



*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**

**BALIS CORPORATION D/B/A BALIS RESTAURANT**  
**59 ESSEX ST.**  
**LAWRENCE, MA 01840**  
**LICENSE#: 059400175**  
**HEARD: 04/13/2016**

This is an appeal from the action of the City of Lawrence Licensing Board (the "Local Board" or "Lawrence") for suspending the M.G.L. c. 138, §12 All Alcohol license of Balis Corporation d/b/a Balis Restaurant (the "Licensee" or "Balis") located at 59 Essex St., Lawrence, MA for five (5) days of which three (3) days will be served and two (2) days will be held in abeyance. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, April 13, 2016.

The following documents are in evidence as exhibits:

1. Licensee's Common Victualler's License;
2. Licensee's Entertainment License;
3. Licensee's Certificate of Inspection from Lawrence Fire Department;
4. Licensee's 2016 Renewal;
5. Licensee's Menu;
6. Local Board's Decision 2/12/2016; and
7. Local Board's Rules & Regulations.

- A. Photograph of Balis' Bar;
- B. Photograph of Tables at Balis;
- C. Photograph of Buffet Area; and
- D. Photograph of Balis Interior.

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

## FINDINGS OF FACT

1. Balis Corporation d/b/a Balis Restaurant (“Balis” or “Licensee”) is a § 12 all alcohol restaurant licensee with a place of business at 59 Essex Street, Lawrence, Massachusetts. (Commission File, Exhibit 6)
2. Juan Hidalgo has owned and operated Balis for twelve years. (Commission File, Testimony)
3. Balis opens at noon every day and closes at 1:00 a.m. Sunday through Thursday, and 2:00 a.m. on Saturday morning. Its kitchen closes a half-hour before the establishment closes. (Testimony)
4. The Licensee has a substantial food service business, both for sit-down patrons and take-out orders. On a typical evening, 60-70% of all sales are from food, while 30-40% of sales are from alcohol service. When the lunch buffet is open from noon to 3:00 p.m., 90% of sales are from food service. (Testimony)
5. Balis has an entertainment license in order to have Thursday night karaoke and on holidays to have a piano bar. (Exhibit 2, Testimony)
6. On the evening of April 30 into the early morning hours of May 1, 2015, two security guards were working at Balis checking identification of patrons. No pat-frisking or metal detection of patrons was conducted that evening. (Testimony)
7. Shortly before 1:00 a.m. on May 1, 2015, an individual was shot and killed inside Balis’s bathroom. The shooter fled and remains at large. (Testimony)
8. After the incident Mr. Hidalgo voluntarily closed Balis for several days in order for the City and the Police Department to conduct its murder investigation. (Testimony)
9. At a hearing before the Local Board after the shooting, Mr. Hidalgo volunteered to begin using a metal detector wand on patrons entering Balis after 11:00 p.m. The Local Board at this time advised Mr. Hidalgo and other licensees that rules were forthcoming requiring metal detection by certain licensees. (Testimony)
10. At least three other restaurants with entertainment licenses in Lawrence, Salvatore’s, The Claddagh, and Terra Luna, did not use any metal detection equipment in May of 2015, nor did the City require it of them. (Testimony)
11. The Licensee has had no other allegations of violations against it in its twelve years of operation and is considered a good licensee in the City. (Testimony)

## DISCUSSION

The Licensee was charged by the Local Board with one violation of 204 CMR 2.05(2): permitting “an assault and battery/murder by gunshot” on May 1, 2015, on the licensed premises (Exhibit 6). On February 12, 2016, the Local Board found the Licensee in violation of 204 CMR 2.05(2) and suspended the Licensee’s license for five days, three days to be served and two days to be held in abeyance.

Pursuant to M.G.L. C. 138, § 67, “[t]he ABCC is required to offer a de novo hearing, that is to

hear evidence and find the facts afresh. As a general rule the concept of a hearing de novo precludes giving evidentiary weight to the findings of the tribunal from whose decision an appeal was claimed.” Dolphino Corp. v. Alcoholic Beverages Control Comm’n, 29 Mass. App. Ct. 954, 955 (1990) citing United Food Corp v. Alcoholic Beverages Control Comm’n, 375 Mass. 240 (1978). The findings of a local licensing board are “viewed as hearsay evidence, [and] they are second-level, or totem pole hearsay, analogous to the non-eyewitness police reports in Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 473 – 476 (1989).” Dolphino, 29 Mass. App. Ct. at 955.

Both the Local Board and the Commission have the authority to grant, revoke, and suspend licenses. Their powers were authorized “to serve the public need and . . . to protect the common good.” M.G.L. c. 138, § 23, as amended through St. 1977, c. 929, § 7. “[T]he purpose of discipline is not retribution but the protection of the public.” Arthurs v. Bd. of Registration in Medicine, 383 Mass. 299, 317 (1981). The Commission is given “comprehensive powers of supervision over licensees,” Connolly v. Alcoholic Beverages Control Comm’n, 334 Mass. 613, 617 (1956), as well as broad authority to issue regulations. The Local Board has authority to enforce Commission regulations. New Palm Gardens, Inc. v. Alcoholic Beverages Control Comm’n, 11 Mass. App. Ct. 785, 788 (1981).

These “comprehensive powers” are balanced by the requirement that the Local Board and the Commission provide notice to the licensee of any violations, as well as an opportunity to be heard. M.G.L. c. 138, §64. In addition, the Local Board has the burden of producing satisfactory proof that the licensee violated or permitted a violation of any condition thereof, or any law of the Commonwealth. M.G.L. c. 138, §§ 23, 64.

The Commission’s decision must be based on substantial evidence. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 528 (1988). “Substantial evidence” is “such evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* Evidence from which a rational mind might draw the desired inference is not enough. See Blue Cross and Blue Shield of Mass. Inc. v. Comm’r of Ins., 420 Mass. 707 (1995). Disbelief of any particular evidence does not constitute substantial evidence to the contrary. New Boston Garden Corp. v. Bd. of Assessor of Boston, 383 Mass. 456, 467 (1981).

The violation alleged by the Local Board involves 204 C.M.R. 2.05(2): “No licensee for the sale of alcoholic beverages shall permit any disorder, disturbance or illegality of any kind to take place in or on the licensed premises. The licensee shall be responsible therefor, whether present or not.”

The Licensee’s obligation under 204 C.M.R. 2.05(2) to maintain control over the premises and to comply with Chapter 138 and local regulations is well-settled. The responsibility of the Licensee is to “exercise sufficiently close supervision so that there is compliance with the law on the premises.” Rico’s of the Berkshires, Inc. v. Alcoholic Beverages Control Comm’n, 19 Mass. App. Ct. 1026, 1027 (1985) (table). A Licensee who sells alcohol is “bound at his own peril to keep within the condition of his license.” Burlington Package Store, Inc. v. Alcoholic Beverages Control Comm’n, 7 Mass. App. Ct. 186, 190 (179); accord Commonwealth v. Gould, 158 Mass. 499, 507 (1893). “It is, thus, quite possible for a Licensee to offend the regulatory scheme without scienter.” Rico’s of the Berkshires, 19 Mass. App. Ct. at 1027.

The Licensee has a duty of care to prevent only foreseeable harm to its patrons and others. Westerback v. Harold F. Leclair, Co., 50 Mass. App. Ct. 144, 145 (2000); Carey v. New Yorker or Worcester, Inc., 355 Mass. 450, 451 (1969); Kane v. Fields Corner Grille, Inc., 341 Mass. 640, 641 (1961); O'Gorman v. Antonio Rubinaccio & Sons, Inc., 408 Mass. 758, 761 n.2 (1990).

“The duty to protect patrons . . . does not require notice of intoxication, but may be triggered when the conduct of another person puts a tavern owner or its employees on notice that harm is imminent.” Christopher v. Father’s Huddle Café, 57 Mass. App. Ct. 217, 222-223 (2003). However, a licensee may discharge its duty to protect patrons by taking steps to prevent the harm – such as . . . calling police when a fight occurs or an aggressive patron threatens assault. See, e.g., Greco v. Sumner Tavern Inc., 333 Mass. 144, 145 (1955); Carey, 355 Mass. at 451.

There is no dispute that a man was shot and killed in the bathroom of the Licensee’s premises. The sole issue before the Commission is a determination of whether the Licensee took adequate security precautions to prevent a foreseeable harm. After a review of the record, the Commission finds that the Licensee took reasonable measures to provide security at its establishment, and nothing more could have been reasonably done by the Licensee to prevent this tragedy from occurring in its establishment.

“The Commission, in deciding illegalities on the premises will consider various factors, such as the licensee’s security plans . . . .” Diamante Restaurant, Inc., Lawrence (ABCC Decision September 7, 2012), accord Trempe & Torres, Inc., Lawrence (ABCC Decision August 21, 2012). The Licensee had two security guards working on the night in question. While these guards were not pat-frisking or conducting any sort of metal detection on patrons entering the establishment, they were present and checking identification. The Local Board’s sole argument is that the Licensee violated 204 CMR 2.05(2) because the Commission, in previous decisions, has found violations of this regulation where a Licensee – in Lawrence specifically -- failed to pat-frisk, “wand,” or use other forms of metal detection on patrons entering licensed premises because it is a common practice to do so in Lawrence. Caribbean Flavors, Inc., Lawrence (ABCC Decision February 15, 2012), Diamante Restaurant, Inc., Lawrence (ABCC Decision September 7, 2012), accord Trempe & Torres, Inc., Lawrence (ABCC Decision August 21, 2012). However, this argument misses an important distinction – in those three Lawrence decisions, all the establishments in question were undisputedly clubs, and not restaurants primarily operated as eating establishments, and it was common practice for *clubs* to search for weapons.<sup>1</sup> The type of business the Licensee runs is readily distinguished from the entertainment-based clubs with large crowds consuming large amounts of alcohol in the Commission’s previous Lawrence decisions that the Commission determined warranted such high measures of security to be a necessary routine. While the Licensee is open late, until 1:00 a.m. Sunday through Thursday and 2:00 a.m.

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<sup>1</sup> See Caribbean Flavors, Inc., Lawrence (ABCC Decision February 15, 2012) (“Individuals entering *clubs* are pat-frisked, their bags are searched, and security uses metal detecting wands to detect weapons”; “In Lawrence there is a practice among on-premises licensees to hire security personnel to search individuals before they enter the *club*”) (emphasis added); Diamante Restaurant, Inc., Lawrence (ABCC Decision September 7, 2012) (“It is a common practice in Lawrence that people entering *clubs* are pat-frisked and metal detecting wands are used to detect for weapons”) (emphasis added); Trempe & Torres, Inc., Lawrence (ABCC Decision August 21, 2012) (“There is a practice in the City of Lawrence among on-premises licensees to hire security personnel to search individuals for weapons before they enter *clubs*”) (emphasis added).

on Saturday mornings, the kitchen remains open until a half-hour prior to closing. As the owner, Mr. Hidalgo explained, the establishment has several late eaters and an extensive late night take-out business because many of his patrons work second shifts. On a typical evening, 60-70% of the Licensee's business is from food sales compared to 30-40% for alcohol consumption. From noon to 3:00 p.m. when the Licensee has a lunch buffet, 90% of its business is from food sales. The Licensee does have an entertainment license, but it is only for karaoke once a week, except on certain holidays when it may have a piano bar for the patrons. It should hardly be expected that a restaurant like the Licensee, that is primarily in the food service business, and not in the alcohol consumption and entertainment business, be expected to pat-frisk, "wand," or use other forms of metal detection on its diners.<sup>2</sup> Indeed, several other restaurants that have entertainment licenses in Lawrence but are not considered "clubs," such as Salvatore's, The Claddagh, and Terra Luna, had no metal detection or pat-frisking at the time either, nor did the Local Board require it of them.

While the Local Board initially contended that there were Local Board rules in place that required the use of metal detection at the Licensee's establishment (and that the Licensee violated 204 CMR 2.05(2) because it did not follow them), by the end of the hearing it became apparent to the Commission that the Local Board could not prove when the rules became effective in the City, and in fact it was conceded by counsel for the Local Board that even if rules were in place they were not being enforced at the time of the incident giving rise to the allegation against the Licensee. Accordingly, there were no City requirements that the Licensee have *any* security measures of any kind such that the Commission infers nothing from the Local Board's introduction of its Local Board Rules that were marked as Exhibit 7 at the hearing and the Licensee's failure to follow them.<sup>3</sup>

The Commission finds that the Licensee took adequate security precautions to prevent harm to its patrons by having two security guards present at its establishment. There was nothing else it could have done to prevent the tragic incident that took place in its bathroom. Accordingly, the Commission disapproves of the finding of a violation by the Local Board.

### CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in suspending the M.G.L. c. 138, § 12 license of Balis Corporation d/b/a Balis Restaurant.

The Commission remands the matter to the Local Board with the recommendation that no further action be taken against the licensee as any penalty would be discrepant with this Decision.

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<sup>2</sup> Following this same logic, the Commission finds that a shooting inside the Licensee's bathroom could not have been, in any event, a *foreseeable* harm.

<sup>3</sup> At any rate, there was also a question of whether these rules, even if in effect at the time, would have been applicable to the Licensee – a matter which does not need to be resolved based on the Commission's findings.

**ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kim S. Gainsboro, Chairman

Elizabeth A. Lashway, Commissioner

Dated: August 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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Local Licensing Board  
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