



*Commonwealth of Massachusetts  
Department of the State Treasurer  
Alcoholic Beverages Control Commission  
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**Jean M. Lorizio, Esq.**  
*Chairman*

**DECISION**

**1709 ASSOCIATES LLC D/B/A 29 FAIR STREET  
29 FAIR STREET  
NANTUCKET, MA 02554  
LICENSE#: 0762-00017  
HEARD: 10/03/2017 (10:30 a.m.)**

This is an appeal of the action of the Town of Nantucket Board of Selectmen (the "Local Board" or "Nantucket") for suspending the M.G.L. c. 138, § 12 wines and malt beverages seasonal license of 1709 Associates LLC d/b/a 29 Fair Street ("Licensee" or "1709 Associates") located at 29 Fair St., Nantucket, Massachusetts for fourteen (14) days of which three (3) days would be served and eleven (11) days would be held in abeyance for 1 year providing no further violations of M.G.L. c. 138 or town of Nantucket regulations occur.

The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a hearing was held on Tuesday, October 3, 2017 at 10:30 a.m.

The following documents are in evidence as exhibits:

1. Nantucket Police Department Incident Report, 7/22/2015;
2. Nantucket Police Department's Compliance Check Guidelines;
3. Local Board's Notice of Hearing, 10/5/2015;
4. Local Board Meeting Minutes, 11/4/2015;
5. Local Board's Decision, 11/6/2015;
6. Nantucket's Rules and Regulations Governing Alcoholic Beverages, 3/1/2010;
7. Change of Manager Application with Licensee's Violations History;
8. Local Board Meeting Minutes, 9/9/2015;
9. Local Board Meeting Minutes, 10/22/2008;
10. Local Board Meeting Minutes, 8/17/2016;
11. Photos of Interior of Licensed Premises;
12. Compliance Check Photo of Underage Operative A.C.; and
13. Compliance Check Photo of Underage Operative R.S.;
14. Local Board's Violation Sanctions, 9/21/2015.

At the close of the hearing, the Commission left the record open until October 20, 2017 for the Local Board to submit documents and allowed the Licensee to submit rebuttal by October 27, 2017. The Local Board submitted documents in a timely manner. The Licensee did not submit any additional documents. The record is now closed.

There is one (1) audio recording of this hearing, and four (4) witnesses testified.

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

### FINDINGS OF FACT

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

1. 1709 Associates LLC d/b/a 29 Fair Street located at 29 Fair St., Nantucket, Massachusetts, holds a § 12 Seasonal wines and malt beverages license. (Commission File)
2. On approximately July 21, 2016, the Nantucket Police Department began conducting liquor license compliance checks. (Testimony)
3. On July 22, 2015, two underage operatives, working with Nantucket Police Officers, entered the licensed premises of 1709 Associates. One operative ordered and was served a glass of prosecco and was not asked for identification. (Testimony, Exhibit 1)
4. Officers spoke to a male employee, Robert Coles, who identified himself as the manager. Coles admitted to serving the wine to the underage operative. (Testimony, Exhibit 1)
5. Mr. Root was approved as manager of record on April 30, 2012. (Commission File)
6. The Local Board held a hearing on September 9, 2015 regarding an alleged violation of M.G.L. c. 138, § 34, Sale or delivery of an alcoholic beverage to a person under twenty-one (21) years of age; and violation of Rules and Regulations Governing Alcoholic Beverages, Ch. 250, § IV, Change of manager, ¶ (1) Failure to notify the Local Licensing Authority of a change of manager. (Testimony)
7. By decision dated September 11, 2015, the Local Board found the Licensee violated both the statute and regulation and suspended 1709 Associates license for a period of 14 days, with 7 days to be served and 7 days held in abeyance. (Testimony)
8. On September 25, 2015 the Licensee appealed the Local Board's decision to the ABCC. In its letter, Counsel stated that the Licensee never received notice of the alleged violation nor the September 11, 2015, hearing. (Commission Files)
9. Therefore, the Local Board held a second hearing on November 4, 2015, regarding the alleged violations. The Board voted 4-0 finding violations of both the statute and the regulation. (Exhibits 3 & 4)
10. By decision dated November 6, 2015, the Local Board suspended the license for 14 days with 3 days to be served and 11 days held in abeyance. (Exhibit 5)
11. The licensee served the 3-day suspension in July of 2016. (Testimony)
12. The Commission held a hearing on the Local Board's decision on October 3, 2017.
13. Tracy Root is now and always has been the approved manager of record. (Commission File, Testimony)
14. The Licensee has no history of prior violations. (Commission File, Testimony)

15. Nantucket's Administrative Penalties for Violation of Alcoholic Beverages Sales to Minors Policy sets forth guidelines to be used in determining penalties: 1<sup>st</sup> Violation, Warning; 2<sup>nd</sup> Violation up to a 2 day suspension; 3<sup>rd</sup> violation up to a 4 day suspension. (Exhibit 6)

### 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. 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)). 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, 29 Mass. App. Ct. at 955.

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, as amended through St. 1977, c. 929, § 7. “[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).

#### Violation of M.G.L. c. 138 §34: Furnishing Alcoholic Beverages to Minors

The Local Board charged the Licensee with violating M.G.L. c. 138, § 34 Sale or delivery of an alcoholic beverage to a person under twenty-one (21) years of age; and 204 CMR 2.05 (2) – Permitting an illegality on the licensed premises. Said alleged sale or delivery of an alcoholic beverage to a person under twenty-one (21) years of age occurred during a compliance check operation, or “sting,” conducted by the Nantucket Police Department.

Massachusetts General Law Chapter 138 provides a comprehensive scheme for the regulation of alcoholic beverages. Pursuant to M.G.L. c. 138, § 34 the sale of alcohol to minors is prohibited, and imposes both criminal and civil sanctions. G.L. c. 138, § 34 provides: “Whoever makes a sale or delivery of any alcoholic beverages or alcohol to any person under 21 years of age, either for his own use or for the use of his parents or any other person...or whoever furnishes any such beverages or alcohol for a person under 21 years of age shall be punished by a fine of not more than \$2,000 or by imprisonment for not more than one year or both.” To enforce the provisions of M.G.L. Ch. 138, § 34, both the Commission and the local licensing authorities commonly perform compliance checks on licensed establishments.

Courts have upheld compliance checks, or “stings” as constitutionally permissible. Fran’s Lunch v. Alcoholic Beverages Control Comm’n, 45 Mass. App. Ct. 663, 665 (1998). “It is generally recognized that absent entrapment or other abuses violative of fundamental fairness, government involvement in criminal activity for the purposes of investigating possible violations of law is permissible.” *Id.* Reliance on strict procedure retains the constitutionality of compliance checks. Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 383-383 (2006). The legality of the use of a minor to conduct underage stings was decided in Fran’s Lunch, Inc. v. Alcoholic Beverages Control Commission, 454 Mass. App. Ct. 663 (1998). The Appeals Court held that where a “sting

operation was conducted in accordance with published guidelines designed to ensure that such operations were conducted fairly, the commission could properly rely on this evidence.” Fran’s Lunch, 45 Mass. App. Ct. at 665.

Here, there is no dispute that the Licensee violated M.G.L. c. 138 § 34 by selling an alcoholic beverage to a person who was not twenty-one years old.

The Commission finds that Nantucket properly conducted the compliance check in conformity with their promulgated guidelines.

The Licensee argues that the penalty is excessive given that this was their first violation. Therefore, the Commission must review whether the sanction imposed by the Local Board for this violation was reasonable. Nantucket’s Rules and Regulations Governing Alcoholic Beverages sets forth guidelines to be used in determining penalties: 1<sup>st</sup> Violation, Warning up to a 2 day suspension. (Exhibit 6) The Local Board argues that while their rules and regulations do set forth a penalty schedule, they have discretion to go higher or lower depending on the circumstances.

The Commission is persuaded and finds that the penalty of a fourteen (14) day suspension, with 3 days to serve and 11 days held in abeyance for 1 year, imposed by the Local Board in this matter was inconsistent with Nantucket’s policy, and is not reasonable given that the licensee has no prior violations on its record.

Violation of Town of Nantucket Rules and Regulations, c. 250, §IV: Change of Manager (1)  
Failure to Notify the Local Licensing Authority of a change of manager.

The Local Board also charged the Licensee with violating violation of Town of Nantucket Rules and Regulations, c. 250, §IV: Change of Manager (1) Failure to Notify the Local Licensing Authority of a change of manager.

“No corporation, organized under the laws of the commonwealth or any other state or foreign country, shall be given a license to sell in any manner any alcoholic beverages unless such corporation shall have first appointed, in such a manner as the licensing authorities by regulation prescribe, as manager or other principal representative, a citizen of the United States, and shall have vested in him by properly authorized and executed written delegation as full authority and control of the premises, described in the license of such corporation, and of the conduct of all business therein relative to alcoholic beverages as the licensee itself could in any way have and exercise if it were a natural person resident in the commonwealth, nor unless such manager or representative is, with respect to his character, satisfactory to the licensing authorities.” M.G.L. c. 138, § 26

The Licensee testified that Tracy Root is the approved manager of record. The Licensee acknowledged that Robert Coles was managing the licensed premise on the evening of the incident but is not the manager of record.

The Commission was not persuaded that the Licensee changed the manager of record without approval.

## CONCLUSION

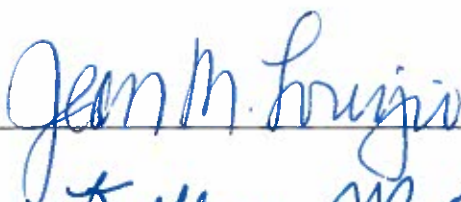
Based on the evidence, the Alcoholic Beverages Control Commission **APPROVES in part** the action of the Local Board, and **DISAPPROVES in part** the action of the Local Board.

The Commission **APPROVES** the finding of a violation of M.G.L. c. 138 §34: Furnishing Alcoholic Beverages to Minors. However, the Commission **DISAPPROVES** of the penalty imposed. The Commission remands this decision to the Local Board with the recommendation that the three day suspension already served by the Licensee be deemed sufficient.

The Commission further **DISAPPROVES** the action of the Local Board in finding a violation of Town of Nantucket Rules and Regulations, c. 250, §IV: Change of Manager (1) Failure to Notify the Local Licensing Authority of a change of manager.

## **ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Jean M. Lorzio, Chairman



Kathleen McNally, Commissioner



Elizabeth A. Lashway, Commissioner



Dated: June 28, 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.

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cc: Danielle E. deBenedictis, Esq. via facsimile 617-367-0650  
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Local Licensing Board  
Administration, File