



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

JAMES T. CORREIA DBA WHITE'SLANDING
7 FISKDALE RD (RTE 148)
BROOKFIELD, MA 01506
LICENSE#: 014600014
HEARD: 04/10/2013

This is an appeal of the action of the Town of Brookfield Board of Selectmen (the "Local Board" or "Brookfield") in denying the M.G.L. c. 138, § 12 license renewal of James T. Correia dba White's Landing (the "Licensee" or "White's Landing") located at 7 Fiskdale Road, Route 148, Brookfield, MA. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, April 10, 2013.

The following documents are in evidence:

1. Minutes of the Local Board's Meeting Held on December 28, 2012; and
2. Local Board's Decision dated January 23, 2012.
 - A. Licensee's 2013 Renewal Application dated November 29, 2012;
 - B. Town of Brookfield Building Department Certificate of Use and Occupancy dated November 5, 2012;
 - C. Letter dated July 26, 2006 from Brookfield Police Chief Ackerman to Local Board;
 - D. Four (4) Pictures of Licensed Premises;
 - E. Letter dated December 22, 2003 from Commonwealth of Massachusetts' Department of Environmental Protection; and
 - F. Email Correspondence between the Local Board and the Licensee.

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

FACTS

1. James T. Correia dba White's Landing is located at 7 Fiskdale Road (Route 148), Brookfield, MA. Mr. Correia has held an on-premises all alcoholic beverages license since 2005. (Testimony, Commission Records)
2. In December 2011, the Licensee submitted an application to alter his premises to the Local Board, which was subsequently approved by both the Local Board and the Commission. (Testimony, Commission Records)

3. In 2011 and 2012, with the Local Board's approval, while the renovations were underway, Mr. Correia did not sell or distribute alcoholic beverages at the licensed premises. (Ex. 2, Testimony)
4. Mr. Correia has completed a portion of the renovations for "The Quaboag Paddler" and the "River Resource Center." Both spaces have been inspected and approved by all required officials from the town. This portion of the premises has been granted an occupancy permit and is open to the public. (Exs. A, B)
5. However, the remodeling of the food service/kitchen portion of the building is ongoing. As a result, the occupancy permit does not include this portion of the premises. (Ex. A)
6. On November 29, 2012, Mr. Correia timely filed his 2013 alcoholic beverages license renewal application, without the annual fire safety certificate. The renewal was for the same type of license and the same premises as licensed in 2012. (Ex. A, Testimony)
7. Mr. Correia followed the same process to renew his license application for 2013 that he followed in 2012. He requested that the license be renewed, but held by the Local Board until the renovations were completed and he could obtain the fire safety certificate. (Ex. A, Testimony)
8. The Local Board discussed Mr. Correia's renewal application at a duly noticed meeting on December 11, 2012 but did not vote to renew his license. (Ex. A, Testimony)
9. On December 12, 2012, Donna Neylon, an employee of the Local Board, sent Mr. Correia an email informing him that the Local Board had tabled his renewal application. She attached a copy of the agenda. (Ex. F, Testimony)
10. Although the Local Board gave no reason, the lack of an occupancy permit was mentioned. The Local Board scheduled a special meeting regarding Mr. Correia's renewal application. (Ex. F, Testimony)
11. On December 14, 2012, Ms. Neylon sent Mr. Correia an email informing him that a Special Meeting of the Local Board had been scheduled for December 28, 2012. Ms. Neylon included a copy of the agenda. This was the only matter scheduled. (Ex. F, Testimony)
12. On December 18, 2012, Ms. Neylon sent Mr. Correia an email informing him that at least one of the Selectmen was concerned about the section of the renewal application regarding parking. (Ex. F, Testimony)
13. Renewal applications are generated by the Commission's Licensing Division, and do not contain any information about parking. (Commission Records)
14. The Local Board held a second meeting on December 28, 2012, that Mr. Correia attended. After more discussion, the Local Board voted to deny the renewal application for 7 Fiskdale Road. (Exs. 1, 2, Testimony)
15. During the discussion, the Local Board focused on issues outside the parameters of the renewal application. For example, the Local Board discussed parking, the exercise of the license, the location of the premises in a flood plain, and the tight tank. (Exs. 1, 2)
16. The Local Board did not provide any notice to the licensee that these issues (other than parking) would be discussed at the hearing on the renewal application. (Testimony)

17. The Local Board also cited the failure to submit the annual fire safety certification signed by the Building Inspector and the Fire Chief. Both the Building Inspector and the Fire Chief indicated that there is an occupancy permit only for the small addition to the building, the "bait shop", and not for the majority of the building. (Exs. 1, 2, Testimony)
18. In 2011, under the same circumstances, i.e. the inability to provide a fire safety certificate for the renewal application, the Local Board approved the Licensee's 2012 renewal. At that time, the Local Board and Mr. Correia agreed that the Local Board would hold the license until the renovations were complete such that the Licensee could obtain the necessary approvals. (Exs. 1, A, Testimony)

DISCUSSION

M.G.L. c. 138, § 16A controls the license renewal process of alcoholic beverages licenses and confers upon such licensees a prima facie right to renewal. This statute states, in pertinent part, that "[l]icenses issued under section twelve ... 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 is of the same type as the expiring license and covers the same licensed premises." *Id.* There is no question that this renewal application was timely filed and is the same license type covering the same licensed premises.

A timely filed renewal application may still be rejected for cause by a local licensing authority, subject to certain constitutional principles. See *Piona v. Selectmen of Canton*, 333 Mass. 510, 511 (1956); M.G.L. c. 138, § 16A. The holder of a license is clothed "with a constitutionally protected interest of which he may not be deprived without procedural due process." *Konstantopoulos v. Whately*, 384 Mass. 123, 132 (1981). In *Konstantopoulos*, the Supreme Judicial Court held, "[o]nce licenses are issued, ... their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses ... involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Id.*

Procedural due process requires "adequate notice setting forth the charge which forms the basis" of the action by the local licensing authority, a hearing and "an opportunity to call witnesses and cross-examine the opposing witnesses, if any, in a reasonable fashion." *Id.* The Supreme Judicial Court has held that a letter warning a licensee of "adverse action" if it failed to comply with a condition imposed by a local licensing authority did not meet the requirements of procedural due process where the letter relied on did not provide the licensee with the "time or place of a hearing nor did it indicate that a revocation hearing would ensue if [the licensee] failed" to comply with the licensing authority's condition. *Id.*

This Commission has been found to be in error when it rejected an appeal by a licensee of an action taken by a local board that had failed to provide required notice. In *Piona v. Alcoholic Beverages Control Commission*, 332 Mass. 53 (1954), the Supreme Judicial Court held that in "failing to allow an appeal from a local board which had omitted to provide notice required by statute ... (the Commission) countenanced and gave effect to the error which the board had committed." *Board of Selectmen of Barnstable v. Alcoholic Beverages Control Commission*, 373 Mass. 708, 717, note 14 (1977). In reaching its decision, the Supreme Judicial Court also cited to M.G.L. c. 30A, § 14(8)(d), that authorizes a reviewing court to overturn an agency action when the court finds that the agency action was "[m]ade upon unlawful procedure."

In this case, the Commission holds that the Local Board did not give the Licensee proper notice and a reasonable opportunity to be heard on the question of whether or not the license would be renewed for calendar year 2013. The Local Board did not issue any separate document for the notice of hearing, but

merely had administrative personnel send an email. The contents of the email did not specify the basis for the Local Board's hearing to determine whether there was good cause to deny renewal of this license. The Local Board also failed to provide notice that it would be discussing the licensee's failure to exercise the license, the location of the premises in a flood plain, and the tight tank. Furthermore, the Local Board permitted Mr. Correia to renew his license in 2011 and 2012 under the same circumstances as those that motivated this activity regarding the renewal of this license for 2013.

As such, the only substantial issue that could be reached by the Commission, but is not reached because of the Local Board's procedural errors specified above, is the Licensee's failure to provide a fire safety certificate. M.G.L. c. 10, § 74, requires on-premises alcoholic beverages licensees to annually submit a valid certificate of inspection, issued by a local inspector and signed by the head of the fire department for the city, town or district in which the applicant intends to sell alcoholic beverages to be consumed on the premises. The issuance of such certificate is a precondition for the issuance or renewal of such a license and the Commission may summarily revoke any license upon notice of noncompliance or expiration of such certificate, by operation of law and without a hearing. Id.

In light of the mandatory language in the statute, the Commission requires a valid fire safety certificate for all new license applicants and for all license renewals. However, the Commission has endeavored to administer and enforce this mandate in compliance with its legislative intent. The Commission therefore has taken a balanced and reasoned approach to this issue. See In Re: Randolph Country Club, Inc., (ABCC Decision dated February 4, 2008).

Individuals who are applying for and renewing alcoholic beverages licenses need some framework they can rely upon when engaging in the licensing process. Legitimate businesses need some assurance that they are not going to undertake a costly construction project or major renovation, only to find that at the end of the process, their license renewal application, which is a necessary component of their business operations, has been disapproved. Clearly it was not the intent of the legislature to deny a new alcoholic beverages license application, simply because the applicant intends to build a new establishment. Similarly, the legislature does not want to penalize licensees seeking to invest in their business by upgrading the licensed premises.

M.G.L. c. 138, § 15A, specifically addresses this issue. It provides in pertinent part, "Where there are no premises actually in existence at the time the application is made, ... the local licensing authorities may thereafter grant a license upon the condition that such license shall issue upon completion of such premises according to said plan." As such, in certain circumstances, i.e. construction, major renovations, etc., when an applicant is not operating the licensed premises, the Commission follows certain protocols to administer and enforce the statute in compliance with this legislative intent.

When a new license applicant who is not operating their proposed business as a result of construction which precludes them from obtaining a fire safety certificate, has an otherwise complete application, the Commission conditionally approves the license. This allows the applicant to move forward with their construction project and obtain the necessary financing etc., with the peace of mind to know that once completed, they will have an alcoholic beverages license. Once the project is completed and prior to the opening or operation of the business, the new licensee must obtain a valid fire safety certificate. Similarly, where a licensee is undergoing major renovations, has an approved alteration of premises application, and is not operating the business, lack of a fire safety certificate is not grounds to refuse to automatically renew the license.

The facts of this case are uncontested. The Local Board has allowed Mr. Correia to renew in previous years under the exact same circumstances. In the decision regarding this license renewal for calendar year 2013, the Local Board failed to comply with M.G.L. c. 138, § 16A by not automatically renewing the

license. The Local Board should approve Mr. Correia's renewal application and continue holding the license until such time as Mr. Correia produces a valid fire safety certificate prior to commencing any operation of the license.

CONCLUSION

The Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in **DENYING THE LICENSE RENEWAL** of James T. Correia dba Whites' Landing. Therefore, the Commission remands the matter to the Local Board with the recommendation that the license be renewed effective January 1, 2013, nunc pro tunc, and held by the Local Board until such time as the previously approved renovations are completed. Operations under this license may commence after the fire safety certificate is issued.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman, _____

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

Kathleen McNally, Commissioner _____

Dated: May 2, 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: Paul Mullan, Esq. via Facsimile 508-792-9979
Brian Riley, Esq. via Facsimile 617-654-1735
Frederick G. Mahony, Chief Investigator
Administration
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