

*Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
239 Causeway Street
Boston, MA 02114
Telephone: 617-727-3040
Facsimile: 617-727-1510*

Jean M. Lorizio, Esq.
Chairman

DECISION

**J. BRIAN'S PUB & GRILLE INC.
615 SOUTH UNION ST
LAWRENCE, MA 01843
LICENSE#: 0594-00205
VIOLATION DATE: 10/20/2017
HEARD: 02/27/2018**

J. Brian's Pub & Grille Inc. (the "Licensee") holds an alcohol license issued pursuant to M.G.L. c. 138, § 12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Tuesday, February 27, 2018, regarding alleged violations of:

- 1) 204 CMR 2.05 (1) – Permitting Gambling;
- 2) 204 CMR 2.05 (2): Permitting an Illegality on the licensed premises, to wit: M.G.L. c. 140 § 177A (5) Automatic amusement devices licensed under this section shall be so installed on the premises described in the license as to be in open view at all times while in operation and shall at all times be available for inspection.

The above-captioned occurred on October 20, 2017, according to Investigator Temple's Report.

The following documents are in evidence as exhibits:

1. Investigator Temple's Investigative Report; and
 2. Chart of Football Wagers.
-
- A. Photographs of inside Premise; and
 - B. Thumb Drive of Licensee's Video of Interior during Investigation.

The Commission took Administrative Notice of the Licensee's Commission files.

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

FINDINGS OF FACT

1. On Friday, October 20, 2017, at approximately 10:20 p.m., Investigators DiCicco and Temple ("Investigators"), along with members of the Lawrence Police Department and members of the Massachusetts State Police, investigated J. Brian's Pub & Grille, Inc. to determine the manner in which its business was being conducted. (Testimony, Exhibit 1)

2. Investigators entered the licensed premises and observed two electronic video devices in an enclosed room to the right of the bar. Electronic gambling device #1 was labeled Fruit Bonus 96 and electronic gambling device #2 was labeled Cherry Master. (Testimony, Exhibit 1)
3. The two electronic video devices were unplugged. Investigators plugged them in. (Testimony, Exhibit 1)
4. Investigators observed that the electronic video devices had the following characteristics which, based on their training and experience, indicated these electronic video machines were being used for illegal gambling:
 - The electronic video gaming devices were located in a separate room;
 - Each device accepted U. S. Currency in bills;
 - Each device had a "double up" option to win additional credits;
 - Each device had a "knock off" mechanism, in the form of a push button at the back of the device, to reset the credits earned to zero. (Testimony, Exhibit 1)
5. Investigators inserted one U.S. dollar into electronic gambling device #1 and heard a ticking noise coming from the machine, which based on their training and experience, indicates the machine is being used for illegal gambling. The ticking sound indicates the machine is equipped with two meters inside the device. One meter recorded the money/credits inserted into the device while another meter recorded the money/credits paid out on the device. (Testimony, Exhibit 1)
6. Investigator DiCicco placed one U.S. dollar into electronic gambling device #2, which showed 4 credits on the screen. Investigator DiCicco selected 2 credits to bet, which the device registered and showed 2 credits remaining. He then pressed the play button, and the device indicated a loss. DiCicco then pressed the "knock off" button at the back of the device, and the credits reset to zero. (Testimony, Exhibit 1)
7. Investigators spoke to manager of record, Kathleen Rupkey, who stated that no one plays the machines except the owner, Jay. When Investigators asked Ms. Rupkey if the club pays out on winnings from the devices, she stated that to her knowledge it did not, but she did not know about the machines. (Testimony, Exhibit 1)
8. Investigators observed the video surveillance camera in the room with the devices and asked Ms. Rupkey what they would find if they looked at the footage from the camera. Rupkey stated that she did not know. (Testimony, Exhibit 1)
9. Investigators then asked to speak with the owner, Jay Incropera. Mr. Incropera stated that the club does not pay out on winnings and the devices are for amusement only. (Testimony, Exhibit 1)
10. Investigators spoke to a bartender on duty and they were directed to Laura Lee Ellis, another bartender, who had worked there longer. Ellis stated that she has worked there for 1½ years and she puts the credits won on a slip of paper and leaves it near the register. Investigators asked to see any slips, but Ellis replied that she did not have any from that day. Investigators asked Ellis if she paid out the winnings and she said she does not, but

Jay takes the slips and makes the payouts. Ellis stated that was an unwritten rule about the machines. (Testimony, Exhibit 1)

11. Investigators went into the office behind the kitchen and observed an 8.5" x 11" piece of paper on a desk with markings indicating it was being used to record wagers on football games. On said paper were listed people's names and the names of the National Football League teams but it contained no other information. (Testimony, Exhibits 1 & 2)
12. At the Commission hearing, Ms. Rupkey admitted that the chart was hers and testified that in the past she has conducted a football pool with family and friends but that what Investigators found had not been used for betting. She further testified that she had left it at the licensed premise with some personal paperwork. (Testimony, Exhibits 1 & 2)
13. Investigators found the above-referenced 8.5" x 11" piece of paper while going through a pile of papers on a desk in the office. (Testimony)
14. Investigators informed Ms. Rupkey of the violation and that a report would be submitted to the Chief Investigator for review. (Testimony, Exhibit 1)

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, 383 Mass. 299, 317 (1981) (emphasis supplied).

In order 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 Licensee is charged with a violation of 204 CMR 2.05 (1) – Permitting Gambling, and a violation of 204 CMR 2.05(2) Permitting an Illegality on the licensed premises, to wit: M.G.L. c. 140 § 177A (5), Automatic Amusement devices licensed under this section shall be so installed on the premises described in the license as to be in open view at all times while in operation, and shall at all times be available for inspection.

Investigator Temple testified as to his observations of the machines and his finding that they had characteristics which, based on his training and experience, indicated they were being used for gambling. He was asked by the Licensee's attorney if they had to plug in the machines before operating them and he answered in the affirmative.

Counsel for the licensee argued that the machines were not in operation at the time of the inspection and that the 8 ½ x 11 inch paper containing the chart was simply that, a blank chart, with no notations indicating that gambling had taken place.

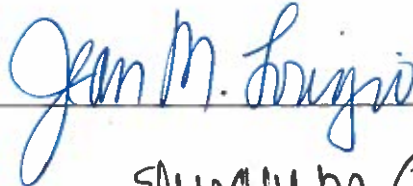
The Commission finds that the machines were not in operation, as the evidence demonstrates that the machines were unplugged and not in use. The Commission also finds that the 8 ½ x 11 inch paper (Exhibit 2) did not contain any markings or notations indicating that it was being used for betting, gaming purposes, or a gaming pool. Upon a review of the exhibits, testimony, and documents submitted in this matter, the Commission finds no substantial evidence that the Licensee committed a violation of 204 CMR 2.05(1) or 204 CMR 2.05(2).

CONCLUSION

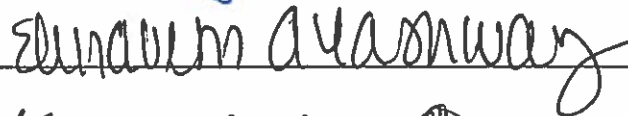
Based on the evidence, the Commission finds NO VIOLATION of 204 CMR 2.05 (1) - Permitting Gambling; and NO VIOLATION of 204 CMR 2.05 (2): Permitting an Illegality on the licensed premises, to wit: M.G.L. c. 140 § 177A (5) Automatic amusement devices licensed under this section shall be so installed on the premises described in the license as to be in open view at all times while in operation and shall at all times be available for inspection, occurred on the licensed premises.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman



Elizabeth A. Lashway, Commissioner



Kathleen McNally, Commissioner



Dated: April 16, 2018

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.

This document is important and should be translated immediately.
Este documento es importante y debe ser traducido inmediatamente.
Este documento é importante e deve ser traduzido imediatamente.
Ce document est important et devrait être traduit immédiatement.
Questo documento è importante e dovrebbe essere tradotto immediatamente.
Το έγγραφο αυτό είναι σημαντικό και θα πρέπει να μεταφραστούν αμέσως.
这份文件是重要的，应立即进行翻译。

cc: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Christopher Temple, Investigator
Joseph Di Cicco, Investigator
Scott Gleason, Esq. via email
Administration, File