forward in a good faith basis and evaluating the special permit request submitted in that February 2014 application." (Exhibit 9, page 7)
17. On March 26, 2016, the Brookfield Zoning Board issued to Mr. Correia a special permit allowing the Licensee to expand the pre-existing, non-conforming historical use to include the new buildings and structures located at 7 Fiskdale Road, Brookfield, MA. (Exhibit 10)
18. The Commission decision dated March 24, 2015, whereby the ABCC approved the action of the Local Board in cancelling Correia's license for non-use, was appealed to the Superior Court pursuant to M.G.L. c. 30A. (Exhibit 8, Commission records)
19. In full consideration of Judge Wrenn's decision, in the Worcester Superior Court M.G.L. c. 30A appeal, the ABCC stipulated that the appeal of James T. Correia d/b/a White's Landing be remanded to the ABCC for further hearing. (Commission records)
20. In the meantime, the Licensee continued to perform construction and renovations on the premises. (Testimony, Exhibits 12, 14)
21. On October 22, 2016, Mr. Correia passed away. His wife, Anna Patricia White-Correia was appointed the personal representative of her husband's estate. Mrs. Correia appeared at the January 21, 2017 Commission remand hearing on behalf of her husband. (Testimony, Exhibit 13)
22. The Brookfield Board of Health has issued the Licensee its permit to operate a take-out food establishment. The current permit expires June 30, 2017. (Testimony, Exhibit 11)
23. The Licensee currently serves take-out food pursuant to its permit, operates a bait shop, a citizens' information center, and rents kayak boats for use on the river. The Licensee has picnic tables and places to eat the prepackaged take-out food. The Licensee does not

prepare food at its premises, because the Licensee does not have a common victualler license. (Testimony, Exhibit 11)

24. The Licensee submitted a punch list and many photos of the premises showing the conditions at the premises and demonstrating that the construction is near completion. (Testimony, Exhibits 12, 14, 16)
25. Mr. Michael Jaquith, the contractor and electrician who is finishing the build out at the premises, provided the punch list and testified that construction is 90 days from completion.¹ (Testimony, Exhibit 16)
26. Mrs. Correia testified that construction is near completion and she intends to operate the restaurant at the premises because that has always been her husband's goal. (Testimony)

DISCUSSION

"The licensing authorities may, after hearing or reasonable opportunity therefore, cancel any license issued under [ch. 138] if the licensee ceases to conduct the licensed business." M.G.L. c. 138, § 77. When a local licensing authority cancels such a "pocket license" for non-use, "the licensee may appeal to the [ABCC] as if such authorities had refused to grant the license upon an original application thereof" *Id.* Accordingly, § 77 "explicitly gives the [ABCC] the authority to review license cancellations by local boards." Bd. of Selectmen of Saugus v. ABCC, 32 Mass. App. Ct. 914, 916 (1992). The decision of the Commission "shall be final." M.G.L. c. 138, § 77.

Because the Commission reviews the cancellation as if the Board had denied the original application, M.G.L. c. 138, § 77, it will give "reasonable deference to the discretion of the local authorities" and determine whether "the reasons given by the local authorities are based on an error of law or are reflective of arbitrary or capricious action." Great Atlantic & Pacific Tea Co., Inc. v. Bd. of License Commissioners of Springfield, 387 Mass. 833, 837, 838 (1983); accord Ballarin, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506, 512 (2000) (when reviewing the local board's authority, court does not assess the evidence but rather "examine[s] the record for errors of law or abuse of discretion that add up to arbitrary and capricious decision-making").

In the second decision issued after the Licensee's second hearing before the Commission, the Commission approved the Local Board's decision in cancelling the section 12 license of the Licensee. (Exhibit 8) The Commission based its decision on the reasons stated by the Local Board. "The Local Board articulated five reasons for cancelling Mr. Correia's license:

1. No alcohol had been sold under the license for several years;
2. The license was not exercised in 2013 and has not been exercised in 2014 and a transfer had not been applied for;
3. On December 17, 2013, the Board put Mr. Correia "on notice as of today to use the license within six months by either operating it on the premises or filing the

¹ The ninety days from completion was as of January 11, 2017, the date of the Commission hearing. (Testimony, Commission records)

appropriate application to transfer the license, or it will be terminated” and such notice was provided to Mr. Correia;

4. The Board again provided Mr. Correia with notice in June 2013; and
5. The Board has been informed by other town boards and departments that the opening of a restaurant or other business use at the premises with which to exercise the license is not foreseeable, and may be in violation of applicable zoning and Board of Health regulations.” (Exhibit 8)

The Commission stated in that decision that “[b]ased on the information before it, the Local Board reasonably cancelled the on-premises license issued to Mr. Correia. See, e.g., Stregare, Inc. d/b/a Stregare (ABCC Decision July 5, 2006) (board action disapproved on other grounds) (board would [have] been entitled to cancel the license because the licensee “ha[d] developed an inconsistent history over 2 ½ years of obtaining various building and zoning permits because notwithstanding other legal complications did not build out a leasehold for a licensed premise”); Atara LLC d/b/a Atara Bistro (ABCC Decision Sept. 5, 2003). Accordingly, the Local Board acted reasonably in cancelling Mr. Correia’s license.” (Exhibit 8)

This is the Licensee’s third hearing before the Commission. The Commission heard this matter pursuant to a stipulated remand (prior to the Superior Court c. 30A hearing) from the Superior Court, where the M.G.L. c. 30A appeal of the second Commission decision was pending. The remand to the Commission was based on the decision rendered by Judge Wrenn on the Licensee’s appeal of the Zoning Board matter. The Licensee was issued the necessary building permits to complete the renovations at the premises pursuant to Judge Wrenn’s findings and order. As a result, the Licensee was able to resume construction and presented evidence to the Commission that construction and renovations at the premises are ninety (90) days from completion. The Licensee presently operates part of the premises as a citizens’ information center, serves take-out food, and provides rentals of boats/kayaks for use on the river.

The Brookfield Local Board argues that it only considered non-use when it cancelled the license. The Local Board argues that the Commission should uphold the cancellation of the license for non-use, and that when construction is completed and the Licensee is ready to utilize the premises, Mrs. Correia can apply to the Local Board for a M.G.L. c. 138, § 12 wines and malt beverages restaurant license.²

The Licensee argues that the Commission should, in light of the new circumstances of renovations and construction being almost completed, disapprove the Local Board’s cancellation of the Licensee’s M.G.L. c. 138, § 12 restaurant license. The Licensee requests that the Commission remand the matter to the Local Board with the directive that the license not be cancelled.

The Licensee further argues that the Commission needs to order the Local Board to issue the license because the Licensee does not believe, based on past history, that the Local Board will issue the M.G.L. c. 138, § 12 restaurant license.

² The Town of Brookfield has both M.G.L. c. 138, § 12 wines and malt beverages licenses (5) and all alcoholic beverages restaurant licenses (12) available through its quota. (Testimony, Commission records)

The Commission finds that new facts exist in this matter resulting in a change of status and circumstances for the Licensee and its premises. The Commission finds that pursuant to Judge Wrenn's order requiring the issuance of the building permits, new evidence came before the Commission that the renovations are at or near completion. Therefore, the Commission finds that the Licensee's M.G.L. c. 138, § 12 restaurant license should NOT be cancelled by the Local Board.

CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Town of Brookfield Board of Selectmen in cancelling the M.G.L. c. 138, § 12 restaurant license of James T. Correia d/b/a White's Landing. The Commission remands the matter to the Local Board for the Local Board to issue a renewal license application for 2017, and to process the renewal license application in the usual administrative process.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner Kathleen McNally

Elizabeth Lashway, Commissioner Elizabeth Lashway

Date: February 24, 2017

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

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Administration, File