

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

Jean M. Lorizio, Esq.
Chairman

DECISION

AMRUT CORPORATION D/B/A ELIXIR LOUNGE
224 EAST STREET, BUILDING A
METHUEN, MA 01844
LICENSE #: 00130-RS-0696
HEARD: 11/30/2022 and 12/08/2022

This is an appeal from the action of the City of Methuen Licensing Board (the "Local Board" or "Methuen") in revoking the §12 all alcoholic beverages license of Amrut Corporation d/b/a Elixir Lounge (the "Licensee" or "Amrut" or "Elixir") located at 224 East Street, Building A, Methuen, Massachusetts. 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 Wednesday, November 30, 2022, and Thursday, December 8, 2022.

The following documents are in evidence as exhibits:

Appellant Exhibits:

1. City of Methuen Assessor Map;
2. Photograph- Aerial view of 224 East Street, Methuen;
3. Photograph- Street view of 224 East Street, Methuen;
4. Elixir Lease re: 224 East Street, Building A, Methuen;
5. Licensing Board Approval of Elixir All Alcohol License, 1/08/2014;
6. Police Notice re: Licensing Board Suspending Elixir's All Alcohol License, 7/23/2022;
7. Secretary of Commonwealth Business Summary re: Amrut Corp.;
8. Methuen Building Inspector Notice of Closure, 7/23/2022;
9. Notice of Hearing 1, 8/23/2022 and police reports;
10. Notice of Hearing 2, 9/8/2022;
11. Patron Scan Occupancy Count Report;
12. News Article re: Shooting at Methuen Hookah Bar;
13. Emails with City of Methuen re: Reinstatement of Certificate of Occupancy;
14. Elixir Plan re: Reinstatement of Certificate of Occupancy;
15. Certificates of Completion re: Crowd Management;

16. Elixir food, beverage and hookah menu.

Appellee Exhibits:

- A. Copy of Amrut Corporation 2022 License;
- B. Notice of Revocation of Certificate of Occupancy 7/23/2022;
- C. Notice of Revocation of Alcohol License, 10/19/2022;
- D. Appellant's Appeal of Revocation, 10/27/2022;
- E. Methuen Police Department Report of Officer Schiavone #2200018982-00025114;
- F. Methuen Police Department Report of Sgt. Shawn Moore # 2200018982-00025128;
- G. Methuen Police Department Report of Off. Jeffrey McAndrew #2200018982-00025110;
- H. Methuen Police Department Report of Off. Lawrence May #2200018982-00025135;
- I. Methuen Police Department Report of Off. Arthur Handy #2200018982-00025177;
- J. Methuen Police Department Report of Off. James Keating #2200018982-00025108;
- K. Methuen Police Department Report of Off. Stephen DeLeo #2200018982-00025111;
- L. Methuen Police Department Report of Off. Joshua Waller #2200018982-00025115;
- M. Methuen Police Department Report of Off. Robert Gordon #2200018982-00025129;
- N. Methuen Police Department Report of Off. Stephen Hatem #2200018982-00025131;
- O. Methuen Police Department Report of Off. James Smith #2200018982-00025134;
- P. Methuen Police Department Report of Off. Felicia Bistany #2200018982-00025151;
- Q. Methuen Police Department Report of Off. Elvin Alarcon #2200018982-00025155;
- R. Methuen Police Department Report of Off. Nicholas Conway #2200018982-00025635.

There is one audio recording of this hearing and ten (10) witnesses testified.

FINDINGS OF FACT

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

1. Amrut Corporation d/b/a Elixir Lounge ("Licensee" or "Amrut" or "Elixir") holds a §12 all alcoholic beverages license and operates a business located at 224 East Street, Building A, Methuen, Massachusetts. The Licensee has held a §12 all alcohol beverage license since 2014. (Testimony, Exhibits 5, A)
2. Mr. Vipul Patel ("Mr. V. Patel") is President, Treasurer, Director, and Manager of Record of Amrut. Pradip Patel is Secretary and Director of the Licensee corporation. Sunil Patel is Director of the corporation. (Testimony, Exhibit 7)
3. 224 East Street, Methuen is a multi-commercial lot with two buildings and a shared parking lot ("Parking Lot") which is used by Elixir and other businesses located at 224 East Street. (Testimony, Exhibits 1, 2, 3, 4)

4. Elixir rents the licensed premises, and its lease gives Elixir “the non-exclusive right to use all parking spaces available on the property and any contiguous lots...” (Testimony, Exhibit 4)
5. Nilsson de Vasconcelos is the Licensee’s head of security and general manager and has several years’ experience in the industry. Mr. de Vasconcelos was working on the night of July 22, 2022, and into the early morning hours of July 23, 2022. (Testimony)
6. Elixir security personnel staff the entrance using Patron Scan and require patrons to go through several security protocols before gaining entry to the licensed premises which includes showing a valid government issued ID; scanning the ID; undergoing a pat/frisk; passing through metal detector; and subjecting possessions to search by staff. Id.
7. Patrons may enter Elixir by reservation only. Security personnel stationed at the entrance confirm the patron’s name is on the reservation list. Security staff search the patrons’ pockets and purses and use a hand-held metal detector wand. Only five people at a time are let into Elixir and all patrons are checked in the same manner. Once the search is completed, the patrons go through doors and have IDs ready to be scanned at a second security point. If a patron does not have a reservation, they may wait in a separate line until something becomes available. Id.
8. On July 22-23, 2022, between the hours of 10:00 p.m. and 2:00 a.m., Officers Schiavone and Keating of the Methuen Police were working a police detail at the licensed premises. The detail officers were posted outside the entrance of Elixir and periodically walked the perimeter to look for illegal activity and to ensure no one accessed the licensed premises other than through the front doors, assist with crowd control, and maintain order. If something required police intervention either inside or outside, the detail officers were to respond as needed. Id.
9. A fire detail was also on duty at Elixir’s front entrance for crowd management and capacity limits. Id.
10. Officer Schiavone did not observe any disturbances or altercations prior to the shots being fired in the parking lot. Nothing occurred that would indicate to Officer Schiavone a police presence was necessary other than to assist in maintaining order at the entrance/exit. Id.
11. Officer Schiavone was not inside Elixir prior to closing time when he entered the foyer area. At that time patrons were actively exiting. Id.
12. Officer Schiavone was stationed at the front door to ensure patrons were leaving Elixir in an orderly manner and Officer Keating followed a group of patrons into the parking lot. Id.
13. Moments later, shots rang out and Officer Keating radioed “shots fired”. Officer Schiavone was unclear as to whether the noise he heard was shots fired or fireworks. He confirmed it was gunshots once he located a victim. He then broadcast “shots fired” and reported that there was a victim on scene. His immediate attention was given to the gunshot victim. (Testimony, Exhibit F)

14. Sargeant Shawn Moore responded to the licensed premises upon receiving the radio transmission of shots fired and observed approximately one hundred and fifty people in the parking lot. For public safety and the safety of officers, Sgt. Moore ordered officers to close the parking lot which was now a crime scene, ensuring no one was able to leave the lot. Id.
15. All patrol cars available were called to Elixir and Sgt. Moore made repeat radio broadcasts for mutual aid. Officers from several surrounding municipalities responded, as well as State Police. (Testimony)
16. Sgt. Moore never entered the licensed premises and was not present prior to his responding to the report of gunshots in the parking lot. Id.
17. Sgt. Eric DeLeon was on desk duty as the commanding officer of the midnight shift on July 23, 2022. He requested mutual aid and directed dispatchers to put out request for mutual aid, however he was not present at the licensed premise on July 22nd or 23rd. Id.
18. Two (2) firearms were recovered in motor vehicles in the parking lot outside of the licensed premises. Id.
19. There was no evidence presented that the victim or suspects were inside the licensed premises on July 22nd or July 23, 2022. Id.
20. Mr. Patel was working at the licensed premises on July 22, 2022, and into the morning of July 23, 2022. He did not observe any disturbances or fights, and none were reported to him. Id.
21. Mr. de Vasconcelos was working inside the licensed premises when shots were fired. An employee notified him of the shooting and he proceeded outside where he spoke with Officers Schiavone and Keating. Mr. de Vasconcelos did not observe anything inside the licensed premises that would have indicated anything other than a calm night. Id.
22. Ms. Valentina Abreu is employed as a server at the licensed premises and was working on the night of July 22, 2022, and into the morning of July 23, 2022. She arrived at Elixir at approximately 8:30 p.m. She learned of the shooting while cleaning at approximately 1:30 a.m. She did not observe any disturbance or fight that night. Id.
23. Ms. Denise Berube is employed as an assistant manager at Elixir and was working on the night of July 22, 2022, and into the morning of July 23, 2022. She arrived at the licensed premise between 5:30 and 6:00 p.m. She learned of the shooting at approximately 1:50 a.m. when she overheard a conversation about an incident outside. She had not observed any disturbances or fights during the night. Id.
24. The City of Methuen police department notified Elixir by letter dated July 23, 2022, that the Licensing Board voted to suspend its license immediately pending the results of the Methuen Police Department Investigation into the events of July 23. (Exhibit 6)

25. By letter dated August 23, 2022, the City of Methuen Licensing Board notified Elixir it would hold a hearing on September 14, 2022, to determine whether their all-alcohol license should be modified, suspended, revoked or canceled. (Exhibit 9)
26. By letter dated September 8, 2022, the City of Methuen Licensing Board rescheduled the hearing to October 12, 2022. (Exhibit 10)
27. The City of Methuen Licensing Board notified Elixir by letter dated October 19, 2022 that its all-alcohol license was revoked. (Exhibit C)
28. The Licensee timely appealed the Local Board's decision revoking its §12 all alcoholic beverage license to the ABCC. (Exhibit D)

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 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.

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 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 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 (1979); 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 July 23, 2022.

The Methuen Licensing Board found the Licensee permitted a violation of 240 CMR 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, and M.G.L. Ch. 138 § 64 the licensing authorities after notice to the licensee and reasonable opportunity for him to be heard by them, may modify, suspend, revoke or cancel his license upon satisfactory proof that he has violated or permitted a violation of any condition thereof, or any law of the commonwealth.

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 of 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 Methuen Police Officers Kevin Schiavone, Sergeant Shawn Moore, Sergeant Eric Deleon, and Police Chief Scott McNamara. The

Commission found the officers to be professional and credible, however, none of the officers were inside the licensed premises prior to the incident occurring in the parking lot.

Sgt. Deleon, although an integral part of the police response calling for mutual aid and assistance, was not present at the licensed premises on the night of the incident and Sgt. Moore only responded to the licensed premises in response to the shots fired.

Officer Schiavone was working a detail at the licensed premises and reported no unusual incidents or disturbances. Officer Schiavone observed an "orderly dismissal" of patrons at the end of the night and described the night as relatively calm for Elixir.

The Licensee offered testimony from Mr. de Vasconcelos, Ms. Abreu and Ms. Berube, none of whom observed any disturbance or fight inside the licensed premises. No fight or disturbance was reported by any patron or employee to Mr. de Vasconcelos.

In order for the Licensee to have permitted an illegality on its premises, the Licensee must have had notice that the harm or disturbance was imminent, and the Licensee must have been able to foresee the disturbance. The record before the Commission is lacking in any evidence that the Licensee knew or should have known an incident would occur in the shared parking lot. There was no evidence of any disturbance inside the licensed premises. In fact, uncontroverted eyewitness testimony to the contrary was presented. There was no evidence that the alleged shooter or weapons were inside the licensed premises. There was nothing presented that would have alerted the Licensee to the possibility of an imminent disturbance. See Kane, 341 Mass. at 641; Carey, 355 Mass. at 451; Greco, 333 Mass. at 145.

The Local Board produced eyewitness testimony from the on-duty detail police officer with regard to the "orderly dismissal" of patrons from Licensee's premises at closing time into a shared parking lot. Upon hearing what was believed to be gunshots outside in the parking lot, the detail police officer investigated and found a gunshot victim in the back of the parking lot. However, the Local Board did not produce eyewitnesses or any direct evidence regarding any conduct in or on the licensed premises that would have put the Licensee or its employees on notice of imminent harm.

The events that transpired outside of Elixir in the early morning hours of July 23, 2022, are of serious concern. The public's safety along with that of the officers was threatened, but without evidence that the Licensee should have foreseen what took place in the parking lot, it cannot be found responsible. The Local Board has not proven by legally competent evidence that the Licensee permitted an illegality to wit a violation of 204 CMR 2.05 (2).

The Commission is not persuaded by the evidence that the Licensee committed the alleged violation of 204 CMR 2.05(2).

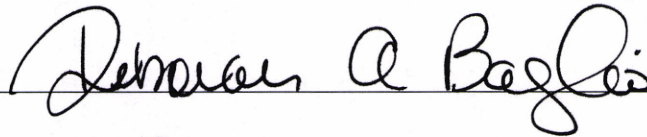
CONCLUSION

The Alcoholic Beverages Control Commission ("Commission") **DISAPPROVES** the action of City of Methuen Licensing Board in finding that Amrut Corporation d/b/a Elixir Lounge committed a violation of 204 CMR 2.05(2).

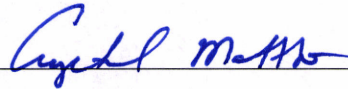
The Commission **DISAPPROVES** the action of the City of Methuen in revoking the license of Amrut Corporation d/b/a Elixir Lounge with the recommendation that it find no violation and that no further action be taken against the Licensee, as any penalty would be discrepant with this decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

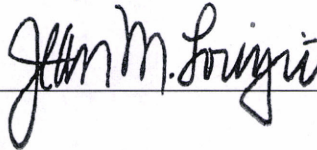
Deborah A. Baglio, Commissioner



Crystal Matthews, Commissioner



Jean M. Lorizio, Chairman



Dated: August 29, 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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2022-000172-ad-enf

cc: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Peter G. Calabrese, Esq.
Administration, File