

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

Jean M. Lorizio, Esq.
Chairman

DECISION

**BARCELONA TAPAS & BAR, INC.
87 WAHCONAH STREET
PITTSFIELD, MA 01201
LICENSE#: 03967-RS-0974
HEARD: 11/7/2022**

This is an appeal of the action of the City of Pittsfield Licensing Board (“Local Board”) in voting to cancel the § 12 all-alcoholic beverages license of Barcelona Tapas & Bar, Inc. (“Licensee”) located at 87 Wahconah Street, Pittsfield, Massachusetts for the Licensee’s failure to activate and utilize the license. 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 November 7, 2022.

The following documents are in evidence as exhibits:

1. Licensing Board Minutes, August 30, 2017;
 2. Licensing Board Minutes, January 29, 2018;
 3. Licensing Board Minutes, October 29, 2018;
 4. Licensing Board Minutes, July 29, 2019;
 5. Licensing Board Minutes, October 28, 2019;
 6. Licensing Board Minutes, January 27, 2020;
 7. Licensing Board Minutes, February 24, 2020;
 8. Licensing Board Minutes, August 20, 2021;
 9. Licensing Board Minutes, January 31, 2022;
 10. Licensing Board Minutes, June 27, 2022;
 11. Licensing Board Minutes, August 22, 2022;
 12. Letter from Local Board cancelling license, August 23, 2022.
- A. August 23, 2022, letter cancelling the license;
 - B. Floor plan drawings for proposed renovations
 - C. August 13, 2018, letter from the Local Board requesting update on license status;
 - D. July 11, 2019, update to the Local Board;
 - E. November 22, 2019, update to the Local Board;
 - F. January 30, 2020, update to the Local Board;
 - G. News article “Pickup truck crashes into building on Wahconah Street in Pittsfield,” July 28, 2022.

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

FINDINGS OF FACT

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

1. Barcelona Tapas & Bar, Inc., is a § 12 all alcoholic beverages licensee at 87 Wahconah Street in Pittsfield, Massachusetts. The Licensee has held this license since March of 2018.
2. Having not opened for operations as of August 2018, the Licensee was required to provide regular status updates to the Local Board. The Licensee did so at Local Board meetings on October 29, 2018, July 29, 2019, October 29, 2019, November 22, 2019, January 27, 2020, February 20, 2020, August 29, 2021, and January 31, 2022. (Exhibits 1-11, C-F)
3. At these status updates before the Local Board, the Licensee first indicated that it was seeking to make improvements to the property but that it faced unexpected construction costs due to necessary code and structural upgrades. Then, it reported that it was marketing the business and license for sale and that it would be making improvements to the building to make it saleable. These renovations were delayed by permitting issues and then by the State of Emergency related to COVID-19 that lasted for 463 days. After the State of Emergency lifted, the Licensee reported that the building was not salvageable and would need to be torn down, necessitating additional time for development and construction of a proposed mixed-use development. (Exhibits 1-11, C-F)
4. At the Local Board meeting on June 27, 2022, the Licensee reported that it was not moving forward with its construction project and instead it had decided to sell the license. The Licensee requested sixty days to do so. (Exhibit 10)
5. The Local Board indicated that the Licensee would need to attend the Local Board's August meeting and that if a signed purchase and sale agreement for the license was not submitted, that the license would be cancelled pursuant to M.G.L. c. 138, § 77. (Exhibits 10, 11, 12)
6. On July 27, 2022, an accident occurred at the licensed premises when a driver drove a pickup truck through the building, causing significant damages. (Exhibits 11, G)
7. At the Local Board hearing on August 22, 2022, the Licensee advised the Local Board of the accident and the need to demolish the building, and that because the need for licenses was not great in Pittsfield it had been unable to find a buyer for the license. (Exhibit 11)
8. The Local Board then voted to cancel the Licensee's license and sent a written notice of decision the following day. (Exhibits 11, 12)
9. As of October 2022, the building has been razed and the lot is ready for redevelopment. (Exhibit B)

DISCUSSION

“The licensing authorities may, after hearing or reasonable opportunity therefore, cancel any license issued under [ch. 138] if the licensee ceases to conduct the licensed business.” M.G.L. c. 138, § 77. When a local licensing authority cancels such a “pocket license” for non-use, “the licensee may appeal to the [ABCC] as if such authorities had refused to grant the license upon an original application thereof” Id. Accordingly, § 77 “explicitly gives the [ABCC] the authority to review license cancellations by local boards.” Bd. of Selectmen of Saugus v. ABCC, 32 Mass. App. Ct. 914, 916 (1992). The decision of the Commission “shall be final.” M.G.L. c. 138, § 77.

Because the Commission reviews the cancellation as if the Board had denied the original application, M.G.L. c. 138, § 77, it gives “reasonable deference to the discretion of the local authorities” and determines whether “the reasons given by the local authorities are based on an error of law or are reflective of arbitrary or capricious action.” Great Atlantic & Pacific Tea Co., Inc. v. Bd. of License Commissioners of Springfield, 387 Mass. 833, 837, 838 (1983); accord Ballarin, Inc. v. Licensing Bd. of Boston, 49 Mass. App. Ct. 506, 512 (2000) (when reviewing the local board’s authority, court does not assess the evidence but rather “examine[s] the record for errors of law or abuse of discretion that add up to arbitrary and capricious decision-making”).

“Once a local board has determined that a license holder risks cancellation of its license under M.G.L. c. 138, § 77 as a result of non-use of the license, this Commission evaluates the amount of time the board has given the licensee to cure the non-use to ensure its reasonableness.” In Re: Turnpike @ Winona, LLC (ABCC Decision May 14, 2010). It is this Commission’s practice to allow a licensee at least six months from the date of the notice of the risk of cancellation to cure the non-use by either operating its premises or filing the appropriate application to transfer the license. See Bd. of Selectmen of Saugus, 32 Mass. App. Ct. at 915-917; Slesar Bros. Brewing Company, Inc. (ABCC Decision Feb. 7, 2019); Empresas Guanacas, Inc. d/b/a Mango Grill Fine Latin Cuisine (ABCC Decision March 13, 2009); Turnpike @ Winona, LLC (ABCC Decision May 14, 2010); 45 Province Restaurant, LLC (ABCC Decision February 22, 2012); EKB Corp., Inc. d/b/a Sully C’s Bar and Grill (ABCC Decision August 16, 2018). The Commission’s sense of fairness is forward looking, and the time within which the licensee must act does not begin to run until the licensee is first put on notice that there is a potential enforcement of Chapter 138, § 77. Slesar Bros. Brewing Company, Inc. (ABCC Decision Feb. 7, 2019); Empresas Guanacas, Inc. d/b/a Mango Grill Fine Latin Cuisine (ABCC Decision March 13, 2009).

While there is extensive evidence in the record as to the Licensee’s actions since it was issued its license, June 27, 2022, is the date that matters for this appeal. It was not until June 27, 2022, that the Local Board gave the Licensee the required notice of potential cancellation of its license. This date started the proverbial clock for a minimum of six months within which the Licensee was obligated to use or sell its license or risk cancellation.

At the June 27, 2022, meeting, the Licensee requested sixty days to effectuate the sale of its license. The Licensee was instructed to attend the August 22, 2022, Local Board hearing for consideration of cancellation, and that the license would be cancelled if the Licensee could not produce a signed purchase and sale agreement. During this sixty-day window, on July 27, 2022, an accident occurred at the licensed premises where a person drove a pick-up truck through the building, causing such significant damage that the licensed premises had to be razed.

As explained above, the Commission looks to whether the amount of time afforded to the Licensee to cure its non-use is “reasonable.” Here, two months was unreasonable to find a buyer and execute a purchase and sale agreement, particularly when the building was in poor condition. Even if the two months was originally reasonable, the intervening event of the licensed premises being destroyed by no fault of the Licensee warranted additional time to rebuild and use or sell the license.

“The licensee has the burden of informing the Local Board what the licensee is doing to exercise the license once it receives notice of potential cancellation.” James T. Correia d/b/a White’s Landing (ABCC Decision March 24, 2015). But this is not a case where the Licensee has “cease[d] operations, [sat] silent, and avoid[ed] contact with the local board.” Contrast Italian-American Restaurant, Inc. (ABCC Decision Feb. 6, 2008). The Licensee did provide the requested status update to the Local Board and demonstrated adequate reasons why its license should not be cancelled.

The Commission finds that the Local Board’s decision to cancel the Licensee’s license for non-use was not reasonable and therefore, is disapproved by the Commission. The Licensee should be extended an additional reasonable amount of time to rebuild and operate its license or to transfer its license. This decision is final. M.G.L. c. 138, § 77.

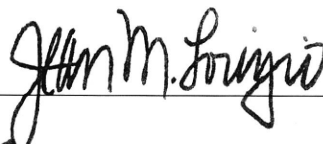
CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of the City of Pittsfield Licensing Board for cancelling the § 12 all alcoholic beverages license of Barcelona Tapas & Bar Inc. for non-use pursuant to Massachusetts General Laws chapter 138, §77.

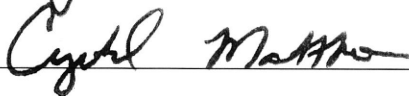
The Commission remands this matter to the Local Board with the recommendation that the Local Board give the Licensee a reasonable period (at least six months) within which to utilize the license or file an application with the Local Board to transfer the license. The time shall begin to run when the Local Board notifies the Licensee that it must utilize the license or file such application to transfer the license, or the Licensee shall risk cancellation of its license for non-use pursuant to M.G.L. chapter 138, § 77.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

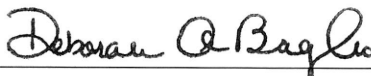
Jean M. Lorizio, Chairman _____



Crystal Matthews, Commissioner _____



Deborah Baglio, Commissioner _____



Dated: March 1, 2023