

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

*Steven Grossman*  
*Treasurer and Receiver General*

*Kim J. Gainsboro, Esq.*  
*Chairman*

**KAREN A. MC GOVERN DBA PUFFIN'S RESTAURANT**  
**95 MAIN ST**  
**MILLBURY, MA 01527**  
**LICENSE#: 071200029**  
**HEARD: 08/06/2014**

This is an appeal of the action of the Town of Millbury Board of Selectmen (the "Local Board" or "Millbury") for modifying the M.G.L. c. 138, §12 all-alcohol license of Karen A. Mc Govern dba Puffin's Restaurant (the "Licensee" or "Puffins") located at 95 Main Street, Millbury, MA. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, August 6, 2014.

The following documents are in evidence as exhibits and no witnesses testified.

1. Joint Pre-Hearing Memorandum;
2. Licensee's Common Victualler's License dated December 9, 1997;
3. Commission Decision dated April 9, 2013;
4. Local Board's Notice of Hearing dated January 27, 2014;
5. Minutes of Local Board's Meeting held February 11, 2014;
6. Counsel's Letter dated February 25, 2014 to Local Board requesting a change of hours of operation;
7. Minutes of Local Board's Meeting held February 25, 2014;
8. Local Board's Decision dated March 12, 2014; and
9. Licensee's Letter dated March 13, 2014 appealing the Local Board's Decision to the Commission.

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

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

FACTS

1. Karen A. Mc Govern dba Puffin's Restaurant is an existing Massachusetts business and the holder of an all alcoholic beverages license issued on December 30, 1997, pursuant to M.G.L. c. 138, §12. (Ex. 1, Commission Records)
2. Puffin's Restaurant is located at 95 Main Street, Millbury, Massachusetts. (Ex. 1, Commission Records)
3. The Local Board initially issued an all alcoholic beverages restaurant-type Section 12 License to the Licensee on December 30, 1997. This license stated that the license hours would be as follows: Monday - Wednesday, 12:00 p.m. - 1:00 a.m.; Thursday - Saturday, 12:00 p.m. - 2:00 a.m.; Sundays, 1:00 p.m. - 1:00 a.m. (Ex. 1, Commission Records)

4. For many years of its existence, Puffin's Restaurant had a general operational practice whereby it was open for breakfast and lunch hours, but closed during dinner hours, thus operating fewer hours than permitted by its §12 license. (Ex. 1, Commission Records)
5. On December 13, 2011, when the Local Board renewed the all alcoholic beverages restaurant-type license, it modified the Licensee's hours of operation: Monday - Wednesday, 8:00 a.m. - 1:00 a.m.; Thursday - Saturday, 8:00 a.m. - 2:00 a.m.; Sundays, 11:00 a.m. - 1:00 a.m. (Ex. 1, Commission Records)
6. The Local Board did not hold a hearing. (Ex. 1, Commission Records)
7. On December 13, 2011, the Licensee accepted the renewal of its section 12 all alcoholic beverages license for calendar year 2012. (Ex. 1, Commission Records)
8. On December 16, 2011, the Local Board submitted a letter to the Licensee providing notice of an informal hearing to be held on January 24, 2012 for the purpose of "discussing the hours of operation and the underutilized liquor license." (Ex. 1, Commission Records)
9. On March 28, 2012, the Local Board submitted a letter to the Licensee providing notice of a second informal hearing to be held on April 10, 2012 for the purpose of discussing the hours of operation and the underutilized liquor license. (Ex. 1, Commission Records)
10. At the informal hearing on April 10, 2012, Selectman Schold stated that the Licensee needed to utilize the license and increase her hours. (Ex. 1, Commission Records)
11. On May 29, 2012, the Local Board submitted a letter to the Licensee providing notice of a third informal hearing to be held on June 12, 2012 for the purpose of discussing the "hours of operation concerning the underutilized liquor license." (Ex. 1, Commission Records)
12. At said hearing, Chairman Plante explained that the Licensee's options are to operate for the licensed hours or to transfer the license to someone who will operate the license on the days and times authorized. (Ex. 1, Commission Records)
13. In a letter dated June 7, 2012, the Licensee provided to the Local Board a "Notice of Updated Hours of Operation." The hours of operation, according to the Licensee, would be extended to comply with the Local Board's concerns. (Ex. 1, Commission Records)
14. On November 5, 2012, the Local Board submitted a letter to the Licensee providing notice of an informal hearing to be held on November 13, 2012. The letter warned the Licensee that the Local Board "may not renew your existing liquor license" due to the underutilized hours. (Ex. 1, Commission Records)
15. A hearing was held on November 13, 2012 in which the Licensee was not present. Due to a car accident and subsequent surgery, the Licensee sent her husband to represent her at the Local Board hearing. The Local Board wanted to hear from the Licensee, as a result, the hearing was continued for two weeks. (Ex. 1, Commission Records)

16. On November 14, 2012, the Local Board submitted a letter to the Licensee requesting that the Licensee bring to the November 27, 2012 meeting before the Local Board "copies of any and all receipts from distributors for liquor purchases for the past year." (Ex.1, Commission Records)
17. A meeting occurred before the Local Board on November 27, 2012. A hearing notice for this date was not submitted in evidence before the Commission. (Ex. 1, Commission Records)
18. On November 28, 2012, the Local Board submitted a letter to the Licensee informing her that the Local Board unanimously voted to revoke the license at the meeting on November 27, 2012. The notice of revocation detailed the reason for revoking the License as being "underutilization" pursuant to M.G.L. c. 138, § 77. (Ex. 1, Commission Records)
19. By letter dated December 4, 2012, the Licensee appealed the Local Board's decision to the Commission. (Ex. 1, Commission Records)
20. The Commission held a hearing and issued a decision dated April 9, 2013, disapproving the action of the local board and directing the Local Board to re-instate the license effective November 27, 2012, *nunc pro tunc*. (Exs. 1, 3, Commission Records,)
21. After its license was reinstated, the Licensee informed the Local Board that it would operate a dinner service, and it did so consistently from approximately August through December 2013, but by late December 2013, the Licensee again discontinued its dinner service. (Ex. 1, Commission Records)
22. The Local Board sent a hearing notice dated January 27, 2014, for a hearing and a public hearing was held on February 11, 2014. (Ex. 1, Commission Records)
23. The hearing was held and continued to February 25, 2014. (Ex. 1, Commission Records)
24. At the February 25, 2014 meeting, the Local Board thereafter voted to modify the license by imposing the following conditions regarding the license hours:

Monday	6:00 A.M. -2:00 P.M.
Tuesday	6:00 A.M. -2:00 P.M.
Wednesday	6:00 A.M. -9:00 P.M.
Thursday	6:00 A.M. -9:00 P.M.
Friday	6:00 A.M. -9:00 P.M.
Saturday	6:00 A.M. -9:00 P.M.
Sunday	7:00 A.M. -1:00 P.M.

(Exs. 1, 8, Commission Records, Pre-hearing Memorandum)

25. At the hearing on February 25, 2014, the Licensee, through counsel, requested to operate seven days a week until 2:00 p.m. each day. (Commission Records, Pre-hearing memo)
26. By decision dated March 12, 2014, the Local Board imposed the previously voted-upon modification to the Licensee's hours of operation. (Commission Records, Pre-Hearing Memorandum)

27. On March 13, 2014, the Licensee filed its notice of appeal with the Commission. (Ex. 1, Commission Records)
28. In accordance with Commission Rules and Regulations, the parties submitted a Joint Pre-Hearing Memorandum. (Ex. 1, Commission Records)
29. In Section 3 to the Jointly-submitted Pre-Hearing Memorandum, the parties agreed as to "AGREED ISSUES OF LAW," the following:
- this appeal should be governed by M.G.L. c. 138, §§§12, 23, 64, and 67 and 801 Code of Massachusetts Regulations §§1.01 and 1.02. The parties further agree that the Massachusetts Alcoholic Beverages Control Commission should determine whether the March 12, 2014 conditioning of the license by the LLA was proper. (Ex. 1)
30. A hearing occurred before the Commission on August 6, 2014. (Commission Records)
31. At the August 6, 2014 hearing before the Commission, the parties appeared in the company of a number of witnesses, all prepared to testify regarding the matter. As the hearing evolved, both parties agreed that the great body of facts necessary to resolve this case were agreed upon, and that the posture of this case was ripe for resolution on a number of key "Agreed Upon Issues of Law." (Ex. 1, Commission Records)

### DISCUSSION

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. [United Food Corp v. Alcoholic Beverages Control Commission, 375 Mass. 240 (1978).] 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. See, e.g. Devine v. Zoning Bd. of Appeal of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 295 (1972); Dolphino Corp. v. Alcoholic Beverages Control Com'n, 29 Mass. App. Ct. 954, 955 (1990) (rescript). 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 Corp. v. Alcoholic Beverages Control Commission, 29 Mass. App. Ct. 954, 955 (1990) (rescript).

Adjudicatory findings must be "adequate to enable [a court] to determine (a) whether the order and conclusions were warranted by appropriate subsidiary findings, and (b) whether such subsidiary findings were supported by substantial evidence." Charlesbank Rest. Inc., v. Alcoholic Beverages Control Comm'n, 12 Mass.App.Ct. 879, (1981) quoting Westborough. Dep't of Pub. Util., 358 Mass. 716, 717-718 (1971). "General findings are insufficient, and if the licensing board does not make sufficient findings, it remains the Commission's obligation to articulate the findings of fact, which were the basis of the conclusions it drew, and not merely adopt the findings of the board. Charlesbank Rest. Inc., 12 Mass. App.Ct. at 879. Recitals of testimony do not constitute findings. Johnson's Case, 355 Mass. 782 (1968)." Exotic Restaurants Concept, Inc. v. Boston Licensing Board, Suffolk Superior Court, C.A. No. 07-3287 (Borenstein, J.)

The Local Board "may exercise judgment about public convenience and public good that is very broad, but it is not untrammelled." Ballarin, supra at 511. Instead, "[w]here the factual premise on which [the board] purports to exercise discretion is not supported by the record, its action is arbitrary and capricious and based upon error of law, and cannot stand." Ruci v. Client's Sec. Bd., 53 Mass.App.Ct. 737, 740 (2002). A Board must state the reasons for its decision whether or not to issue the liquor license. M.G.L. c. 138, §23; Exotic Restaurants Concept, Inc. v. Boston Licensing Board, Suffolk Superior Court, C.A. No. 07-3287 (Borenstein, J.)

On February 25, 2014, the Local Board imposed special conditions on the Licensee. The special conditions imposed by the Local Board took the form of a modification in license hours; although the Local Board never officially changed the hours of the license itself (the hours on the face of the license remained unchanged). The Local Board imposed the conditions by manner of a written decision dated March 12, 2014. The Licensee then filed an appeal to the Commission, and a hearing took place before the Commission on August 6, 2014.

In its March 12, 2014 letter to the Licensee, the Local Board indicated that at its meeting of February 25, 2014, it voted to "modify the license to require [the licensee] to stay open for business as follows:

- Monday 6:00 A.M. -2:00 P.M.
- Tuesday 6:00 A.M. -2:00 P.M.
- Wednesday 6:00 A.M. -9:00 P.M.
- Thursday 6:00 A.M. -9:00 P.M.
- Friday 6:00 A.M. -9:00 P.M.
- Saturday 6:00 A.M. -9:00 P.M.
- Sunday 7:00 A.M. -1:00 P.M. (Exhibit 7, Joint Pre-Hearing Memorandum)

The March 12<sup>th</sup> letter to the Licensee, also provided that "[a]dditionally, please be advised that if you fail to comply with the terms of this modification, your License may be revoked."

It is clear to the Commission that by taking this action, the Local Board has acted to impose a modification to the hours of the Licensee's license. When the Local Board sent the March 2014 letter imposing the hours described above, it did so in contravention of the law. When the Commission examines a license, "it may approve it and determine whether there are any illegalities or unreasonable restrictions placed upon it." Georgetown v. Cammarata, Commission Decision July 29, 2009.

Licensees must comply with all requirements of the statute and any other "reasonable requirements" that the local licensing authority may make. Id. § 23, 4th par; see also Connolly v. Alcoholic Beverages Control Comm'n, 334 Mass. at 619 ("licenses are a special privilege subject to public regulation and control"). The licensing authorities may "modify, suspend, revoke, or cancel" a license upon "satisfactory proof" that the licensee has violated "any condition" of the license or "any law of the commonwealth." Id.

Although the first sentence of the sixth paragraph of M.G.L. c. 138, §12, as amended through St. 1973, c. 477, provides that the local licensing authorities shall fix the hours during which sales of alcoholic beverages may be made by any licensee, either by a general determination as to all licensees or specially for each licensee; **sales ... must be permitted**, except on certain days (see M.G.L. c. 138, §33), **between 11 a.m. and 11 p.m.** (Emphasis supplied.) Casa Loma, Inc. v. Alcoholic Beverages Control Com., 377 Mass. 231 (1979).

The Supreme Judicial Court has concluded that the hours of a licensee during the periods from 8 a.m. to 11 a.m. and from 11 p.m. to the statutorily mandated closing time (2 a.m. as to restaurants) are a matter solely of local control..., subject only to judicial review of a local authority's failure to give a proper hearing. Thus the hours from 8 a.m. to 11 p.m. are not subject to local discretion but mandatory hours of operation. See Id. Therefore, the Local Board had no authority to require that the premises open prior to 8:00 a.m. In reviewing the actions of the Local Board, it is evident to the Commission that the Local Board has imposed upon the Licensee a legally impermissible condition.

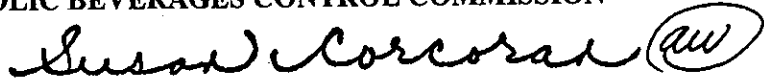
The Local Board has directly placed a condition on the Licensee that requires the Licensee to open at 6:00 A.M. Monday to Saturday. This opening time is a full two hours before the earliest opening time permitted by M.G.L. c. 138, §12. Moreover, the Local Board has also required the Licensee to open at 7:00 A.M. on Sundays, which is also not legally permissible under limitations imposed by M.G.L. c. 138. Finally, the conditions on the Licensee also require the Licensee to close earlier than permitted by the express statutory grant of M.G.L. c.138.

CONCLUSION

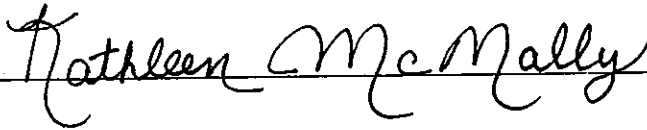
The conditions imposed by the Local Board in the instant case are *per se* illegal, and the Commission need proceed no further. To impose an illegal condition on a licensee is *per se* unreasonable, and any such regulation must fail. As the conditions are *per se* illegal, the Commission cannot proceed further with this matter and **DISAPPROVES** the action of the Local Board. The Commission remands the matter to the Local Board with the recommendation that the Local Board hold a public hearing, in compliance with due process, regarding the imposition of specific conditions for the operating hours of this license, in accordance with M.G.L. c. 138.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Susan Corcoran, Commissioner

 (aw)

Kathleen McNally, Commissioner



Dated: November 13, 2014

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: John P. Connell, Esq. via facsimile 617-227-3222  
Jeffrey T. Blake, Esq. via facsimile 617-654-1735  
Frederick G. Mahony, Chief Investigator  
Local Board  
✓ Administration  
File