

*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**

**TAVERN MANAGEMENT CORPORATION**  
**30 WESTERN AVENUE**  
**GLOUCESTER, MA 01930**  
**LICENSE#: 045000050**  
**HEARD: 02/09/2016**

This is an appeal of the action of the Gloucester Licensing Board (the "Local Board" or "Gloucester") for cancelling the M.G.L. c. 138, §12, all alcoholic beverages license of Tavern Management Corporation (the "Licensee" or "Tavern") located at 30 Western Avenue, Gloucester, Massachusetts. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Tuesday, February 9, 2016.

The following documents have been entered in evidence as exhibits:

1. Local Board Meeting Minutes dated 01/18/2011;
  2. Local Board Meeting Minutes dated 10/21/2014;
  3. Local Board Meeting Minutes dated 08/11/2015;
  4. Legal Notice of Local Board's Hearing scheduled for 11/10/2015 and dated 10/31/2015;
  5. Letter from Local Board Chairman Meredith Fine to Licensee;
  6. Local Board Decision dated 11/23/2015;
  7. Licensee's 2015 Liquor License dated 12/23/2015;
  8. Licensee's 2015 Renewal of License Form dated 11/25/2014; and
  9. Licensee's 2016 Renewal of License Form dated 12/22/2015.
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- A. Transcript from Local Board Hearing dated 11/10/2015;
  - B. Attorney Coyne's Letter to Local Board dated 11/5/2015;
  - C. Local Board Letter to the ABCC dated 12/28/2010;
  - D. Local Board Letter to Licensee dated 01/11/2011;
  - E. Local Board Letter to Licensee dated 01/20/2011;
  - F. Licensee Notice of Appeal to the ABCC;
  - G. ABCC Decision dated 05/12/2011;
  - H. Transcript from Local Board Hearing dated 01/18/2011;

- I. Photograph of Outside Licensed Premises;
- J. Photograph of Function Hall inside Licensed Premises;
- K. Photograph of Entryway of Licensed Premises; and
- L. Licensee Food Menu.

There is one (1) audio recording of this hearing, and three (3) witnesses testified.

### FINDINGS OF FACT

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

1. Tavern Management Corporation ("Tavern" or "Licensee") operates a restaurant with a common victualler's license at 30 Western Avenue in Gloucester and has held an all-alcoholic beverages license issued pursuant to M.G.L. c. 138, §12, since 1987. (Commission records, Testimony)
2. Joseph L. Talty is the President and sole stockholder of Tavern Management Corporation. (Commission Records)
3. The Tavern has been a tenant of Ocean View Trust ("Trust") since 1987.
4. Mr. Talty is also the trustee of the Ocean View Trust and therefore has had common control over the Tavern and the Trust since at least 1985.
5. The description of the licensed premises has remained the same since 1987 and includes a 7,400 square foot function/banquet room, a bar, and a 750 square foot room adjacent to the bar. (Commission records, Testimony)
6. The Tavern's license specifies that it is for a "[f]ull service restaurant, bar, lounge, function rooms, kitchen & storage . . . ." (Exhibit 7)
7. The Licensing Board of Gloucester ("Local Board") has no bylaws, ordinances, or rules defining a "full service restaurant." (Testimony)
8. The Tavern's license has never specified any hours of operation and has never required the service of alcoholic beverages during any particular hours. (Commission records, Exhibit 7, Testimony)
9. The Local Board has never put required opening hours and/or days on retail alcoholic beverages licenses. (Testimony)
10. The nature of the Tavern as a restaurant and function hall has not changed since its opening in 1987. (Testimony)
11. The Tavern has always used its 7,400 square foot function room exclusively to host functions, including wedding receptions, banquets, and meetings. (Testimony)

12. From May to December 2015, approximately 12 functions were held at the Tavern. (Testimony)
13. Outside caterers cater the food at private functions but alcoholic beverage service is exclusively handled by the Tavern and its employees.
14. The Tavern's bar and adjacent room have been open to the public since 1987. The Tavern is always open Tuesdays through Saturdays from 1:00 p.m. to 5:00 p.m., but sometimes also opens occasionally on other days and times when the manager is on the premises. The Tavern is not open to the public when the premises are booked for private functions. (Testimony)
15. The Tavern serves light fare and alcoholic beverages. The restaurant space includes a kitchen with dining room equipment for preparing, cooking, and serving food to customers. (Exhibit L, Testimony)
16. There are three employees at the Tavern: the license manager, Dawn Caraway, and two wait staff, Laurie Shuffleman and Jared Harwood. (Testimony)
17. The Tavern maintains an inventory of alcoholic beverages that it purchases from licensed wholesalers, and works with food purveyors to stock its kitchen. (Testimony)
18. The Tavern made significant expenditures for the operation of its restaurant and function room in 2015 for air conditioning, a hot water heater, new kitchen equipment, refrigeration, and a dishwasher, all related to the use of the licensed premises. The Tavern has also applied to expand its outdoor deck for patrons. (Testimony)
19. On January 18, 2011, the Local Board conducted a hearing regarding the Tavern's § 12 license. The Local Board cancelled the Tavern's license for non-use under M.G.L. c. 138, § 77. (Exhibit 1)
20. After the Tavern appealed this decision to the Commission, the Commission reinstated the license on the grounds that the Local Board did not provide proper notice to the applicant and a reasonable opportunity to be heard. (Commission records, Exhibit G)
21. On November 23, 2015, after a hearing on November 10, 2015, the Local Board voted to cancel the Tavern's § 12 license effective December 31, 2015. In its decision, it provided five reasons for cancellation: (Exhibits 4, 6)
  - a. "The Tavern Management Corporation has had ample notice of the Gloucester Licensing Board's concern that the premises were not being used for its licensed purpose dating back to 2006";
  - b. "The Tavern Management Corporation received proper notice and due process for the November 10, 2015, hearing";
  - c. "The Tavern Management Corporation is not operating a full-service restaurant in accordance with the terms of its liquor license";
  - d. "The Tavern Management Corporation has not asked to amend its liquor license to remove the reference to a full-service restaurant";

- e. “By operating only a private function hall, the Tavern Management Corporation is not serving a public need.”

### 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 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 . . . .” *Id.* Accordingly, § 77 “explicitly gives the [ABCC] the authority to review license cancellations by local boards.” Bd. of Selectmen of Saugus v. ABCC, 32 Mass. App. Ct. 914, 916 (1992). The decision of the Commission “shall be final.” M.G.L. c. 138, § 77.

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

The Local Board did not cancel the Licensee’s license because the Licensee had completely ceased operations as a § 12 licensed establishment. Instead, it cancelled the license for under-utilization because the Licensee was not operating a “full service restaurant” as stated on the license since it was only open to the public for limited days and hours every week. This determination was an error of law by the Local Board. The plain language of § 77 only permits cancellation of a license if the Licensee ceases to conduct the licensed business. There is no dispute that the Licensee had not ceased operating its licensed business. Indeed, the Licensee’s bar was open to the public and served alcoholic beverages and food at a minimum Tuesdays through Saturdays from 1:00 pm to 5:00 pm when there were no functions. It was also available for bookings for functions, of which it had several each year, including 2015. Because the Licensee did not cease its operations as a § 12 licensed establishment operating as a restaurant, its license could not be cancelled under § 77.

This interpretation is bolstered by previous Commission decisions. The Commission has approved of Local Board cancellations under § 77 only when the licensee has completely stopped operating a licensed business for several months. See Turnpike @ Winona, LLC Peabody (ABCC Decision Oct. 21, 2009) (§ 12 licensee never opened several months after being issued a license); Ristorante Marino, Inc., Boston (ABCC Decision June 14, 2005) (§ 12 licensee did not open for several months). Furthermore, in response to a request for an advisory opinion from the Town of Hull Board of Selectmen in 2010, the Commission informed the Board that, “[t]he Commission concurs that a change in the hours of operation . . . would not be viewed as constituting a cessation of the business and thus triggering a possible enforcement action under G.L. c. 138, § 77 or any other law, rule, or regulation.”

It likewise appears that the Appeals Court interprets § 77 in a similar light. In BAA Massachusetts, Inc. v. Alcoholic Beverages Control Comm'n, the Appeals Court affirmed the Commission's cancellation of a § 15 licensee's license. 49 Mass. App. Ct. 839. The Court considered several factors in affirming the Commission's actions, including that the licensee maintained no inventory, no sales equipment, no telephone, and no regular employees at its premises; the premises were filled with another company's equipment; the licensee did not receive orders or payments from consumers at the premises; and the licensee had never operated in compliance with its license stating its opening hours of 35 hours a week. In short, the licensed premises were an address at which no activity occurred at all. That the licensee was not open all the hours stated on its license was but one factor to consider in determining whether the licensee ceased operating as a licensed establishment. The Commission also treats opening hours as but one factor in evaluating whether a licensed establishment has ceased operations such that its license may be cancelled under § 77.

The Local Board, in part, relied on the Commission's "Notice to All Retail Licensees" ("2004 Notice") from September 28, 2004, to support its argument that a licensee not operating during the entirety of the license's stated operating hours is considered to be a "pocket license." Therefore, while the Commission usually adheres to prior Commissions' interpretation of Chapter 138 to maintain consistency for licensees, cities and towns, and the public, it cannot hold fast to an interpretation of a section of Chapter 138 that it does not believe correct. To be sure, it appears that since the 2004 Notice, in the couple of decisions the Commission has affirmed cancellation of a license and the Commission's 2010 advisory opinion, the Commission has consistently understood that § 77 requires complete cessation of the licensed business. See Turnpike @ Winona, LLC, Peabody (ABCC Decision Oct. 21, 2009); Ristorante Marino, Inc., Boston (ABCC Decision June 14, 2005).

The Local Board also erroneously based its decision on a finding of lack of public need. Public need is not a factor to be considered in whether to cancel a license under § 77. As the Appeals Court noted in the oft-cited Ballarin case, public need is only for the issuance of a license: "The statute *authorizing the issuance of liquor licenses* speaks in terms of serving 'the public need and in such a manner as to protect the common good and, to that end, to provide, in the opinion of the licensing authorities, an adequate number of places at which the public may obtain, in the manner and for the kind of use indicated, the different sorts of beverages for the sale of which provision is made.'" Ballarin, Inc. v. Boston Licensing Bd., 49 Mass. App. Ct. 506, 510-511 (2000), *quoting* M.G.L. c. 138, § 23 (emphasis added). Indeed, to hold otherwise would forever subject all retail licensees to uncertainty in the possession of their licenses, even when in full compliance with Chapter 138, based on the changing compositions of local boards and their evolving expectations for licensees' operations, and would potentially chill business operations and development of licensed establishments in Massachusetts.

Finally, the Local Board expended much time at the hearing before the Commission arguing that it cancelled the Licensee's license at least in part because it ceased operating as a "full service restaurant." This conclusion by the Local Board was an error of law. There is no requirement that a § 12 restaurant licensee operate as a "full service restaurant." Under Chapter 138, a "restaurant" is a

space, in a suitable building, leased or rented or owned by a person holding a duly issued and valid license as a common victualler under the provisions of said chapter one hundred and forty, and provided with adequate and sanitary kitchen and dining room equipment and capacity for preparing, cooking and serving suitable food for strangers, travelers and other patrons and customers, and in addition meeting and complying with all the requirements imposed upon common victuallers under said chapter one hundred and forty.

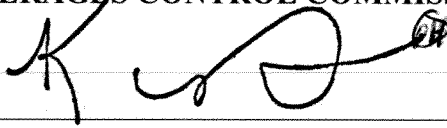
M.G.L. c. 138, § 1. Therefore, the only requirement, as it relates to food service, that a § 12 restaurant license must meet is that it have a common victualler's license issued under M.G.L. c. 140, § 2, and serve food. In order to be granted a common victualler's license, "every common victualler shall at all times be provided with suitable food for strangers and travelers," M.G.L. c. 130, § 5, and "[a] common victualler's . . . license may be issued to an applicant therefor if at the time of his application he has upon his premises the necessary implements and facilities for cooking, preparing and serving food for strangers and travelers . . . ." M.G.L. c. 140, § 6. There is no dispute that the Tavern has a valid common victualler's license. The Commission presumes that because the Local Board granted the Tavern a common victualler's license -- which is still valid -- the Local Board has determined that the Tavern complies with Chapter 140 because it provides suitable food for strangers, and has the appropriate implements and facilities for cooking, preparing, and serving food to customers. And the Tavern does actually serve food, albeit "light fare," to customers. Therefore, the Licensee has not ceased operating as a § 12 restaurant. Accordingly, the Local Board erred as a matter of law in canceling the Licensee's license.

#### CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Board in cancelling the M.G.L. c. 138, § 12, license of Tavern Management Corporation. The decision of the Alcoholic Beverages Control Commission is final. M.G.L. c. 138, § 77.

#### **ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kim S. Gainsboro, Chairman



Kathleen McNally, Commissioner



Dated: June 9, 2016

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: John Coyne, Esq. via facsimile 617-523-5612  
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Frederick G. Mahony, Chief Investigator  
Local Licensing Board  
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