



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

Deborah B. Goldberg
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

DECISION

FI-HI PIZZA INC. DBA HI-FI PIZZA
492-496 MASSACHUSETTS AVE.
CAMBRIDGE, MA 02139
LICENSE#: 016600146
HEARD: 08/04/2015

This is an appeal of the action of the City of Cambridge Licensing Board (the "Local Board" or "Cambridge") for revoking the M.G.L. c. 138, §12 wines and malt beverages license of Fi-Hi Pizza Inc. dba Hi-Fi Pizza (the "Licensee" or "Hi-Fi") located at 492-496 Massachusetts Avenue, Cambridge, MA. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Tuesday, August 4, 2015.

The following documents have been entered in evidence as exhibits:

1. Local Board Decision 5/29/2015;
2. Local Board's Notice of Hearing 6/17/2014;
3. Local Board's Decision 7/10/2014;
4. Local Board's Notice of Hearing 1/15/2015;
5. Local Board's Notice of Rescheduled Hearing 2/5/2015;
6. Local Board's Decision 3/2/2015;
7. Transcript of Local Board's Hearing 7/8/2014;
8. Transcript of Local Board's Hearing 2/24/2015;
9. Transcript of Local Board's Hearing 5/19/2015;
10. Transcript of Local Board's Hearing 5/28/2015;
11. Wicked Local Cambridge Article on Restaurant Closing 7/16/2015;
12. Landlord Mark Simon's Letter 10/25/2014 to Local Board;
13. Draft Purchase & Sale Agreement;
14. Local Board's Policy on Inactive Licenses;
15. ABCC Decision 2/11/2009;
16. ABCC Decision 8/26/2009; and
17. Joint Pre-Hearing Memorandum.

There is one (1) audio recording of this hearing, and two (2) witnesses testified.

FACTS

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

1. Fi-Hi Pizza Inc. dba Hi-Fi Pizza is a Massachusetts corporation which holds a wines and malt beverages license issued pursuant to M.G.L. c. 138, §12. (Commission records)
2. Francis Holland has operated Hi-Fi Pizza from 1969 to 2014. (Exhibit 17)
3. In March 2014, Hi-Fi was forced to close when the landlord terminated its lease. (Exhibit 17)
4. In June 2014, Frank Holland applied to the Local Board to hold the wines and malt beverages license in inactive status. A hearing was held July 8, 2014 on the application, and the Board voted 3 – 0 to approve it. The Local Board allowed Mr. Holland six months to find a buyer for the license. This approval expired on January 8, 2015. (Exhibit 17)
5. Hi-Fi did not find a buyer for its license by January 8, 2015, and did not file a request to extend its inactive status. ((Exhibit 17)
6. The Local Board held a hearing February 24, 2015 to consider a revocation of the license. At the hearing the Local Board voted 3 – 0 to approve an extension of the license's inactive status until April 9, 2015. The Local Board stated if a transfer application were not received by that date, the matter of a revocation of the license would be heard. (Exhibit 17)
7. During this time, Hi-Fi received an offer to purchase the license, which subsequently fell through. (Exhibit 17)
8. At the May 19, 2015, hearing on the revocation, Hi-Fi asserted that it had received another offer to purchase its license. (Exhibit 17)
9. The Local Board voted 3 – 0 to continue the hearing to May 28, 2015, at which time the Hi-Fi would present either a signed purchase offer or a signed purchase and sale agreement. (Exhibit 17)
10. At the hearing on May 28, 2015, Hi-Fi did not produce any signed purchase offer or sale agreement. They were unable to meet the deadline as the potential buyer was going through a corporate restructuring. (Exhibit 17)
11. Although the Local Board recognized Hi-Fi was diligent in marketing its license, they voted 2 – 1 to revoke the license. The Local Board had never revoked a license for non-use before this vote. The Local Board's past practice has been to allow licensees who have gone out of business a considerable amount of time to transfer a license. (Exhibit 17)
12. The following licenses were inactive or remained inactive for periods of time well in excess of the 14 months at issue here:

- a) ManRay – went out of business in 2005; remained inactive for 10 years without revocation;
- b) Pizzeria Uno – went out of business in March 2010; remained inactive until September 2014 when it transferred its license;
- c) Hoffa's Swiss Alps – went out of business between 2006 and 2010; remained inactive without revocation until January 2013 when its license was transferred¹.
- d) Tommy Doyle's – closed in December 2013; currently inactive without revocation as license transfer is pursued;
- e) The Western Front – closed December 2013; currently inactive without revocation as a license transfer is pursued. (Commission records, Exhibit 17)

13. The Local Board adopted formal regulations on inactive or "pocket" licenses as of July 28, 1987. These regulations state that the Local Board may, for good cause shown, permit a licensee to hold an inactive license for up to 48 months. The regulations also address the need to balance the public need against any undue hardship resulting from a Licensee being forced to surrender the license when the licensed premises are a) taken by eminent domain; b) destroyed by fire; c) being extensively renovated; and d) lost due to termination of a lease. (Exhibit 17)

DISCUSSION

M.G.L. Chapter 138 section 77 states, in pertinent part: "The licensing authorities may, after hearing or reasonable opportunity therefore, cancel any license issued under this chapter if the licensee ceases to conduct the licensed business." A license must be exercised on an approved premises and cannot exist as a roving license. A license is not valid separate and apart from the premises to which it attaches. Opinion of the Justices, 349 Mass 794, 798 (1965). The Appeals Court has held that a renewal application may be denied where the applicant has not been operating and no longer has a right to occupy the premises. Board of Selectmen of Sudbury v. ABCC, 25 Mass. App. Ct. 470 (1988).

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"). While the actions of cancellation and revocation both operate to terminate a license, the difference between a cancellation and revocation of license is the statutory disqualification from holding a license that is expressly set in M.G.L. c. 138, §64 for revocation. Empresas Guanacas, Inc., dba Mango Grill Fine Latin Cuisine (Watertown) (ABCC Decision March 19, 2009). No such statutory disqualification from holding a license is expressly set in M.G.L. c. 138, §77 for cancellation.

Moreover, the Commission has previously decided what the legal requirements are for a Local Board when it seeks to exercise its authority to cancel a license under section 77. "Once a local

¹ The new owner has yet to exercise its license as of August 4, 2015.

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, Peabody (ABCC decision dated 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 Commission, 32 Mass. App. Ct. 915 (1992). "Under the authority of M.G.L. c. 138, §77, this statute explicitly gives the Commission the authority to review the license cancellation by the Local Board." Id. In Saugus, this Commission gave the Licensee six (6) months to transfer the license once he received notice of the risk of cancellation. Id.

"It is this Commission's practice to allow the licensee six (6) months from the date of the notice of the risk cancellation to cure the non-use by either operating its premises or filing the appropriate application to transfer the license. Id. 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 Massachusetts General Laws chapter 138, §77. "In Re Turnpike @ Winona, LLC, Id., quoting In re: Empresas Guanacas, Inc. dba Mango Grill Fine Latin Cuisine, (Watertown) (ABCC Decision dated March 13, 2009).

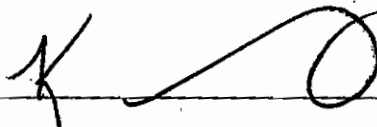
In this case, the Local Board first became aware of the non-use in June 2014. The Local Board first put the license at risk by issuing a notice of a revocation hearing on February 5, 2015. Then it revoked the license on May 28, 2015. The Local Board therefore failed to allow the licensee a six month period of time, from the date it first notified the licensee of the risk of cancellation for non-use in violation of M.G.L. 138, section 77.

CONCLUSION

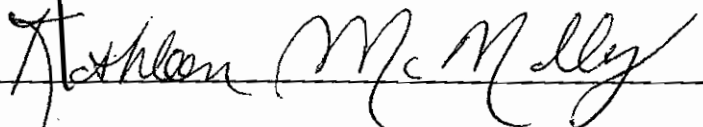
The Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Licensing Board for the City of Cambridge in cancelling the license for non-use, and remands the matter to the Local Board with the recommendation that the Local Board give the Licensee a reasonable period (six (6) months) of time within which to comply, which time period begins to run at the time in which the Local Board specifically notifies the Licensee that it risks cancellation of its license for non-use pursuant to M.G.L. chapter 138, § 77.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman



Kathleen McNally, Commissioner



Dated: September 10,, 2015

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: Kevin Crane, Esq. via facsimile 617-864-6357
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Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration
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