

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

Steven Grossman
Treasurer and Receiver General

Kim J. Gainstoro, Esq.
Chairman

Memorandum and Order

On the Town of Dedham's Motion to Dismiss District Convenience Inc.'s Motion for Appeal

DISTRICT CONVENIENCE, INC. D/B/A DISTRICT CONVENIENCE
380 WASHINGTON STREET
DEDHAM, MA 02026
LICENSE#: 027400055
HEARD: 09/11/2013

District Convenience, Inc. d/b/a District Convenience (the "Licensee" or "District") held a wines and malt beverages package store license (the "license") issued pursuant to M.G.L. c. 138, §15 which was located at 380 Washington Street, Dedham, MA. District submitted an appeal of the action of the Town of Dedham Board of Selectmen (the "Local Board" or "Dedham") for revoking its §15 license. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Wednesday, September 11, 2013, to consider Dedham's Motion for Dismissal or Denial of Appeal and District's Memorandum in Opposition.

The following documents are in evidence:

1. District's Motion for Appeal dated 6/12/13; and
2. District's Memorandum in Opposition to Dedham's Motion for Dismissal.
- A. Dedham's Motion for Dismissal ("Motion") with the attached exhibits:
 - A1. Settlement Agreement dated 1/31/13 between Licensee's and Local Board;
 - A2. Local Board's Decision dated 6/7/13; and
 - A3. Norfolk Superior Court's Decision dated 6/25/13 denying Emergency Motion for Injunctive Relief.

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

FACTS

1. District Convenience, Inc. d/b/a District Convenience is located at 380 Washington Street, Dedham, MA and held a wines and malt beverages retail package store license issued pursuant to M.G.L. c. 138, §15.
2. The Local Board voted to REVOKE District's license on October 4, 2012. (Local Board's Motion to Dismiss)
3. The Licensee appealed this revocation to the Commission on October 10, 2012. (Local Board's Motion to Dismiss)

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4. On January 31, 2013, a Settlement Agreement was executed by the Local Board and the Licensee. (Local Board's Motion to Dismiss; District's Motion in Opposition)
5. The Settlement Agreement between the parties contained ten (10) conditions. The agreement specifically stated, in part:

"Now, therefore, in consideration of the mutual covenants and promises contained herein, as well as other good and valuable consideration, the Board agrees to vote, at a duly posted meeting, to reconsider and rescind its vote of October 4, 2012, revoking said License, so as to leave said license reinstated as previously in effect upon the following conditions, but only so long as all such conditions are met:

Condition 4: Commencing on the first business day of the month following the date of said reinstatement and on the first business day of each subsequent month for twenty-four (24) consecutive months, the Licensee shall submit to the Board of Selectmen a written statement signed under the pains and penalties of perjury by the authorized manager attesting to the hours the licensed premises was open for business during the previous month, including the opening and closing hours for each day and the total hours open per week. After the conclusion of said twenty-four (24) consecutive month period and for as long as the Licensee shall hold said license, the Licensee shall continue to keep the licensed business open for business not less than seventy (70) hours per week and all remaining terms of this Agreement shall remain in effect so long as the Licensee shall hold said License.;

Condition 7: Upon the reinstatement of the License as set forth herein, the Licensee shall formally withdraw and terminate with prejudice its appeal to the ABCC;

Condition 8: The Licensee further agrees and stipulates that, in the event that the Licensee fails to satisfy any of the terms and conditions of this Settlement Agreement, the Board may, after notice to Licensee and hearing, vote to revoke the License, and upon such vote, Licensee shall forthwith surrender said License without any right of appeal, which right of appeal the Licensee hereby specifically waives;

Condition 9: A copy of this Settlement Agreement shall be filed with the ABCC and incorporated as a condition of the reinstated license." (Local Board's Motion to Dismiss, Exhibit A1)

6. The Settlement Agreement was signed by Mr. Perry Markarios, President and Manager of District Convenience, Inc, and by the Town of Dedham, Board of Selectmen, specifically four members. (Local Board's Motion to Dismiss, Exhibit A1)
7. Both parties were represented by Counsel during the negotiations and execution of the Settlement Agreement. (Local Board's Motion to Dismiss)
8. The Licensee agreed to formally withdraw its appeal, with prejudice. (Local Board's Motion to Dismiss, Exhibit A1)
9. The Licensee further agreed that if it failed to satisfy any of the terms and conditions of the Agreement, and if the license were revoked after notice and a hearing, the Licensee would surrender its license without any right of appeal which right of appeal the Licensee would hereby specifically waive. (Local Board's Motion to Dismiss, Exhibit A1)

10. On February 14, 2013, the Local Board voted to RESCIND its October 4th vote to revoke District's license pursuant to a Settlement Agreement. Thereafter, District failed to submit timely reports. (Local Board's Motion to Dismiss)
11. At the hearings on May 23, 2013, and June 5, 2013, which were attended by District and its counsel, the Local Board stated that evidence was presented that District had violated Condition 4 of the Agreement, in that it failed to submit timely reports to the Local Board. (Local Board's Motion to Dismiss)
12. The Local Board found that the licensee violated a condition of its license and Settlement Agreement and, pursuant to Condition 8, voted unanimously to revoke District's license. (Local Board's Motion to Dismiss, Exhibit A1)
13. By decision dated June 7, 2013, the Local Board notified District of the Revocation of its license. (Local Board's Motion to Dismiss)
14. On June 12, 2013, the Licensee filed a Notice of Appeal of this revocation¹ with the Commission. (Local Board's Motion to Dismiss, Exhibit A3)
15. On August 6, 2013, the Local Board filed a Motion for Dismissal and a Motion to Deny the Appeal. (Local Board's Motion to Dismiss)
16. District filed a Memorandum in Opposition to the Local Board's Motion for Dismissal or Denial of Appeal. (Licensee/District Memorandum in Opposition to Appellee's Motion for Dismissal or Denial of Appeal)
17. On September 11, 2013, the Commission held a hearing to consider Dedham's Motion to Dismiss and District's Motion in Opposition.

DISCUSSION

At issue before the Commission is a Settlement Agreement which was jointly agreed upon and executed by both parties. The Settlement Agreement was filed by both parties during the pendency of a previous appeal for the revocation of this license. The Settlement Agreement was executed by both parties to avoid further appeal litigation of the revocation of this license before the Commission. At issue specifically is a condition contained in the Settlement Agreement, whereby the licensee waives its right of appeal.

District filed an appeal in this matter as the Local Board moved, after notice and a hearing, to revoke District's section I5 package store license for non-compliance with the terms and conditions of the Settlement Agreement.

Dedham filed a Motion to Dismiss and/or a Motion to Deny Licensee's Motion to Appeal the Revocation, per the executed Settlement Agreement, within which the Licensee waived its right of appeal.

¹ District sought a preliminary injunction to block the revocation. On June 25, 2013, the Superior Court (Connors, J) denied the application on the grounds that the plaintiff failed to show significant likelihood of success on the merits of its appeal, "especially in light of his agreement in the parties' past dispute to waive right of appeal of any future revocation of license by the defendants." (See Exhibit A3, of Local Board's motion)

M.G.L. chapter 138, section 23 states, in part... “Whenever, in the opinion of the local licensing authorities, any applicant for a license under section twelve, fourteen, fifteen or thirty A fails to establish to their satisfaction his compliance with the requirements of this chapter, or any other reasonable requirements which they may from time to time make with respect to licenses under said sections, respectively, or to the conduct of business by any licensee thereunder, said authorities may refuse to issue or reissue to such applicant any such license; and whenever in their opinion any holder of such a license fails to maintain compliance with this chapter or it appears that alcoholic beverages are being or have been sold, served or drunk therein in violation of any provision of this chapter, they may, after hearing or opportunity therefor, modify, suspend, revoke or cancel such license,” M.G.L. chapter 138, section 23. (Emphasis supplied.)

The Commission finds that the Settlement Agreement was entered into and executed willingly and knowingly by both parties. The Licensee was represented by counsel. The Commission finds that the conditions imposed within the Settlement Agreement are within the lawful authority of the Local Board. The Settlement Agreement thus, became a condition of the license, and the Licensee’s failure to comply with the conditions imposed by the Local Board, after due notice and a hearing, resulted in the revocation of such license by the Local Board, pursuant to M.G.L. chapter 138, section 23.

The Local Board argues that the Motion to Dismiss this appeal should be allowed, as District executed a complete waiver of all rights to appeal a future revocation based on the Board of Selectmen finding a violation of the agreement. Therefore, District has waived its right to appeal this revocation to the Commission.

The Licensee argues that District’s waiver of its appeal is void as against public policy, as it seeks to usurp the statutory powers conferred upon the Commission in M.G.L. chapter 138, section 67.

In the case of Restaurant Consultants, Inc. v. Alcohol Beverages Control Commission, the SJC upheld an ABCC regulation requiring a licensee making an offer in compromise, to file a waiver of appeal and of judicial review. “The plaintiff’s contention that the requirement of a waiver of judicial review violates his rights under G.L. Ch. 30A, section 14, is unpersuasive. The regulatory offer in compromise scheme permits a licensee to enter into an agreement foregoing the expense of judicial redress and of business closure, in return for the ABCC’s willingness to allow the licensee to remain open while accepting a lesser penalty. The process is eminently fair to the licensee, saving him much time and expense and leaving to his discretion the choice whether or not to utilize the agreement procedures. ***If he so chooses, the licensee may not then have a second bite at the apple and pursue an action for judicial review.***” Restaurant Consultants, Inc. v. Alcohol Beverages Control Commission, 401 Mass. 167, 169 (1987) (Emphasis supplied.)

The Commission finds that the Settlement Agreement was executed by both parties as an instrument to avoid a revocation by the Local Board, and as a means to avoid revocation litigation before the Commission. District was represented by Counsel. The conditions were expressly put forth in the Settlement Agreement and District voluntarily, knowingly, specifically, and expressly waived its right of appeal, with prejudice, as consideration for the Local Board rescinding their vote to revoke the license. The Local Board, in consideration of the Settlement Agreement and the Licensee’s withdrawal of the appeal with prejudice, and waiver of its right to appeal, voted to rescind its vote to revoke this license.

The Commission disagrees that District’s waiver of its right to appeal is void as against public policy. District was given the option to perform under the agreement which was mutually entered into, executed, and incorporated as a condition of the license, or face revocation, specifically waiving its right to appeal. The terms of the agreement were clear, valid, and binding. The licensee had “one bite of the apple” and

when it failed to perform under the Settlement Agreement and comply with the conditions of its license, now wants another bite of the apple, by claiming, after failing to abide by the conditions of its license and the Settlement Agreement, that it still has a right to appeal. The Commission is not persuaded by District's argument.

The Commission finds that the Settlement Agreement is valid and is not against public policy. The Licensee was afforded due process, entered into the agreement knowingly and voluntarily as a means to avoid revocation litigation, was represented by counsel, and withdrew the previous appeal filed with the Commission with prejudice, and specifically waived its right of appeal.

The Commission finds that the Settlement Agreement is a lawful condition imposed by the Local Board, which the Licensee did violate resulting in a revocation of its license; and that the Licensee did in fact voluntarily, expressly, specifically, and knowingly waive its right of appeal in this matter.

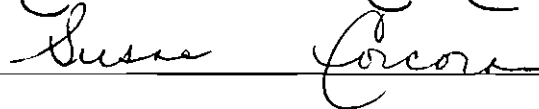
Therefore, the Commission **ALLOWS** the Motion to Dismiss by the Local Board and finds that District did waive its right of appeal. The Motion to Dismiss is **ALLOWED** and District's appeal in this matter is **DENIED**.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



Susan Corcoran, Commissioner



Dated: October 28, 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: Brian W. Riley Esq.
Michael W. Ford Esq.
Frederick G. Mahony, Chief Investigator
Local Licensing Board
Administration
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