



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

DECISION

**LUCIOSO'S PUB, LLC
D/B/A LUCIOSO'S PUB
6 SPRING LANE
PLYMOUTH, MASSACHUSETTS 02360
LICENSE#: NEW
HEARD: 12/14/ 2011**

Lucioso's Pub, LLC (the applicant) applied for an All Alcoholic Beverages Licenses pursuant to M.G.L. c. 138, section 12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Wednesday, December 14, 2011 regarding the approval of the license subject to the imposition of dual conditions, i.e.:

1. That the applicant/approved licensee, or the former licensee at these premises, 6 SPRING LANE, PLYMOUTH, MASSACHUSETTS, 02360, obtain withdrawal of the Department of Revenue protest, if any, against the unconditional approval of your application within sixty (60) days of this date.
2. If the former licensee at this premise is on the delinquent credit list, the applicant's license will be placed on the delinquent credit list in place of the former licensee.

The applicant was advised that they could request, in writing, a hearing DE NOVO, before the Commission for determination whether their license application should be approved subject to these dual conditions. (Document #1).

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

FACTS

1. A hearing DE NOVO was requested by the applicant for this license, Lucioso's Pub, LLC. Mr. John H. Luce, II, and Mr. Gabriel J. Daher, III are the members of the LLC. (Document #2)
2. Attorney William Kelley, Jr., General Counsel for the Commission, attended the hearing and presented the basis for the administrative recommendation made by himself and the Commission's Executive Director regarding the approval of this license application, subject to the aforementioned dual conditions. (Document #3)
3. Mr. John H. Luce, II and Mr. Gabriel J. Daher, III both appeared and testified as the members for Lucioso's Pub, LLC, the applicants for the aforementioned license. (Appearance Slips, Document #4, and Document #5)

4. Mr. Tom Whyte appeared at the hearing, and identified himself as the landlord of the aforementioned premises located at 6 Spring Lane, Plymouth, Massachusetts, 02360. (Appearance Slip, Document #6)
5. Attorney Kelley requested that the Commission take Administrative Notice of the file for Run of the Mill, Inc. d/b/a Run of the Mill Tavern, located at 6 Spring Lane, Plymouth, Massachusetts, 02360, including the original application to transfer the Section 12 license from Run of the Mill, Inc. to applicant Lucioso's Pub, LLC. Without objection, the Commission took administrative notice of the contents of that file, and the file of the applicant.
6. That the Applicants, Lucioso's Pub, LLC, had originally applied for a transfer of an existing license from Run of the Mill, Inc. d/b/a Run of the Mill Tavern, Mary A. Howarth, Owner and Manager, at the same location, on August 15, 2011. (Form 43, Document #7)
7. Information provided by Mr. Lucioso and Mr. Daher, in response to Question # 17 "Costs Associated with the License Transaction:" of this transfer application, stated in Question 17 (B) Purchase Price for Business Assets: Applicants answered: twenty thousand (20,000) dollars. (Question 17 of Transfer Application, Document #8)
8. In response to Question 17(E) Purchase Price for Inventory: Applicants answered fifteen thousand (15,000) dollars. (Question 17 of Transfer Application, Document #9)
9. The Commission received Notice # 80401, dated 9/20/11 requesting that the Commission withhold the transfer of the Alcoholic Beverages License of the named license holder, Run of the Mill, Inc., until a tax release is issued by the Department of Revenue evidencing compliance with the Commonwealth. (Notice from the Department of Revenue, Document # 10)
10. The Commission received a faxed notice from Mary A. Howarth, dated September 18, 2011, yet received by the Commission on September 20, 2011, stating that her business Run of the Mill Inc. located at 6 Spring Lane, Plymouth, Massachusetts, is no longer in operation, and that she is relinquishing her liquor license to the town of Plymouth. (Facsimile from Mary A. Howarth, faxed to Commission on September 20, 2011, Document # 11)
11. The Commission received a letter dated September 28, 2011 from applicants Lucioso's Pub, LLC, signed by Mr. Luce, and Mr. Daher, informing the Commission that they are withdrawing their application to transfer the liquor license at 6 Spring Lane, Plymouth, Massachusetts. (Document from Lucioso's Pub, LLC, Document #12)
12. ABCC Approval Cover Sheet, indicating that the Applicant "WITHDRAWS" the application, and the application is being "Returned No Action", dated September 27, 2011 and September 28, 2011. (ABCC Approval Cover Sheet, Document # 13)
13. The applicant, Lucioso's Pub, LLC, submitted a subsequent application for a NEW All Alcoholic Beverages License, pursuant to M.G.L. chapter 138, section 12, dated October 4, 2011. (ABCC Form 42, dated October 4, 2011. Document #14)

14. The Commission then received a letter from applicants Mr. John H. Luce, II and Mr. Gabriel J. Daher, III, dated November 6, 2011, that they have not purchased anything, nor made any financial transactions with the previous owner of Run of the Mill Tavern at 6 Spring Lane, Plymouth, Massachusetts. (Document # 15)
15. The Commission received a Notice from the Department of Revenue (ABCC Form 43) notifying the Commission that the applicant has "Failed to Comply with Massachusetts Tax Laws". (ABCC Form 43 with Department of Revenue Stamp, dated November 10, 2011, Document # 16.)
16. The license, Run of the Mill Tavern, appears on the Credit Delinquency List for fourteen (14) unpaid deliveries, including deliveries reportedly made as recently as August 4, and August 8, 2011.
17. Applicants Mr. Luce and Mr. Daher (Lucioso's Pub, LLC) both testified at the hearing in opposition to the dual conditions being imposed on the license.
18. Mr. Luce testified that he was presented with an opportunity to get into the premises located at 6 Spring Lane, Plymouth, Massachusetts because the previous operator owed the landlord, Mr. Whyte, a lot of money in unpaid rent. The previous licensee, Run of the Mill Tavern, was ready to be evicted, but left the premises in August 2011.
19. Mr. Luce testified that he took over the premises in September of 2011, and started the process to transfer the Run of the Mill Tavern liquor license to Lucioso's Pub, LLC.
20. Mr. Luce and Mr. Daher both testified that they expended a lot of money cleaning and renovating the premises. They also purchased new appliances and equipment. The applicants submitted copies of receipts, cancelled checks, and invoices to support this. (Document # 17, containing fifteen (15) pages).
21. Mr. Luce testified that he is also the holder of a liquor license located at another address.
22. After the original transfer application was "Returned Without Action", due to unpaid taxes and unpaid deliveries of alcohol which are published and appear on the credit delinquency list, the applicants filed an application for a new license.
23. Based on the application filed first by Lucioso's Pub, LLC for a transfer of ownership of the prior license of Run of the Mill Tavern, there appears to be an overlap of assets and an exchange of monies between the prior licensee and the applicants, as indicated under oath, in the original application for that transfer.
24. Question #17B of that first filed transfer application states that the applicants paid twenty thousand (20,000) dollars as the purchase price for business assets.
25. In Response to Question 17E in the transfer application the applicants reported that they paid fifteen thousand (15,000) dollars for the purchase for inventory.

DISCUSSION

The law is well-settled that "[i]t was essential to the validity of [a section 12] license that it be approved by the Commission. General Laws (Ter. Ed.) c.138, section 12," Coyne v. Alcoholic Beverages Control Commission, 312 Mass. 224, 227, 44 N.E.2d 692,694 (1942). Further, under the controlling law, "[t]hrough the authority to issue a license is conferred by the governing statutes upon the local licensing authorities, they could rightly issue such a license only 'subject to the prior approval of the commission.' G.L. (Ter.Ed.) chapter 138, section 12, as amended. See, also, General Laws (Ter. Ed.) chapter 138, section 67, as appearing in St.1938, c.400; Town of Webster v. Alcoholic Beverages Control Commission, 295 Mass. 572, 574, 575, 4 N.E.2d 302. When such approval has been granted, the license is issued by the local licensing authorities. General Laws (Ter. Ed.) chapter 138, section 16B, as amended." Coyne, 312, Mass. at 228; 44 N.E. 2d at 695.

The Supreme Judicial Court has acknowledged that "[t]he powers of the States in dealing with the regulation of the sale of intoxicating liquors are very broad. What they may wholly prohibit, they may permit only on terms and conditions prescribed by the Legislature. Supreme Malt Products Co., Inc. v. Alcoholic Beverages Control Commission, 334 Mass. ---, 133 N.E. 2d 775; Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138-139, 60 S.Ct. 163, 84 L.Ed. 128; Carter v. Virginia, 321 U.S. 131, 137-143, 64 S.Ct. 464, 88 L.Ed. 605. In dealing with a trade, which, because of its great potential evils, can be wholly prohibited, a wide power is given to the Legislature with respect to the delegation of discretionary powers. Particularly in view of the extent to which the policy of chapter 138, and the basis for action under it, have been specified, as already indicated, there is no invalid delegation of authority to the Commission in leaving to it, as was done in [section 12], the power to approve or disapprove applicants for licenses. See Butler v. East Bridgewater, 330 Mass. 33, 36-37, 110 N.E. 2d 922." Connolly v. Alcoholic Beverages Control Commission, 334 Mass 613, 619, 138 N.E. 2d 131, 135-136 (1956).

The Alcoholic Beverages Control Commission was created under General Laws chapter 10, section 70. Its authority is broad and without express limitation. Board of Selectmen of Barnstable v. Alcoholic Beverages Control Commission, 373 Mass. 708, 716 (1977); J & J Enterprises, Inc. v. Martignetti, 369 Mass. 535, 538, (1976). The ABCC's powers "were not intended to be perfunctory or limited." Connolly v. Alcoholic Beverages Control Commission, 334 Mass. 613, 617 (1956).

General Laws chapter 138, section 64 requires each license holder to comply with all laws of the Commonwealth. These laws include the tax laws as well as the laws created under General Law chapter 138, The Liquor Control Act. The tax laws of the Commonwealth include the many provisions of General Laws chapter 62C and General Laws chapter 151A including, but not limited to, General Laws chapter 62C, section 44 and General Laws chapter 151A, sections 14 and 15.

General Laws chapter 138, section 25 regulates the extension of credit between licensees. Section 25 prohibits the extension of credit for alcoholic beverages to any section 12 license holder who has been reported as "delinquent" and has been posted to a delinquency list by the Commission as required by this statute. Section 25 requires that "[w]hensoever the license of any licensee whose name appears on the delinquent list is transferred, the name of the transferee shall appear in the place and stead of the transferor, as of the date of license transfer, in the same manner as if no

transfer had occurred.” The effect of this mandatory substitution is for the transferee to be prohibited from receiving credit as specified in Section 25.

It has been held that the “ABCC has a duty under the provision of General Laws chapter 138, section 25 to see to it that those provisions are implemented for the protection of wholesalers providing alcoholic beverages to retail licensees. That includes a duty to carefully scrutinize all arrangements which result in the re-issuance of a license previously held by a delinquent licensee to a new entity.” Stadler Street, Inc. v. Alcoholic Beverages Control Commission, Hampshire Superior Court C.A. No. 94-222 (Moriarty, J.) (Memorandum and Order dated December 7, 1995).

Based on the information contained in the documents comprising the transfer application filed first, in conjunction with the documents signed by the applicants, Lucioso’s Pub, LLC, Mr. Luce and Mr. Daher as members, the Commission finds that the withdrawal of the original transfer application, and the subsequent filing of an application for a new license, is an attempt by the applicant to circumvent the payment of taxes and monies owed to the Commonwealth and to avoid the public policy set in General Laws chapter 138, section 25 that regulates and restricts credit for alcoholic beverages sold. Mr. Luce is not ignorant and unaware of the liquor licensing process. The Commission thereby will consider approval of this application, in the ordinary course of the Commission’s administrative practice subject to the satisfaction of the dual conditions.

CONCLUSION

The Commission will consider approval of this application, in the ordinary course of the Commission’s administrative practice subject to the satisfaction of the dual conditions:

1. That Lucioso’s Pub, LLC and /or the former licensee at these premises, Run of the Mill Inc., 6 SPRING LANE, PLYMOUTH, MASSACHUSETTS, 02360, obtain withdrawal of the Department of Revenue protest, if any, against the unconditional approval of your application within sixty (60) days of this date. Your license will be suspended indefinitely after that date unless the Commission has determined that you have complied with this condition or, for good cause shown, has ordered a continuance of the date by which to satisfy this condition.
2. If the former licensee at this premise is on the delinquent credit list, your license, once approved by the Commission, will be placed on the delinquent credit list in place of the former licensee. You will have to contact the listing wholesalers regarding resolution of any listing claims. See MGL Chapter 138, section 25.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner

Kathleen M. McNally

Susan Corcoran, Commissioner

Susan Corcoran

Dated: January 4, 2012

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: Local Licensing Board
Attorney William Kelly
Frederick G. Mahony, Chief Investigator
Mark Kenny, Investigator
Department of Revenue
Administration
File