The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Deborah B. Goldberg
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

DECISION

JAMES T. CORREIA D/B/A WHITE'S LANDING
11 FISKDALE ROAD (ROUTE 148)
BROOKFIELD, MA 01506
LICENSE # 014600014
HEARD: 01/21/2015

This is an appeal from the action of the Town of Brookfield Board of Selectmen (the "Local Board") in revoking 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 21, 2015.

The following documents are in evidence as exhibits:

1. Commission Decision dated May 2, 2013, re: James T. Correia v. Town of Brookfield;
2. Letter from Brookfield Zoning Board's Attorney P. Cantor dated March 12, 2013;
3. Letter from Brookfield Zoning Board's Attorney P. Cantor dated June 11, 2013;
4. Notice of Taking by Eminent Domain dated September 9, 2013;
5. Attorney O'Neil's Letter dated November 20, 2013, to Brookfield Fire Chief Martell;
6. Brookfield Zoning Board of Appeals Decision dated March 19, 2014;
7. Licensee's Check #1652 Payment for 2014 license renewal;
8. Board's Letter dated July 15, 2014, for public hearing; and
9. Board's Decision dated July 31, 2014.

A. Minutes of the Board Meeting, June 4, 2013'
B. Board's Letter dated June 10, 2013, status notice;
C. Board's Letter dated November 20, 2013, for public hearing;
D. Minutes of the Board Meeting, December 17, 2013;
E. Board's Letter dated July 15, 2014, for public hearing; and
F. Minutes of the Board Meeting, July 22, 2014.

There is one (1) audio recording of this hearing and four (4) witnesses testified.
The Commission took Administrative Notice of the Licensee's Commission file.

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FACTS

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 an on-premises all alcoholic beverages license since 2005. (Exhibit 1, Testimony)

2. Mr. Correia began renovations on the premises in 2009 with all the necessary permits issued by the local boards. By December 2010, when he received his license renewal for 2011, he had stopped serving alcohol because of the renovations. He did not notify the Board that he had stopped serving food and alcohol. (Testimony)

3. As of December 2012, Mr. Correia had spent approximately $300,000 in renovation costs (Testimony)

4. 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. (Commission File, Exhibit 1)

5. Subsequent to the Commission's ruling, Mr. Correia invested an additional $50,000 into renovations of his premises. (Testimony)

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 and that under the current law, the premises can only be used as a bait shop and boat rental business. (Exhibit 2)

7. In June 2013, the Local Board mailed Mr. Correia notice of a hearing to discuss the status of his license. Despite Mr. Correia's knowledge of the hearing and its purpose – for a status of the license -- he did not attend. 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." Correia received this notice on or around June 10, 2013. (Testimony, Exhibits A, B)

8. On or around September 9, 2013, Mr. Correia received notice from Town of a taking of a portion of the premises. (Exhibit 4)

9. On or around November 20, 2013, Mr. Correia received another notice from the Local Board that a hearing was scheduled in December "to discuss the liquor license associated with White's Landing . . . . The Board will be considering your lack of response on June 4, 2013, and the Board may consider such disciplinary action as it deems appropriate, including . . . cancelation of such license pursuant to M.G.L. c. 138, § 77." (Exhibit C)

10. Mr. Correia attended the December 17, 2013. At this hearing, Mr. Correia told the Local Board that "construction is very close to being finished and the intention is to open the business ASAP and use the license." He was again put on notice that he had six months

from December 17, 2014, to exercise his license or transfer it, or it would be cancelled (Exhibits C, D)

11. Seven months later, on July 17, 2014, the Board sent Mr. Correia notice of a hearing "to consider the status of [his] business and failure to exercise the license or comply with the Board's December 17, 2014 directive to [the licensee] to either exercise the license for a transfer within six months of that date" (Exhibit 8, Exhibit E)

12. On July 22, 2014, at a public Board meeting, "Mr. Correia said he was unable to discuss the current status of his building project due to pending litigation against the Town.

13. The Local Board then voted to cancel Mr. Correia's licenses for non-use pursuant to M.G.L. c. 138, § 77. The Local Board discussed Mr. Correia's refusal to update the Board on the construction of his premises, the premises not having a fire certificate, and the fact that the premises had not served alcohol in years. The Local Board made the following findings: (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 has 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 F).

14. On July 31, 2014, the Local Board sent Mr. Correia written notice of the cancelation of his license. The letter stated the same reasons for cancellation as were articulated at the July 22, 2014, hearing. (Exhibit 9)

15. Mr. Correia's alcohol license had been renewed by the Brookfield Board of Selectmen ("Local Board") every year since 2005, until its cancelation in 2014. (Commission file)

16. As of January 21, 2015, Mr. Correia represented to the Commission, that there is still at least one year more of renovation work to be done at the premises, including interior finish work and sheet work, which Mr. Correia is completing himself. (Testimony)

DISCUSSION

"The licensing authorities may, after hearing or reasonable opportunity therefore, cancel any license issued under [c. 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, and the decision of the [ABCC] shall be final." Id. Section 77 "explicitly gives the [ABCC] the authority to review license cancellations by local boards." Board of Selectmen of Saugus v. ABCC, 32 Mass. App. Ct. 914, 916 (1992).

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. Board of License Commissioners of Springfield, 387 Mass. 833, 837, 838 (1983); accord Ballarin, Inc. v. Licensing Board 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 the record for errors of law or abuse of discretion that add up to arbitrary and capricious decision-making").

The Local Board articulated five reasons for canceling 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 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.

Mr. Correia admits that he has not exercised his license since at least December 2010 in order to conduct renovations on the premises. The Local Board provided Mr. Correia an opportunity to be heard on three separate occasions to adequately apprise the Board of his renovations in order to determine whether the license was in a state of disuse. Instead, he failed to attend one meeting, misrepresented his progress at a second meeting, and refused to speak of his progress at a third meeting. With nothing else before it except for the knowledge that Mr. Correia had not exercised the license in years nor had transferred it, and that in any event the license could never reasonably be utilized on that premises, the Local Board was reasonable in canceling the license for nonuse under M.G.L. c. 138, § 77.

The licensee has the burden of informing the Local Board what the licensee is doing to exercise the license once it receives notice of potential cancellation. Ristorante Marino (ABCC Decision June 14, 2005). At the first meeting, on June 4, 2013, the licensee did nothing to explain why he was not exercising the license; in fact, the licensee did not even attend the hearing despite having knowledge of it and that the purpose was to discuss the status of his license since it was not being used. Shortly after, he received notice from the Board that he had six months to either utilize his license or transfer it, or it would be cancelled. Despite this warning, the licensee did nothing to keep the Board informed regarding his use of the license from June until December 17, 2013. This "dilatory behavior of the licensee in not contacting the Licensing Board and informing them of the progress" for six months, after being warned he had to utilize his license or transfer it, cannot be ignored. See Id. (nothing "would excuse the dilatory behavior of the licensee in not contacting the Licensing Board and informing them of the progress of their negotiations for over 10 months); Italian-American Restaurant Inc., d/b/a Italian American Restaurant (ABCC Decision Feb. 6, 2008) ("The Commission is persuaded and finds that the Licensee did not contact the Local Board within the prescribed 90 day period and thus could not

show any evidence that the licensee exercised its good faith efforts to comply with the Local Board). "A licensee cannot cease operations, sit silent and avoid contact with the local board without facing the real peril of cancellation of its license." Id.

Then, on December 17, 2013, at the second hearing, the licensee misrepresented to the Local Board the status of his renovations. Mr. Correia represented that "construction is very close to being finished and the intention is to open the business ASAP and use the license" (Exhibit D). However, as of the time of the Commission hearing on this appeal -- over two years later -- Mr. Correia testified that he still has, at a minimum, at least one more year of renovations.[1] Instead of cancelling his license on December 17, as was within its right, the Local Board, based on Mr. Correia's representations, gave him another six months to exercise his license. However, "the Licensee did not abide by the material, factual representations on which the Local Board relied in forbearing from canceling the license under M.G.L. c. 138, § 77," Atara LLC d/b/a Atara Bistro (ABCC Decision Sept. 5, 2003), and the Local Board was entitled to cancel the license. While the Local Board was not required to do so, the Local Board, in its discretion, permitted the licensee another six months to exercise his license. From this December hearing until the following July, the licensee did nothing to continue informing the Local Board of his progress, as was his responsibility.

Finally, at the third hearing on this matter, July 22, 2014, Mr. Correia refused to provide any information regarding his renovations. He "said he was unable to discuss the current status of his building project due to pending and current litigation against the Town." "[T]he license owed the Local Board the obligation to keep them informed . . . ." Stregare, Inc. d/b/a Stregare (ABCC Decision July 5, 2006). Again, he sat silent and avoided apprising the Board of his renovations at his peril. Italian-American Restaurant Inc., d/b/a Italian American Restaurant (ABCC Decision Feb. 6, 2008).

In addition to the licensee's failures before the Local Board, which on their own are sufficient to approve of the Board's cancellation of the license, it also appears that the license can never be exercised at White's Landing. See, e.g., Atara LLC d/b/a Atara Bistro (ABCC Decision Sept. 5, 2003) (a lawsuit "suggests that the Licensee has lost its legal right to occupy the licensed premises. This fact alone has been held to be ground to deny renewal of a license").

Based 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 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.

[1] The Commission does not credit Mr. Correia's representations that there is one year left of renovations to be made to the premises. There appears to be no end in sight as to when these renovations will be completed, if ever, and it appears that this premises can never be used as Mr. Correia intends.

CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in cancelling the M.G.L. c. 138, §12, license of James T. Correia d/b/a White's Landing. The Commission **APPROVES** the action of the Local Board as a reasonable exercise of its discretion. The decision of the Alcoholic Beverages Control Commission is final. M.G.L. c. 138, §77.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Susan Corcoran, Commissioner Susan Corcoran

Kathleen McNally, Commissioner Kathleen McNally

Date: March 24, 2015

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

cc: Sean C. Murray, Esq., via facsimile (508) 754-4904
Brian Riley, Esq., via facsimile (617) 54-1735
Frederick G. Mahony, Chief Investigator
Administration
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