



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

Jean M. Lorizio, Esq.
Chairman

DECISION

**MAXX TRE INC. D/B/A LA CAVA FINE CUISINE & SPIRITS INC.
20-22 UNION STREET
LAWRENCE, MA 01840
LICENSE#: 044929-RS-0594
HEARD: 4/7/2021**

This is an appeal from the action of the City of Lawrence Licensing Board (the "Local Board" or "Lawrence") in voting to revoke the § 12 all alcohol license of Maxx Tre Inc. d/b/a La Cava Fine Cuisine & Spirits Inc. ("Licensee" or "La Cava") located at 20-22 Union Street, Lawrence, MA. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a remote hearing was held via Microsoft Teams on Wednesday, April 7, 2021.

The following documents are in evidence as exhibits:

1. Local Board's Notice of Hearing, 9/23/2020;
2. Local Board's Decision, 10/14/2020;
3. Mayor Daniel Rivera's Letter dated 10/14/2020 to Lawrence Licensing Board;
4. Licensee's Motion to Introduce and View Official Video of the Events of September 20, 2020, with Affidavit, 1/13/2021;
5. Video Footage of Incident, 9/20/2020;
6. Two Photos of the Interior of Licensed Premises, 9/22/2020;
7. Licensee's Motion to Preclude Any Reference As To Any Action of Any Former License Holder [or Relative of Appellant] that Operated a Business at this Location or any other Location, 3/31/2021;
8. Local Board's Rules and Regulations;
9. Cash Register Receipts, 9/20/2020; and
10. Lawrence Police Department Incident Report #20005373 and Supplementary Report #20005373/2, 9/20/2020.

There is one audio recording of this hearing, and two (2) witnesses testified.

FINDINGS OF FACT

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

1. Maxx Tre Inc. d/b/a La Cava Fine Cuisine & Spirits Inc. ("La Cava" or "Licensee"), holds an all-alcohol license and operates a business at 20-22 Union Street, Lawrence, Massachusetts. Mark A. Trempe, Jr. is President, Treasurer, Secretary and Director of the corporation. Mr. Trempe is also the manager of record.
2. On Sunday, September 20, 2020, at approximately 8:51 p.m., Lawrence Police Officers Bonilla and Delacruz ("Officers") responded to Lawrence General Hospital to speak with Anthony Perez, the victim of an alleged assault. (Testimony, Exhibit 5)
3. Upon arrival, Officers spoke to Mr. Perez who stated he had been with a friend at La Cava. He got into an argument and a fight ensued. Mr. Perez was struck in the face with a mug by another patron and they both fell to the floor. (Testimony, Exhibits 5, 10)
4. While the men struggled on the floor, several individuals attempted to pull the men apart. Once the men were separated, Mr. Perez was quickly pushed out the closest exit. Id.
5. After driving away from the licensed premises, Mr. Perez realized he was bleeding so proceeded to Lawrence General Hospital. (Testimony, Exhibit 10).
6. After speaking with Mr. Perez, Officers responded to La Cava and spoke to the Licensee, Mark Trempe. Officer Colantuoni later joined the Officers at La Cava. Id.
7. The altercation lasted approximately 12 to 15 seconds. (Testimony, Exhibit 5)
8. Mr. Trempe did not realize Mr. Perez was injured. (Testimony)
9. The assailant was allowed to remain in the licensed premises to gather his personal belongings before he left. (Testimony, Exhibit 5)
10. Mr. Trempe did not call police to report the incident. (Testimony, Exhibit 10)
11. Mr. Trempe was not able to access the video surveillance, but arranged for his video person, Mr. Carlos Castillo, to help Lawrence Police view the videos the next day, September 21, 2020. (Testimony, Exhibit 10)
12. Mr. Trempe and Mr. Castillo met with Officer Colantuoni the next day to review the video surveillance footage of the incident. Officer Colantuoni reviewed footage which included the interior, behind the bar and the patio. Any and all videos requested by Officer Colantuoni were turned over to the police. (Testimony)
13. On Wednesday, October 14, 2020, the Local Board held a virtual hearing on the Licensee's alleged violations of the Lawrence Licensing Board Regulation (Safety section 9) for failure

to call police, failure to provide assistance to injured persons, failure to preserve a crime scene and overserving a customer.¹ (Exhibit 1)

14. By decision dated October 14, 2020, the Local Board found the Licensee in violation of Section B (9) of the Lawrence Licensing Board Rules and Regulations² and voted to “immediately and indefinitely” revoke its license. (Exhibit 2)

15. The Licensee timely appealed the Local Board’s decision to the ABCC. (Commission Records)

16. Lt. Cerullo later requested additional video footage of the parking lot. Mr. Trempe contacted Mr. Castillo to assist in obtaining the video and learned Mr. Castillo had contracted COVID and was not available. Upon Mr. Castillo’s return, the footage could not be obtained. (Testimony)

DISCUSSION

Pursuant to M.G.L. Ch. 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); Devine v. Zoning Bd. of Appeal of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Bd. of Appeals of Brookline, 362 Mass. 290, 295 (1972)). 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).” Id.

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) The Commission is given “comprehensive powers of supervision over licensees.” Connolly, 334 Mass. At 617.

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. “[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

¹ The Notice of Hearing also includes alleged violations of M.G.L. Ch. 111, §§ 122, 123 (public health); however, the Local Board did not make findings related to those allegations but rather the Local Board of Health held a separate hearing on October 13, 2020.

² The Notice of Decision did not include a finding related to allegation of overservice.

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 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). 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.

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 violation that is alleged to have occurred on September 20, 2020.

The Licensee is charged with violating Section B(9) of the Lawrence Licensing Board Rules and Regulations which states, "[l]icensees are to call for police assistance where necessary to alert police to unlawful activities, to protect patrons and members of the public from disruptive incidents, to clear the premises and the vicinity from unruly persons where needed, to provide assistance to injured persons, and on other occasions where police assistance is needed to preserve the public safety and order. The Licensee shall stop serving any and all types of alcoholic beverages once the police department has been contacted pertaining to matters of this magnitude." Section B(9) Rules and Regulations of the City of Lawrence Licensing Board.

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). The Supreme Judicial Court has held that 204 C.M.R. 2.05(2),

describes a preexisting common law duty which licensees owe to their patrons or guests. A bar owner, for example, has the duty to protect persons on or about the premises from the dangerous propensities of its patrons, served or unserved. When the bar has served a potentially dangerous patron, the duty may extend beyond the premises. When the bar has not served the patron, however, the duty is based merely on a duty to keep the premises safe, and the duty applies on or about the premises. See Gustafson v. Matthews, 109 Ill. App. 3d 884, 65 Ill. Dec. 475, 441 N.E. 2d 388 (1982) (bar owner had no duty to prevent intoxicated patron from driving away with his five children in the car); Locklear v. Stinson, 161 Mich. App. 713, 411 N.W. 2d 834 (1987) (bar owner not liable when one patron was killed by

another patron off the premises). O’Gorman v. Antonio Rubinaccio & Sons, Inc., 408 Mass. 758, 761 n.2 (1990) (citations omitted).

“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 denying service to a person who appears intoxicated or who has requested too many drinks or calling police when a fight occurs, or an aggressive patron threatens assault. See, e.g., Greco v. Sumner Tavern, Inc., 333 Mass. 144, 145 (1995); Carey, 355 Mass. at 451.

The Local Board presented evidence through the testimony of Lawrence Police Lieutenant Robert Cerullo. The Commission found Lt. Cerullo to be professional and credible. However, Lt. Cerullo was not present on the night of the incident and as a result, he does not have first-hand knowledge of what occurred.

The Licensee was present on the night of the incident and testified nothing took place in the licensed premises which alerted him a fight was about to ensue. He testified, and the video evidence (Exhibit 5) corroborates, the fight lasted mere seconds. However, the video evidence also clearly depicts the victim being quickly forced out the door of the establishment while the assailant was allowed to remain inside. Mr. Trempe admittedly failed to call the police as required by Section B(9) of the Lawrence Licensing Board Rules and Regulations. (Testimony)

The Commission finds by substantial evidence the Licensee committed this violation.

The Commission must determine if the penalty issued by the Local Board is appropriate. “The burden is on the licensee to prove the penalty imposed should not be approved.” Metrowest Tropical Foods, Inc. (ABCC Decision Sept. 20, 2006) Lawrence’s Rules and Regulations do not address progressive discipline. In the absence of these regulations, the Commission must consider the totality of the evidence, including but not limited to the prior violation history of the Licensee, punishments meted out for similarly situated licensees, and the egregiousness of the violation(s) in making this determination. The Commission was presented with no evidence regarding other licensees charged with similar violations, and thus no evidence regarding what sanctions the Local Board imposed upon other licensees for these or similar Section B(9) violations. No evidence was presented of any history of violations.

The Commission finds that the violation was committed by the Licensee and the violation is serious in nature. The Commission finds that the Rules and Regulations of the Local Board do not address progressive discipline. Furthermore, the Commission was not presented with any evidence of similar violations committed by other licensees in Lawrence, nor any sanctions imposed by the Local Board for similar infractions.

The Commission finds that based on the Licensee’s lack of prior violation history, the Local Board’s revocation of the license was excessive. The Commission disapproves the action of the Local Board in revoking the M.G.L. c. 138, section 12 license of La Cava.

The Licensee has been closed since October of 2020, which is a period of approximately 19 months. Here, the Commission finds that in light of the violation and analysis above, a two (2) week period of closure to be an appropriate sanction for this violation.

The Commission reminds the Licensee that the Rules and Regulations of the Local Board must be adhered to, and the police are to be notified immediately of any disturbance on the licensed premises.

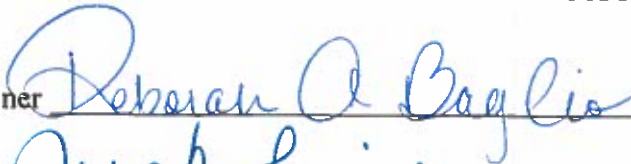
CONCLUSION

The Alcoholic Beverages Control Commission ("Commission") **APPROVES** the action of the City of Lawrence Licensing Board in finding that Maxx Tre Inc. d/b/a La Cava Fine Cuisine & Spirits Inc. committed a violation of Lawrence Licensing Board Rule B (9).

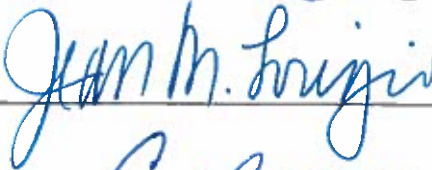
However, the Commission **DISAPPROVES** the action of the City of Lawrence in revoking the license of Maxx Tre Inc. d/b/a La Cava Fine Cuisine & Spirits Inc. The Commission finds that based on the aforementioned analysis, the penalty of revocation is too severe. The Commission **REMANDS** this matter to the Local Board with the recommendation that a two (2) week suspension is an appropriate sanction for this violation. With the Licensee having been closed for over one year, the Commission recommends the suspension be deemed served.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Deborah Baglio, Commissioner



Jean M. Lorizio, Chairman



Crystal Matthews, Commissioner



Dated: May 31, 2022

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: Robert H. Minasian, Esq.
Timothy Houten, Esq.
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration, File
