



*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 (1:30P.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 eleven (11) days brought forward from the Local Board's decision of November 14, 2015, plus two (2) additional days.

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 1:30 p.m.

The following documents are in evidence as exhibits:

1. Nantucket District Court Criminal Complaint, 7/21/2016;
2. Local Board's Notice of Hearing, 8/8/2016;
3. Local Board Meeting Minutes, 8/17/2016;
4. Local Board's Decision, 8/22/2016;
5. Nantucket's Rules and Regulations Governing Alcoholic Beverages, 3/1/2010;
6. Photos of Interior of Licensed Premises;
7. Local Board Meeting Minutes, 10/22/2008;
8. Local Board Meeting Minutes, 11/4/2015;
9. Local Board Meeting Minutes, 9/9/2015; and
10. Local Board 2016 Compliance Checks and Sanctions Chart, with attached memoranda from the Nantucket Police Department regarding the 2016 compliance checks.

At the close of the hearing, the Commission left the record open for the Local Board to submit additional documents by October 10, 2017 and allowed the Licensee to submit rebuttal by October 17, 2017. The documents, which the Commission has marked as Exhibit 10 above, were timely received by the Commission, and the record is now closed.

There is one (1) audio recording of this hearing, and three (3) 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. 1709 Associates purchased the license from 29 Fair Street Inc., and the ABCC approved the license transfer on March 8, 2006. (Commission File)
3. On approximately July 21, 2016, the Nantucket Police Department conducted liquor license compliance checks. (Testimony; Exhibit 1)
4. On July 21, 2016, two underage operatives working with police officers entered the licensed premises of 1709 Associates. An employee served each underage operative a Cisco Sankaty Light beer. The underage operatives were not asked for identification. (Testimony; Exhibit 1)
5. The server was in training that evening. (Testimony)
6. The Local Board sent a Notice of Hearing to the Licensee for a hearing on alleged violations 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 Nantucket's Rules and Regulations Governing Alcoholic Beverages (the "Local Board's Rules"), Ch. 250, § II, General Provisions regarding the administration of licensed premises, ¶ (2), "[a]ll employees engaged in serving or selling alcoholic beverages and/or viewing of identification cards shall be certified [by an alcoholic beverage server training program] within thirty (30) days of employment at the licensed premises." (Exhibit 2)
7. The Local Board held a hearing on August 17, 2016. By decision dated August 22, 2016, the Local Board found the Licensee violated M.G.L. c. 138, § 34 and imposed a two-day suspension. By an earlier decision dated November 14, 2015, the Licensee's license was suspended for fourteen days, three days to serve and eleven days held in abeyance for one year.<sup>1</sup> Based on the instant violation found, the Local Board determined that the Licensee violated the conditions of the eleven-day suspension being held in abeyance and therefore ordered the eleven days to be served. (Exhibits 3, 4)
8. The Local Board never voted to find a violation of Local Board Rule, Ch. 250, § II, ¶ (2). (Exhibits 3, 4)
9. On August 22, 2016, the Licensee appealed the Local Board's decision to the ABCC. (Commission Files)
10. 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, written warning; 2<sup>nd</sup> Violation, one to two-day suspension; 3<sup>rd</sup> violation, three to four-day suspension, and so forth. (Exhibit 5)

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<sup>1</sup> The Licensee appealed that November 14, 2015 decision, and the Commission heard that appeal the same day as the instant appeal. The ABCC's decision on the appeal of the November 14, 2015 Local Board decision is being issued separately but in conjunction with the instant decision.

11. A review of the Local Board's sanctions to other license holders for failure of a compliance check in 2016 reveals that other licensees received penalties ranging from a written warning to a four-day suspension, depending in large part on the licensee's history. (Exhibit 10) The only licensees who received less than a two-day suspension had a history of no violations. See id.
12. Other than the November 14, 2015 violation decision and the instant violation decision, the Local Board has not found any other violations against the Licensee. (Testimony; Exhibits 1, 4; Commission File)

### 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. "[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 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 years of age. Said alleged sale or delivery of an alcoholic beverage to a person under twenty-one 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 the statute imposes both criminal and civil sanctions. Section 34 provides: "[w]hoever 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 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.

Here, there is no dispute that the Licensee violated M.G.L. c. 138 § 34 on July 21, 2016 by selling beer to two operatives who were not twenty-one years old.<sup>2</sup>

With regard to the second charge brought against the Licensee-- that the server was not trained in the safe service of alcoholic beverages within thirty days of her employment for the Licensee (Local Board's Rules, Chapter 250, § II, ¶ 2 (hereinafter, the "Rule"))--the Commission finds no violation. (Exhibit 2) It appears from the Local Board's meeting minutes of August 17, 2016 that the Local Board never voted to find a violation of the Rule. (Exhibit 3) Likewise, while the Local Board's decision cites the Rule and notes that the server was not TIPs certified, the Local Board's decision did not explicitly find a violation of the Rule. (Exhibit 4). No evidence was presented to the Commission regarding how long the server worked for the Licensee, and therefore, there was no evidence that she worked there longer than thirty days without a certificate of training in the safe sale/service of alcoholic beverages. Consequently, the Commission finds no violation of Local Board Rule, Chapter 250, § II, ¶ 2.

The Licensee argues that the penalty—two days to serve plus the eleven days carried forward-- is excessive given that this was its second violation of a compliance check. 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, written warning; Second violation, one to two-day suspension. (Exhibit 9) The Local Board argues that the suspension it issued to the Licensee was consistent with that policy.

With regard to the imposition of the eleven days held in abeyance from the prior decision, the Commission, by way of decision of today's date, has voted to recommend to the Local Board that the Local Board not hold any days in abeyance on the July 22, 2015 violation(s). With no days held in abeyance from the earlier decision, there are no days to carry forward in the present case.

Here, for the instant July 21, 2016 failed compliance check, the Commission looks to the Local Board's Rules, which suggest a one to two-day suspension for a second violation. The two-day suspension that the Local Board imposed here is consistent with the penalties imposed on other licensees. (Exhibit 10)

The Commission is persuaded and finds that the penalty of a two (2) day suspension imposed by the Local Board in this matter was fair and rational and consistent with Nantucket's suspension guidelines in its Rules and Regulations and consistent with the Local Board's past practices with other licensees.

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<sup>2</sup> The Licensee did, however, dispute the portion of the police report that stated that the underaged operatives were served at the "bar." The Licensee states that there is no bar in its restaurant. (Testimony)

### CONCLUSION

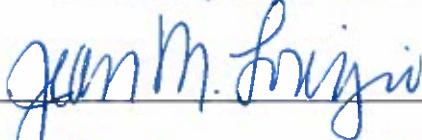
Based on the evidence, the Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board in finding a violation of M.G.L. c. 138, § 34 and approves of the Local Board's decision to impose a two (2) day suspension for that violation. However, the Commission **DISAPPROVES** the action of the Local Board in carrying forward the eleven (11) days that the Local Board previously had held in abeyance by way of decision dated November 14, 2015. The Commission remands this decision to the Local Board with the recommendation that the Licensee serve a total of two (2) days.

### **ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Elizabeth A. Lashway, Commissioner



Jean M. Lorizio, Chairman



Kathleen McNally, 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