

The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Steven Grossman
Treasurer and Receiver General

DECISION

Kim J. Gainsboro, Esq.
Chairman

ZYX, LLC DBA SWEENEY' S RETREAT
18 ATLANTIC AVE
MARBLEHEAD, MA 01945
LICENSE #: 065600003
HEARD: 03/05/2013

This is an appeal of the action of the town of Marblehead's Board of Selectmen (the "Local Board") in denying the M.G.L. c. 138 §12 License Renewal Application of ZYX, LLC dba Sweeney's Retreat (the "Applicant" or "ZYX") located at 18 Atlantic Ave., Marblehead, MA. This renewal was filed by the trustee in bankruptcy appointed for ZYX. The trustee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Tuesday, March 5, 2013.

The following documents are in evidence:

1. Single-page Renewal Application signed by the trustee dated December 27, 2012 and date stamped as received on December 28, 2012;
2. One-page Letter dated January 10, 2013 to Kyle Wiley from Kathleen R. Cruickshank with attached single page Renewal Application signed by the trustee dated December 27, 2012 and date stamped as received on January 11, 2013;
3. One-page Letter dated January 18, 2013 to Kyle Wiley from Kathleen R. Cruickshank with attached Single-page Renewal Application signed by the trustee dated January 18, 2013 and copy of 5-page Stipulation of Settlement filed in the bankruptcy action of ZYX;
4. Two-page letter dated February 15, 2013 from Jackie Belf-Becker to Kathleen R. Cruickshank with copy of check and 4 pages of minutes of Local Board meeting on February 13, 2013; and
5. Eight-page Joint Prehearing Memorandum Dated March 1, 2013 containing agreed upon facts.

There is one (1) audio recording of this hearing. This hearing was expedited upon the joint request of the parties based on stipulated facts contained in the Joint Prehearing Memorandum.

FACTS

1. On November 28, 2012, the Debtor filed a voluntary petition for relief under chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Massachusetts, Case No. 12-19296 WCH.
2. As of November 28, 2012, the Debtor was the holder of an All Alcoholic Beverages License Restaurant number 065600003 issued by the Local Board.
3. On November 29, 2012, the Trustee was appointed.
4. ZYX did not file an application to renew the license prior to November 30, 2012.
5. On or about December 27, 2012, the Trustee filed a single-page application to renew the license.
6. On or about December 28, 2012, the Trustee filed the *Motion by Trustee for Order Authorizing Sale of Liquor License by Public Auction Sale Free and Clear of Liens, Claims, Encumbrances and Interests* ("Sale Motion") in the Bankruptcy Court, by which Sale Motion the Trustee sought court authority to sell the License by public auction sale on January 18, 2012 at 11:00a.m.
7. The terms of the auction as set forth in the Sale Motion provided that the Trustee would be permitted to utilize the high bidder's deposit to pay the \$1,500 renewal fee for the License in connection with the First Application.
8. A hearing on the Sale Motion was scheduled for January 16, 2013 at 9:30a.m.
9. The Sale Motion was served on the Local Board and the Commission (collectively known as the "Licensing Authorities").
10. The Licensing Authorities contacted the Trustee to informally communicate their objections to the Sale Motion.
11. In an effort to resolve the disputes between the Trustee and the Licensing Authorities and to avoid the risk, costs, and delays related to litigation with respect to the License, the Trustee and the Licensing Authorities entered into an agreement which was approved by the Bankruptcy Court on January 16, 2013.
12. The agreement with respect to the License provides that the Licensing Authorities would proceed on the following basis, without prejudice to the Trustee's rights under the first Application.
13. The trustee shall forthwith file another renewal application for the License with the Local Board and remit a check to the local Board in the amount of \$200 payable to the Commission.
 - The second application shall be treated by the Local Board as an application for a new liquor license subject to the requirements of M.G.L. c. 138 §15A.
 - The Local Board shall publish a notice of the Local Boards public hearing with regard to the second application.
 - The trustee shall pay the costs to publish the Notice with respect to the Second Application.
 - The Local Board shall hold a public hearing on the Second Application.

- The Commission shall promptly as soon as practicable act upon the decision made by the Local Board with regard to the Second Application, either to approve the Local Board's granting of the Second Application, or to consider the Trustee's appeal of the Local Boards denial of the Second Application, as the case may be.
 - The Licensing Authorities reserve their rights to dispute the applicability of 11 USC Section 108 (b) to the First Application; provided, however, that the Local Board and the Commission acknowledge that the Trustee has taken all necessary and appropriate actions to timely and properly renew the License in accordance with the First Application during the time period provided under 11 USC Section 108 (b), as applicable.
14. On or about January 10, 2013, the Trustee remitted a check to the Local Board in the amount of \$200 made payable to the Commission. (Exhibit B by memo) On or about January 18, 2013, the Trustee filed the Second Application. (Exhibit C by memo)
 15. The Local Board published notice of a hearing to be held by the Local Board with respect to the Second Application.
 16. The Trustee paid for the notice of hearing for the Second Application.
 17. The Local Board held a public hearing on the Second Application on February 13, 2013 at 7:35p.m.
 18. At the hearing, the Local Board acknowledged that the Trustee had paid the appropriate fee for the Second Application and had provided appropriate notification of the Second Application and the public hearing to abutters of the Debtor, and that the hearing had been noticed in the newspaper.
 19. The Local Board denied the Second Application because it was incomplete, and specifically because the Trustee did not provide:
 - (i) Articles of Organization;
 - (ii) A floor plan, lease or proof of legal right to occupy the premises;
 - (iii) A managers form;
 - (iv) Information on all individuals with beneficial interests, if any, in the licenses;
 - (v) Supporting financial records;
 - (vi) CORI release,
 - (vii) Records regarding source of money for the application;
 - (viii) Three months of bank statements; and
 - (ix) A corporate vote to authorize the filing of the application.
(See exhibit D and minutes from hearing from memo)

ISSUE

What application forms and paperwork are required to be filed by a chapter 7 bankruptcy trustee to renew "late" (i.e., after November for an annual license) a retail license under

the Massachusetts Liquor Control Act when the trustee has no authority to conduct the licensed business and in fact has no intention of conducting the licensed business; rather, the trustee seeks through the renewal process required under Massachusetts state law to preserve a substantial if not the only asset of value within the bankruptcy estate?

DISCUSSION

M.G.L. c. 138 §23 provides, in pertinent part, that “[i]n case of the appointment of a ... trustee in bankruptcy ... of a licensee under this chapter, such license, unless earlier surrendered, revoked or cancelled, shall authorize such ... trustee to exercise all authority conferred on such licensee until the termination thereof.” Under this provision, upon appointment, a Trustee in bankruptcy steps into the position of a licensee for a liquor license.

Under the pertinent provisions of M.G.L. c. 138 §16A, “[l]icenses issued under section twelve or fifteen shall be automatically renewed for the next annual license period upon application by the holder thereof during the month of November and shall be automatically renewed.” Failure to file such application results in the expiration of the license. “Except for an application in November the current license terminates at the year end and the licensee in respect of a license for the next year stands the same as do applicants who are applying for the first time.” Zelman v. Alcoholic Beverage Control Commission, 335 Mass. 515, 520 (1957).

“Under G.L. c. 138 §16A, a debtor or a bankruptcy trustee must file a renewal application in November to preserve the right to automatic renewal.” The statute does not contain a grace period. If the holder of the license fails to preserve the right to automatic renewal, the statute provides that the application “shall be treated as an application for a new license.” G.L. c. 138 §16A.

The application requirements for a new license are set forth in G.L. c. 138 §15A and 204 CMR 2.01. “[A]ll applications for an original license under sections twelve and fifteen shall be made on a form or forms to be prescribed by the commission.” G.L. c. 138, §15A. Under the statute any new license application shall include “a sworn statement by the applicant giving the names and addresses of all persons who have a direct or indirect beneficial interest in said license” and “[w]here there are no premises actually in existence at the time the application is made, the applicant may file with the local licensing authorities a plan showing the actual dimensions of premises which are to be constructed on which the license is to be exercised. “ Further, 204 CMR 2.01 requires new license applicants to produce proof of citizenship “by production of a certificate of birth, naturalization or as a registered voter” and, shall be submitted on fully answered blanks provided by the licensing authority.

Ordinarily, a multi-page new application form must be filed by any licensee or trustee in bankruptcy seeking to renew a license after the month of November has passed. The Commission had not considered the impact these required multi-page forms would have on a trustee looking to file a “late renewal” to preserve the license as an asset of the estate.

In this matter, the trustee does not have the ability to provide all of the information set forth in the Commission multi-page forms for a new license application due to the fact that he is not the proposed licensee and has no authority or intention to operate the licensed business. The trustee is simply the fiduciary of the assets of the bankruptcy estate, accountable to the bankruptcy court judge assigned to each case. It is the trustee's responsibility to sell all available assets and obtain the best price for each, including the alcoholic beverages license. As such, it appears to the Commission that it would not advance any public policy interest to require the Trustee to provide all of the information required in the multi-page forms ordinarily required for a new license application.

Moreover, there is no identified or identifiable prejudice to either the Commission or the Local Board by allowing a Trustee in bankruptcy to provide a minimal amount of information on a new license application when they have missed the November 30th deadline to renew a license. The Local Board and the Commission always holds the authority and indeed the responsibility to review and grant or approve both the application to renew the license late as well as the application of the bankruptcy trustee to transfer the ownership and/or location of the renewed license to the ultimate purchaser and operator of the license, as required under Massachusetts state law.

Therefore, the Commission holds that the application form required to be filed by a chapter 7 trustee in bankruptcy, who has no authority to operate a license and does not seek any authority to operate a license, is the single-page renewal application generated by the Commission in the name of the last-approved licensee, now the debtor in bankruptcy. This application should be signed by the bankruptcy trustee indicating his capacity as trustee. It is also recommended, but not a fatal defect to the renewal application, that the bankruptcy trustee attaches to the renewal application a copy of the appointment as trustee for the debtor in bankruptcy. All costs of the application and license fees will be paid by the trustee, as required.

In this case, the trustee in bankruptcy complied with this application requirement in Exhibits 1, 2 and 3. The trustee in bankruptcy also bore appropriately the cost of the publication for the hearing before the Local Board, the cost of the notice to abutters, and the required Commission fee for consideration of approval. The trustee will also be paying the license fee as authorized by the terms of the order to be issued by the bankruptcy court.¹

Since the Commission decides this matter on these grounds, it does not consider and leaves for another day the other questions of law presented by the parties.

¹ The Commission notes that under the pertinent state law, even if the licensee fee is not paid by an applicant for renewal, it does not invalidate the license and is not grounds to deny renewal of the license. M.G.L. c. 138, §16B. The failure to pay the license fee merely presents the licensing authorities with the opportunity, but not the obligation, to declare that license forfeit.

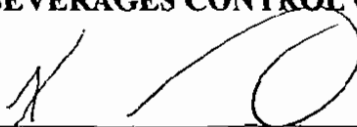
CONCLUSION

The Commission disapproves the action of the Local Board in denying the application for renewal of ZYX, LLC. The Commission holds that when a licensee or debtor in bankruptcy or trustee in bankruptcy fails to file an application for renewal of a license by November 30th, and is required to file a new application, the Local Board shall accept the single-page renewal application form as the equivalent of a new license application form.

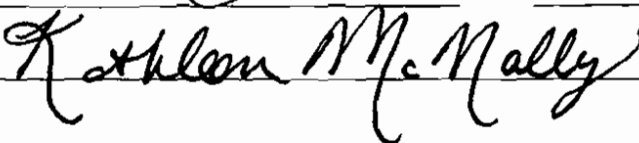
The Commission remands this matter to the Local Board with the recommendation that the Local Board grant the renewal forthwith and forward the application to the Commission for its consideration of approval in the usual administrative course.²

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman

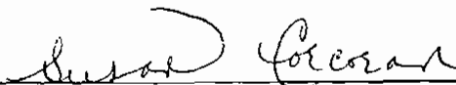


Kathleen McNally, Commissioner



I, the undersigned, hereby certify that I have reviewed the hearing record and concur with the above decision.

Susan Corcoran, Commissioner,



Dated: March 21, 2013

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.

cc: Kathleen Cruikshank, Esq.
Lisa Mead, Esq.
Frederick G. Mahony, Chief Investigator
Administration
File

² The Commission acknowledges the consistent diligence of the Local Board in making the decision at the meeting on February 13, 2013. The Commission looks forward to the Local Board's continuing diligence pursuant to this decision.