



*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150-2358*

Jean M. Lorizio, Esq.
Chairman

DECISION

**THE PORT RESTAURANT & BAR INC.
541 ROUTE 28
HARWICH PORT, MA 02646
LICENSE#: 00074-RS-0506
HEARD: 9/28/2021 and 11/01/2021**

This is an appeal from the action of the Town of Harwich Licensing Board (the "Local Board" or "Harwich") for suspending the § 12 seasonal all alcoholic beverages license of The Port Restaurant & Bar Inc. ("Licensee" or "The Port") located at 541 Route 28, Harwich, MA, for three (3) days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and remote hearings were held via Microsoft Teams on Tuesday, September 28, 2021, and Monday, November 1, 2021.

The following documents are in evidence as exhibits:

Agreed-upon Exhibits

- A. Licensee's ABCC Appeal;
- B. ABCC Notice of Appeal Hearing;
- C. Governor's March 10, 2020, Declaration of State of Emergency;
- D. COVID-19 Order No. 13;
- E. COVID-19 Order No. 31;
- F. COVID-19 Order No. 33;
- G. COVID-19 Order No. 35;
- H. COVID-19 Order No. 37;
- I. COVID-19 Order No. 40;
- J. COVID-19 Order No. 43;
- K. December 6, 2018, ABCC Finding of Violation re: the Port Restaurant and Bar, Inc.;
- L. Communications between THE PORT and the Harwich Health Director;
- M. Communications to Harwich licensees from the Harwich Health Director and Town Administrator;
- N. Guidance issued to restaurants by the Harwich Health Director and the Harwich Town Administrator;
- O. Town of Harwich Liquor License Regulations.

Contested Exhibits of Licensee

1. Diagram of The PORT;
2. Pictures of The PORT;
3. Cape Cod Chronicle Article;
4. Email Guidance issued to Restaurants by the Harwich Health Director and Harwich Town Administrator;
5. Series of Communications to Harwich licensees from the Harwich Health Director and Town Administrator;
6. Licensee Business Records – Employee Schedules.

Contested Exhibits of Local Board

- I. Notice of Liquor License Disciplinary Hearing dated December 28, 2020;
- II. April 3, 2020, ABCC Advisory;
- III. May 18, 2020, ABCC Advisory;
- IV. June 19, 2020, ABCC Advisory;
- V. August 10, 2020, ABCC Advisory;
- VI. Investigative Report of ABCC Investigator Nicole Smith dated July 17, 2020;
- VII. Harwich Police Incident Report No. 20-5518;
- VIII. June 22, 2020, DPH Guidance (Restaurant Safety Standards);
- IX. July 6, 2020 DPH Guidance (Restaurant Safety Standards);
- X. Certified Copy of Town of Harwich Board of Selectmen decision, 5/20/2021.

After the Local Board’s presentation of its case in chief, the Licensee made an oral Motion for a Required Finding of Disapproval of the Action of the Local Board. The Local Board presented its objections to the Motion and the matter was taken under advisement. The Licensee’s Motion for a Required Finding of Disapproval of the Local Board’s actions is Denied.

At the close of the November 1, 2021, hearing, the Commission left the record open for both parties to submit post-hearing briefs. The briefs were received in a timely manner. The record is now closed.

There is one audio recording of each hearing and five (5) witnesses testified.

FINDINGS OF FACT

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

1. The Port Restaurant & Bar Inc. (“Licensee” or “The Port”) holds a Ch. 138, § 12 seasonal all-alcoholic beverages license exercised at 541 Route 28, Harwich, Massachusetts.
2. On March 10, 2020, Governor Baker declared a State of Emergency in Massachusetts due to the outbreak of the 2019 novel Coronavirus (COVID-19 virus), effective immediately. (Exhibit C)

3. On March 23, 2020, Governor Baker signed Executive COVID-19 Order No. 13 Assuring Continued Operation of Essential Services in the Commonwealth, Closing Certain Workplaces, And Prohibiting Gatherings of More than 10 People. Said Order prohibited on-premises consumption of food or beverages and took effect March 24, 2020. (Exhibit D)
4. On April 3, 2020, the ABCC issued an Advisory regarding the Governor's April 3, 2020, Executive Order authorizing on-premises licensees to sell malt beverages and wine for off-premises consumption for the duration of the Governor's declared state of emergency. (Exhibit II)
5. On May 1, 2020, Governor Baker signed Executive COVID-19 Order No. 31 Requiring Face Coverings In Public Places Where Social Distancing Is Not Possible. Said Order took effect May 6, 2020. (Exhibit E)
6. On May 18, 2020, Governor Baker signed Executive COVID-19 Order No. 33 Implementing A Phased Reopening of Workplaces and Imposing Workplace Safety Measures To Address COVID-19. The Order extended COVID-19 Order No. 13 prohibiting on-premises consumption of food or beverages until rescinded or until the state of emergency is ended, whichever occurred first. Said Order took effect May 18, 2020. (Exhibit F)
7. On May 18, 2020, the ABCC issued an Advisory regarding the Governor's Order outlining the four-phased reopening plan for businesses in the Commonwealth. The Advisory informed that "all on-premises consumption licensees remain prohibited from selling alcohol for on-premises consumption to the public until June 8, 2020 at the earliest, awaiting further notice by the Governor." (Exhibit III)
8. On May 22, 2020, Harwich Police Officer Neil Nolan responded to a call for service to The Port. Officer Nolan parked across the street and observed people standing and congregating around an outside bar while in possession of and drinking beverages. The patrons were not wearing facial coverings. (Testimony, Exhibit VII)
9. Officer Nolan then approached the rear patio area, entered the licensed premises and asked to speak with the manager on duty. He observed approximately 15-17 individuals, some seated at picnic tables and others standing around. He observed people in possession of open containers of beverages. He also observed a bar set up in the rear of the licensed premises and saw 4 to 5 people at that bar. Id.
10. Officer Nolan was at the licensed premises for approximately 10 minutes and did observe other patrons entering the establishment to pick up to-go orders, and then leaving the premises. Id.
11. On June 1, 2020, Governor Baker signed Executive COVID-19 Order No. 35 Clarifying the Progression of the Commonwealth's Phased Workplace Re-Opening Plan And Authorizing Certain Re-Opening Preparations at Phase II Workplaces. The Order authorized restaurants at the start of Phase II to provide outdoor table service so long as

- they complied with sector-specific COVID-19 workplace safety rules for restaurants. (Exhibit G).
12. On June 6, 2020, Governor Baker signed Executive COVID-19 Order No. 37 Authorizing the Re-Opening of Phase II Enterprises. The Order authorized Step 1 of a Two-Step Progression Phase II Openings schedule, which allowed restaurants to provide outdoor table service beginning on June 8, 2020. (Exhibit H)
 13. The Governor's Executive COVID-19 Orders require adherence to all Sector Specific Workplace Safety Standards for Restaurants to Address COVID-19 including:
 - The size of a party seated at a table cannot exceed 6 people;
 - Restaurants may not seat any customers at the bar;
 - All customers must be seated; eat-in service to standing customers (e.g., around the bar areas) is prohibited;
 - All other amenities and areas not employed for food and beverage service (e.g., dance floors, pool tables, playgrounds, etc.) must be closed or removed to prevent gathering of customers;
 - Require face coverings for all customers and workers at all times, except where an individual is unable to wear a face covering due to medical condition or disability.(Exhibit IX)
 14. On Thursday, July 16, 2020, at approximately 9:00 p.m., Investigators Smith, Binienda, and Temple ("Investigators") inspected the licensed premises of The Port to determine the manner in which its business was being conducted. (Testimony, Exhibit VI)
 15. Investigators approached the back of the licensed premises and observed individuals seated or standing at two (2) outdoor bar locations, at tables underneath a tent and in an outdoor area with Adirondack chairs. They observed people they believed to be employees behind an outside bar, and patrons in possession of beverages sitting on stools in front of the bar. Several individuals were observed to be without facial coverings. Investigators were on the licensed premises for approximately a half-hour to an hour. Id.
 16. The following evening, on July 17, 2020, Investigators returned to The Port and observed several individuals without facial coverings walking throughout the outdoor area of the licensed premises. They also observed tables with more than 6 people and several individuals playing a "Ring and Hook" game. Id.
 17. Stools were placed in front of the outdoor bar because staff believed they could seat individuals at the bar for table service. (Testimony)
 18. On July 17, 2020, they stopped using the Nauti bar as table service. Id.
 19. Paula Ribeiro, an employee of the Licensee, was working in the outside tent area of the licensed premises on July 16 and 17, 2020. Employees faced constant challenges in reminding individuals to wear a mask when standing up from their tables and walking around the property. Patrons were informed that no more than six (6) people were allowed at a table, but individuals would often join tables together without staff's permission. Id.

20. The Port is a seasonal operation and was closed at the time of the Governor's state of emergency declaration in March 2020. The Licensee reopened the second week in May for take-out only. The Licensee began outdoor on-premises food and beverage operations at the beginning of June 2020. Id.
21. Mr. Justin Brackett, the Licensee, was not present at The Port during the evening hours of July 16, 2020. He learned from the manager on duty that ABCC Investigators were at the licensed premises. Mr. Brackett then communicated with Meggan Eldredge, Health Director, regarding COVID-19 guidance, and specifically requested advice regarding the Ring and Hook game. (Testimony, Exhibit 5)
22. Ms. Eldredge informed the Licensee that the Ring and Hook game was not allowed and recommended it be removed or secured to prevent its use. (Testimony, Exhibit L)
23. The Local Board held hearings on May 4, 2021, and May 12, 2021, regarding alleged violations of 204 CMR 2.05(2): permitting a disorder, disturbance or illegality to take place on the licensed premises on May 22 and 24, 2020 and July 16 and 17, 2020. (Exhibit I)
24. In its decision dated May 20, 2021, the Local Board found The Port committed three (3) violations of 204 CMR 2.05(2), permitting a disorder, disturbance or illegality to take place on the licensed premises, to wit: violations of the Governor's COVID-19 orders and guidance on May 22, 2020, July 16, 2020, and July 17, 2020. (Exhibit X)
25. The Local Board voted to impose a three (3) day suspension.¹ Id.
26. The Licensee timely appealed the Local Board's decision to the ABCC. (Commission Records)

DISCUSSION

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Comm'n., 334 Mass. 613, 619 (1956), for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Opinion of the Justices, 368 Mass. 857, 861 (1975).

Chapter 138 was "enacted . . . to serve the public need and . . . to protect the common good." M.G.L. c. 138, § 23. In order to effectuate the purpose of Chapter 138, the Commission has "general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting and selling alcoholic beverages. . . ." M.G.L. c. 10, § 71. As part of these "comprehensive powers of supervision over licensees," Connolly, 334 Mass. at 617, the Commission has the authority to grant, revoke and suspend licenses. "[T]he purpose of discipline is not retribution, but the protection of the public." Arthurs v. Bd. of Registration in Medicine,

¹ The Local Board imposed a 3-day suspension "to be held in abeyance for sixty (60) days to allow the ABCC to determine if it will enforce its December 6, 2018 six (6) day suspension. In the event that the ABCC does enforce its suspension, the three (3) days ordered by the LLA will run concurrent with that suspension. In the event that the ABCC fails to enforce the December 6, 2018 six (6) day suspension, the LLA orders that The Port Restaurant shall surrender its Liquor License for three (3) days, August 5, 6, and 13, 2021." (Exhibit X)

383 Mass. 299, 317 (1981). The law is well-settled that “the responsibility of the licensee is to exercise sufficiently close supervision so that there is compliance with the law on the premises. A vendor who sells alcohol is ‘bound at his own peril to keep within the condition of his license.’” Rico’s of the Berkshires, Inc. v. Alcoholic Beverages Control Comm’n, 19 Mass. App. Ct. 1026, 1027 (1985) (quoting Commonwealth v. Gould, 158 Mass. 499, 507 (1893), and citing Burlington Package Liquors, Inc. v. Alcoholic Beverages Control Comm’n, 7 Mass. App. Ct. 186, 190 (1979)).

For the Commission to make a finding, there must be substantial evidence that a violation has occurred. “Substantial evidence of a violation is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Consol. Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 229 (1938); accord Charlesbank Rest. Inc. v. Alcoholic Beverages Control Comm’n, 12 Mass. App. Ct. 879 (1981).

The Local Board has the burden of producing satisfactory proof that the Licensee committed the three (3) violations that allegedly occurred on May 22, 2020, July 16, 2020, and July 17, 2020.

May 22, 2020

The Governor’s Executive COVID-19 Order No. 13, effective March 24, 2020, encouraged restaurants, bars and other retail establishments that sell food and beverage products to the public to continue with take-out and delivery of food and beverages. However, the Order prohibited on-premises consumption of food or beverages at restaurants, bars, or other establishments that offer food or beverages to the public. (Exhibit D)

The Governor’s Executive COVID-19 Order No. 31, effective May 6, 2020, required “any person over the age of two who is in a place open to the public in the Commonwealth, whether indoor or outdoor, and is unable to or does not maintain a distance of approximately six feet from every other person shall cover their mouth and nose with a mask or cloth face covering, except where a person is unable to wear a mask or face covering due to a medical condition or the person is otherwise exempted by Department of Public Health guidance. This requirement applies to all workers and customers of businesses and other organizations open to the public that are permitted to operate as COVID-19 Essential Businesses.” (Exhibit E)

The Licensee argued they were open on May 22, 2020, for take-out only. However, direct evidence was presented, through the testimony of Officer Nolan, as to individuals standing and congregating, without facial coverings, within the outdoor areas of the licensed premises, holding and consuming beverages. (Testimony)

The Commission is persuaded that a violation of the Governor’s Executive COVID-19 Orders occurred on May 22, 2020.

July 16, 2020, and July 17, 2020

The Governor’s Executive COVID-19 Order No. 37 authorized restaurants to provide outdoor table service beginning June 8, 2020. For the purpose of this Order, the term ‘restaurant’ shall mean an establishment that provides seated food service that is prepared on-site and under a retail food permit issued by a municipal authority pursuant to 105 CMR 590.000.” The Order further

required restaurants to adopt and comply with all Sector-Specific Workplace Safety Standards for Restaurants to Address COVID-19. (Exhibit H)

Sector Specific Workplace Safety Standards for Restaurants to Address COVID-19 (updated July 6, 2020) included:

- The size of a party seated at a table cannot exceed 6 people;
- Restaurants may not seat any customers at the bar;
- All customers must be seated; eat-in service to standing customers (e.g., around the bar areas) is prohibited;
- All other amenities and areas not employed for food and beverage service (e.g., dance floors, pool tables, playgrounds, etc.) must be closed or removed to prevent gathering of customers;
- Require face coverings for all customers and workers at all times, except where an individual is unable to wear a face covering due to medical condition or disability.

(Exhibit IX)

Direct evidence was presented through the testimony of Investigators Binienda and Smith as to several individuals seated or standing at the licensed premises' outdoor bar area and moving throughout the patio area without facial coverings. Individuals were seated at a bar consuming beverages and tables of patrons exceeded the 6-person limit. While the Licensee may have believed seating patrons at the bar was allowed, the Sector Specific Workplace Safety Standards for Restaurants (Exhibit IX) clearly prohibited such seating. In addition, individuals playing an outdoor game of "Ring and Hook." (Testimony, Exhibit L)

The Licensee acknowledged individuals were not wearing facial coverings but argued it was challenging to enforce the mask requirement as patrons were sometimes hostile towards staff. Similarly, the Licensee argued staff informed individuals of the 6-person per table limit, yet large groups would join tables together exceeding the 6-person limit without the Licensee's permission. The Licensee sought advice regarding the outdoor game but not until sometime after the dates of the Investigators' visits. *Id.*

The Commission is persuaded by the evidence that violations of the Governor's Executive COVID-19 Orders occurred on July 16, 2020, and July 17, 2020.

CONCLUSION

Based on the evidence and testimony at the hearing, the Commission **APPROVES** the action of the Town of Harwich Licensing Commission in finding three (3) violations of 204 CMR 2.05(2), permitting a disorder, disturbance or illegality to take place on the licensed premises, to wit: violations of the Governor's Executive COVID-19 Orders on May 22, 2020, July 16, 2020, and July 17, 2020.

The Commission finds, considering the totality of the evidence and the fact that a state of emergency was in place, the penalty issued by the Local Board, a 3-day suspension, was not excessive and was a reasonable exercise of the Local Board's discretion. The Commission **APPROVES** the action of the Licensing Board of the Town of Harwich in imposing a 3-day suspension.

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The Commission is persuaded by the evidence that violations of the Governor's Executive COVID-19 Orders occurred on July 16, 2020, and July 17, 2020.

CONCLUSION

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ALCOHOLIC BEVERAGES CONTROL COMMISSION

Crystal Matthews, Commissioner Crystal Matthews

Deborah Baglio, Commissioner Jean M. Lorizio

Jean M. Lorizio, Chairman Jean M. Lorizio

Dated: March 8, 2023

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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αμέσως.

这份文件是重要的，应立即进行翻译。

यह दस्तावेज़ महत्वपूर्ण है और इसका तुरंत अनुवाद किया जाना चाहिए

Dokiman sa a enpòtan epi li ta dwe tradwi touswit

'Đây là tài liệu quan trọng và cần được dịch ngay'

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cc: William A. Kelley, Esq.
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Administration, File