



Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
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Jean M. Lorizio, Esq.
Chairman

DECISION

SLESAR BROS. BREWING COMPANY, INC.
D/B/A BURLINGTON BEER WORKS
34 CAMBRIDGE STREET
BURLINGTON, MA 01803
LICENSE#: 0160-00011
HEARD: 1/10/2019

This is an appeal of the action of the Town of Burlington Board of Selectmen (the "Local Board" or "Burlington") for voting to revoke or cancel¹ the § 12 all-alcoholic beverages license of Slesar Bros. Brewing Company, Inc. d/b/a Burlington Beer Works (the "Licensee" or "Slesar Bros.") located at 34 Cambridge Street, Burlington, Massachusetts for the Licensee's failure to activate and utilize the license granted. 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, January 10, 2019.

At the close of the January 10, 2019 hearing, the Commission left the record open for the parties to submit additional documents. Burlington submitted documents in a timely manner, which have been marked as Exhibits O through Z below. The record is now closed.

¹ In the instant case, the Burlington Local Board's meeting minutes indicate that the Local Board voted to "revoke" the Licensee's license, and the Local Board's written decision on this matter provides that the Local Board voted to "revoke or cancel" the license. (Exhibits M, 10) Pursuant to M.G.L. c. 138, § 77, the only authorized sanction for the failure to conduct the licensed business is cancellation of the license. Compare M.G.L. c. 138, § 64 ("[t]he licensing authorities after notice to the licensee and reasonable opportunity for him to be heard by them, may modify, suspend, revoke or cancel his license upon satisfactory proof that he has violated or permitted a violation of any condition thereof, or any law of the commonwealth"). Here, as set forth below, the basis of the Local Board's action was the Licensee's non-use of the license, and therefore, the applicable section of Chapter 138 is § 77, "cancellation of license upon cessation of licensed business."

The following documents are in evidence as exhibits:

Slesar Brothers Brewing Company, Inc.'s exhibits:

1. Joint Pre-Hearing Memorandum;
2. Affidavit of David Maida;
3. Affidavit of Daniel R. Newcomb;
4. Affidavit of Joseph D. Slesar;
5. Planning Board Special Permit for 34 Cambridge Street, Burlington, 2/13/2013;
6. Planning Board Special Permit for Slesar Brothers Brewing Company, Inc., 10/18/2016;
7. Local Board's Decision on Slesar Brothers' Special Permit Application; Letter from Burlington to Atty. Sporn and Slesar, 8/10/18; Local Board Agenda for 8/13/18 Meeting;
8. Edens [Landlord] Letter to ABCC, 1/10/2019;
9. Photos of Burlington Shopping Plaza;
10. Atty. Sporn's Letter appealing the Local Board's Decision, 9/25/2018, with attached Local Board Decision, 9/17/18;
11. Licensee's Memorandum of Law in Support of Its Appeal;
12. Local Board's Letter to Atty. Sporn, 5/26/2016;
13. Emails between ABCC and Local Board re: Licensee's Application to Alter Premises, 7/18/2017.

Town of Burlington's exhibits:

- A. Maps of Shopping Plaza and floor plans;
- B. Local Board's Meeting Minutes, 11/9/2015 with Letter to Atty. Sporn, 11/19/2015;
- C. Local Board's Meeting Minutes, 1/25/2016 with Letter to Atty. Sporn, 7/18/2016;
- D. Local Board's Meeting Minutes, 2/13/2017;
- E. Local Board's Meeting Minutes, 3/13/2017 with LLA Review Record for Alteration of Premises Application, 3/13/2017;
- F. Local Board's Meeting Minutes, 12/18/2017;
- G. Local Board's Meeting Minutes, 1/22/2018;
- H. Email from Planning Board to Atty. Sporn, 1/25/2018;
- I. Email from Building Inspector John Clancy to Atty. Sporn, 2/6/2018 with Building Permit #39852 and Inspector Clancy's Letter to Atty. Sporn, 3/26/2018.
- J. Correspondence from Joseph Slesar and Atty. Sporn to Burlington Building Department re: extension of time to complete work, August 2018, with emails between Atty. Sporn and John Clancy;
- K. Building Inspector Clancy's Memo to Town Counsel and Town Administrator re: extension of time request, 8/10/2018 with attached Building Code;
- L. Local Board's Meeting Minutes, 8/13/2018;

- M. Local Board's Meeting Minutes, 9/10/2018 with Legal Notice of Public Hearing 9/10/2018;
- N. Town Administrator's Letter to Atty. Sporn and J. Slesar, re: Show Cause Hearing to Revoke or Cancel License, 9/17/2018;
- O. Local Board's Email Notice of Hearing to Atty. Sporn, 11/20/2017;
- P. Local Board's Notice of Public Hearing, 11/20/2017;
- Q. Legal Notice of Public Hearing to be held 12/18/2017;
- R. Copy of Published Legal Notice of Public Hearing, 12/4/2017;
- S. Local Board's Meeting Agenda for 12/18/2017 posted 12/15/2017;
- T. Letter from Town Administrator to Atty. Sporn, 8/10/2018;
- U. Local Board's Meeting Agenda for 8/13/2018 posted 8/9/2018;
- V. Local Board's Email for Show Cause Hearing to Atty. Sporn, 8/24/2018;
- W. Copy of Published Legal Notice of Public Hearing, 8/27/2018;
- X. Local Board's Meeting Agenda for 9/10/2018 Meeting;
- Y. Local Board's Email for Plan Review Comment Follow-Up, 12/8/2017 with Legal Notice of 12/18/2017 hearing and Copy of Published Notice of Public Hearing [ex.1];
- Z. Local Board's Email Notice of Hearing to Atty. Sporn, 8/24/2018 with Legal Notice of Public Hearing to be held 9/10/2018 with Copy of Published Notice of Public Hearing; and Local Board's Notice to Atty. Sporn, 8/23/2018, for Show Cause Revocation Public Hearing. [ex.2]

There is one (1) audio recording of this hearing and two (2) witnesses testified. The Commission took administrative notice of the contents of the Commission File.

FINDINGS OF FACT

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

1. Slesar Bros. Brewing Company, Inc. d/b/a Burlington Beer Works (the "Licensee" or "Slesar Bros.") is a Massachusetts corporation with principal offices located at 110 Canal Street, Boston, Massachusetts. The corporation owns and operates pub breweries licensed by local licensing authorities and the ABCC pursuant to M.G.L. Chapter 138. (Commission files)
2. Outback Steakhouse of Florida, LLC ("Outback") formerly owned and operated an Outback Steakhouse restaurant with a full liquor service at 34 Cambridge Street, Burlington, MA, which is in a shopping plaza (the "Shopping Plaza"). (Testimony; Commission files; Exhibit B)
3. In or about October 2015, Slesar Bros. submitted to the Local Board a § 12 transfer application from Outback to Slesar Bros. for the same location. Id. The ABCC approved the application on or about January 20, 2016. (Commission files)

4. On or about December 8, 2015, Slesar Bros. filed a Special Permit application, which the Planning Board approved with conditions in January 2016. (Exhibit 4, at ¶¶ 18, 19)
5. The Licensee filed an alteration of premises application with the Local Board in January 2016, which the Local Board approved and then the Commission approved in July 2016. (Commission files; Exhibit C)
6. On or about August 21, 2016, the Licensee submitted to the Burlington Planning Department its second Special Permit application with a revised seating plan to address seating capacity. (Exhibit 6)
7. The Burlington Planning Department held a public hearing on the second Special Permit application on October 6, 2016. The Planning Board approved the application as set forth in its decision dated October 18, 2016, which included conditions. Id.
8. In or about December 2016, the Licensee filed with the Local Board another application for alteration of premises based upon the decision of the Burlington Planning Board. (Commission files) Following multiple Local Board meetings, the Local Board approved the second application, and the ABCC approved it in June 2017. (Exhibits D, E; Commission files)
9. In August 2017, the Licensee filed a Building Permit application with the Town of Burlington Building Department. (Exhibit I; Exhibit 4, at ¶ 36)
10. On or about November 20, 2017 the Local Board requested that the Licensee or his representatives appear at the Local Board hearing scheduled for November 27, 2019 to provide an update as to Burlington Beerworks. (Exhibit P)
11. On December 9, 2017, the Local Board forwarded to the Licensee's attorney the Legal Notice of a Local Board hearing scheduled for December 18, 2017 to vote on the continued status, including potential revocation, of the Licensee's license. (Exhibit Y)
12. At the public hearing on December 18, 2017, the Licensee presented testimony regarding the status of its permits and the anticipated start of construction. The Local Board decided to continue this matter to the public meeting on January 22, 2018. (Exhibit F)
13. At the public hearing on January 22, 2018, the Local Board voted to not revoke the Licensee's license and also voted to close the hearing. (Exhibit G)
14. The Burlington Building Department issued a building permit to the Licensee on February 6, 2018. (Exhibit I)
15. In about February 2018, the Licensee decided to terminate its lease and search for a buyer of the license. (Testimony; Exhibit 4, at ¶ 49)
16. In March 2018, the Licensee had David Maida of Allied Restaurant Brokerage commence a search for a buyer of the license and/or for an entity that could replace the Licensee at the same location. (Exhibit 2, at ¶ 8) The Licensee worked with him throughout the spring and summer of 2018 to identify and meet with parties who expressed interest in the license and leased premises. (Exhibit 4, at ¶ 50)

17. In late July 2018, the Licensee retained Daniel Newcomb, a broker of The Atlantic Restaurant Group, Inc., to sell the license. Accordingly, Newcomb began to advertise and market the license in an attempt to find a buyer of the Licensee's license. (Exhibit 3, at ¶ 6; Exhibit 4, at ¶ 52)
18. On August 10, 2018, the Local Board sent the Licensee a notice of a Local Board meeting on August 13, 2018 to discuss the status of the Licensee's license. (Exhibit T)
19. On August 13, 2018, the Local Board held a public hearing on the status of Burlington Beer Works. The Licensee informed the Local Board that it was attempting to sell the license. The Local Board voted to schedule a show-cause revocation public hearing for September 10, 2018. (Exhibit L)
20. On August 23, 2018, the Local Board gave notice to the Licensee of a September 10, 2018 meeting, the subject of which was to be, "Burlington Beer Works Show Cause Revocation Public Hearing." In the notice, the Local Board advised the Licensee to "provide proof to the [Local Board] that the All Alcohol License for Burlington Beer Works should not be revoked for on-going non-use of the License. The construction permit was ready to be picked up on February 6, 2018 and was picked up on August 3, 2018." (Exhibit Z)
21. On September 10, 2018, the Local Board held a show cause hearing on the revocation of the Licensee's liquor license. The Licensee requested sufficient time to dispose of the license. The Local Board voted unanimously to revoke the license. See supra n. 1; Exhibit M.
22. The Local Board issued its written decision in which it stated that it had voted to revoke or cancel the Licensee's liquor license.² (Exhibit 10)

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 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. Alcoholic Beverages Control Comm'n, 32 Mass. App. Ct. 914, 916 (1992). The decision of the Commission "shall be final." M.G.L. c. 138, § 77.

"Once a local board has determined that a license holder risks cancellation of its license under M.G.L. c. 138, § 77 as a result of non-use of the license, this Commission evaluates the amount of time the board has given the licensee to cure the non-use to ensure its reasonableness." In Re: Turnpike @ Winona, LLC (ABCC Decision May 14, 2010). The Commission's practice of granting a reasonable time to transfer a license is in step with the Board of Selectmen of Saugus v. Alcoholic Beverages Control Comm'n, 32 Mass. App. Ct. 914 (1992). In that case, the licensee received a show cause notice for cancellation. The licensee had made several attempts to sell its

² Note that the Licensee timely renewed its license for 2019. (Testimony, Commission files)

license, and before the hearing, the licensee negotiated a purchase and sale agreement with a potential buyer who submitted a transfer application the day before the hearing. The local board still voted to cancel the license. The Commission disapproved this action, holding that the licensee should have been afforded six additional months to transfer its license. The Appeals Court affirmed the Commission. See Bd. of Selectmen of Saugus, 32 Mass. App. Ct. at 915-917.

It is this Commission's practice to allow a licensee at least six months from the date of the notice of the risk of cancellation to cure the non-use by either operating its premises or filing the appropriate application to transfer the license. See id.; Empresas Guanacas, Inc. d/b/a Mango Grill Fine Latin Cuisine (ABCC Decision March 13, 2009); Turnpike @ Winona, LLC (ABCC Decision May 14, 2010); 45 Province Restaurant, LLC (ABCC Decision February 22, 2012); EKB Corp., Inc. d/b/a Sully C's Bar and Grill (ABCC Decision August 16, 2018). The Commission's sense of fairness is forward looking, and the time within which the licensee must act does not begin to run until the licensee is first put on notice that there is a potential enforcement of Chapter 138, § 77. Empresas Guanacas, Inc. d/b/a Mango Grill Fine Latin Cuisine (ABCC Decision March 13, 2009).

In the present case, the Local Board did not give the Licensee six months from the date of notice of the risk of cancellation to either begin operating its premises or file an application to transfer the license. The record reflects that the Local Board gave the Licensee notice on August 23, 2018 of a September 10, 2018 hearing, the subject of which was to be a possible "revocation." See supra n. 1; Exhibit Z. It was at that September 10, 2018 hearing when the Local Board voted to revoke or cancel the license. (Exhibits M, 10) The Licensee had less than a month notice of the risk of cancellation.

One could argue that the Licensee was first given notice of the possibility of revocation/cancellation as early as December 9, 2017, when the Local Board forwarded to the Licensee's attorney the Legal Notice of a Local Board hearing scheduled for December 18, 2017, the subject of which was to be the continued status, including potential revocation, of the Licensee's license. (Exhibit Y) However, at that hearing, which occurred on January 22, 2018, the Local Board voted not to revoke the Licensee's license and also voted to close the hearing. (Exhibit G) When the hearing officially closed on January 22, 2018, so too did the Licensee's notice of the possibility of revocation/cancellation.

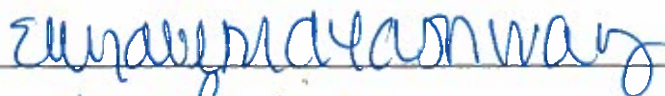
The Commission finds that the Local Board's decision to cancel the Licensee's license for non-use was not reasonable and therefore, is disapproved by the Commission. The Licensee should be extended an additional reasonable amount of time to find a buyer for its license or to operate its license. This decision is final. M.G.L. c. 138, § 77.

CONCLUSION

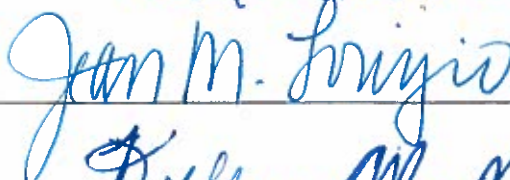
Based on the evidence, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Town of Burlington Licensing Board for cancelling the § 12 all alcoholic beverages license of Slesar Brothers Brewing Company, Inc. d/b/a Burlington Beer Works for non-use pursuant to Massachusetts General Laws chapter 138, § 77. * The Commission remands this matter to the Local Board with the recommendation that the Local Board give the Licensee a reasonable period (six months) of time within which to utilize the license or file an application with the Local Board to transfer the license. The time period shall begin to run at the time in which the Local Board specially notifies the Licensee that it must utilize the license or file such application to transfer the license, or the Licensee shall risk cancellation of its license for non-use pursuant to M.G.L. chapter 138, § 77.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Elizabeth Lashway, Commissioner



Jean Lorizio, Chairman



Kathleen McNally, Commissioner



Dated: February 7, 2019

*The decision of the Commission regarding the cancellation of this license is final and cannot be appealed. M.G.L. c. 138, § 77.

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cc: Paul Sporn, Esq.
David DeLuca, Esq.
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration, File