

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

YU HUA CHEN, d/b/a MING SEAFOOD RESTAURANT
297 NEWPORT AVE.
QUINCY, MA 02170
LICENSE#: NEW
HEARD 2/21/2012

Yu Hua Chen, d/b/a Ming Seafood Restaurant (the "Applicant") applied for a Wine and Malt Beverages License pursuant to M.G.L. c. 138, section 12. The Alcoholic Beverages Control Commission (the "Commission") held an Informational Hearing on Tuesday, February 21, 2012, regarding whether the application for this license should be approved. Based on the information presented at the hearing, the Commission finds the following facts and makes the following rulings:

The following documents and physical items are in evidence as Exhibits:

1. Investigator Carey's Investigative Report and Recommendation dated February 13, 2012;
 2. Quincy Police Department Report dated January 20, 2012 by Lt. Peter Truowski; and
 3. Quincy Health Department Report dated February 1, 2012.
- A. Affidavit of Mrs. Yu Hua Chen dated February 20, 2012;
 - B. Photo of front desk in restaurant;
 - C. Photo of assorted platters of food;
 - D. Photo of beverage refrigerator and seafood tank;
 - E. Photo of seafood tank containing lobsters and crabs; and
 - F. Photo of restaurant with patrons seated.

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

FACTS

1. On November 22, 2011, a hearing was held at the Quincy Licensing Board (Local Licensing Board) regarding the application of Mrs. Yu Hua Chen, as the sole shareholder, director, and officer of Yu Hua Chen, d/b/a Ming Seafood Restaurant, for a new Wine and Malt Beverages License.
2. The Quincy Licensing Board processed the application of Yu Hua Chen, d/b/a Ming Seafood Restaurant, and submitted the application to the Alcoholic Beverages Control Commission (the "Commission") for approval.

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3. Commission Investigator John Carey was assigned to complete the investigation and inspection regarding this application.
4. While Investigator Carey was conducting the investigation, he received information from both the Quincy Licensing Board, and the Quincy Police Department, about recent activity at this establishment. (Exhibit 1).
5. Investigator Carey received a copy of the Quincy Police Department Incident Report from Lieutenant Peter Turowski, dated January 20, 2012, about Ming Seafood Restaurant. (Exhibit 2).
6. Investigator Carey received a copy of the Quincy Health Department Inspection Report dated February 1, 2012 on Ming Seafood Restaurant. (Exhibit 3).
7. Investigator Carey recommended the Commission hold an Informational hearing to determine the fitness and character of the Applicant. (Exhibit 1).
8. Investigator Carey testified at the hearing that he received a telephone call from the Quincy Licensing Board, and from the Quincy Police Officer in charge of Licensing.
9. Investigator Carey testified that the Quincy Licensing Board informed him that this applicant had originally been approved for a malt and wine license at this location. However, due to an incident which occurred at the premises, after the Local Board's approval, the Quincy Licensing Board now recommends that this application be denied.
10. Investigator Carey also testified that he received information from Lieutenant Peter Turowski, the Quincy Police Officer in charge of the Licensing Division. Lieutenant Turowski submitted a report to Investigator Carey about an incident which occurred after this application was approved at the local level.
11. Lieutenant Turowski also recommended that this alcoholic beverages application be denied based on the licensee's illegal actions after being approved by the Local Licensing Board, and failure to adhere to the licensing laws of the Commonwealth.
12. Lieutenant Peter Turowski wrote a report regarding this applicant, which was in the process of obtaining a beer and wine license. (Exhibit 2). The report consists of the following information:
13. On Thursday, January 19, 2012, at approximately 19:55 hours [7:55 p. m.], Lt. Turowski received a call from a concerned party who wished to remain anonymous.
14. The anonymous caller stated that Ming Seafood Restaurant was serving beer as we spoke.
15. The anonymous caller stated the restaurant was very busy, and that cold tea was being served.
16. Lt. Turowski understood that to mean that beer was being served in a tea pot so that it would go undetected.
17. In the past, Lt. Turowski had received numerous complaints regarding this same issue.

18. Lt. Turowski drove to Ming Seafood and entered the premises at approximately 20:10 hours [8:00 p. m.].
19. Lt. Turowski observed that the restaurant was very busy and all seats were filled.
20. Lt. Turowski approached the counter, identified himself, and asked to speak to the manager.
21. An Asian female, later identified as Yeung Wu a/k/a Rita, stated she was the manager.
22. Lt. Turowski informed Ms. Wu about the complaint.
23. Ms. Wu called over two (2) Asian males, and spoke to them in Chinese.
24. Lt. Turowski informed Ms. Wu that he would conduct an inspection of the premises to check for alcoholic beverages.
25. Ms. Wu spoke again to the two (2) Asian males, and one of the males left and went into the kitchen.
26. Lt. Turowski informed Ms. Wu again that he would inspect the premises, including the kitchen area.
27. Ms. Wu, in broken English, said no, in a few minutes.
28. Lt. Turowski opened the kitchen door and observed an Asian male running away from him, and towards the back of the restaurant.
29. Lt. Turowski observed that the Asian male was carrying a case of Heineken beer.
30. Lt. Turowski asked Ms. Wu where the Asian male was going with the beer.
31. Ms. Wu stated the Asian male would put the beer out back.
32. Ms. Wu stated they were not selling beer, only serving what the customers brought in for themselves.
33. Lt. Turowski advised Ms. Wu that the restaurant is not allowed to have patrons bring in their own alcohol, and that this is clearly stated on the bottom of their CV (Common Victualler) license.
34. Lt. Turowski stated that this was the third complaint he had received regarding the restaurant serving beer as cold tea.
35. Ms. Wu stated it would not happen again.
36. Lt. Turowski included in his report a brief history of prior complaints against Ming Seafood since they opened for business.
37. On April 15, 2009, Officer Kent Yee notified Lt. Turowski that he, Officer Yee, had received information that Ming Restaurant was allowing patrons to BYOB (bring your own bottle of alcohol).

38. On April 16, 2009, Lt. Turowski checked the restaurant but observed no obvious signs of alcohol on the premises.
39. On September 28, 2009, Captain Lyons of the Quincy Fire Department questioned Lt. Turowski if Ming Seafood had a liquor license.
40. Captain Lyons related that one (1) of his [off-duty] firefighters was eating dinner there, and wanted to order a drink. The wait staff at Ming Seafood informed the [off-duty] firefighter that they did not have a liquor license but that he was welcome to bring his own beer or wine.
41. On September 30, 2009, License Board Chairman, Mr. Shea, requested that Lt. Turowski ascertain if Ming Seafood was allowing BYOB.
42. Lt. Turowski arrived on the premises at 20:00 hours [8:00 p. m.] and spoke to Ms. Ling Zheng.
43. Lt. Turowski asked Ms. Zheng if Ming Seafood allowed patrons to bring in their own alcohol.
44. Ms. Zheng stated that Ming did permit patrons to BYOB and she believed this practice was allowed.
45. Lt. Turowski asked to see the CV (common victualler) license, and pointed out to Ms. Zheng that the CV license states that no alcohol is allowed on premises.
46. Lt. Turowski informs Ms. Zheng that if alcoholic beverages are found on the premises, he will report the establishment to the licensing board.
47. Ms. Zheng assures Lt. Turowski that this won't happen again.
48. During a safety inspection by the Quincy Fire Department, fire department members observed gaming tables and smoke detectors rendered inoperable at the restaurant.
49. On July 20, 2010 the local license board advised the owner, Ms. Yu Hua Chen, to remove gaming tables in the basement, and to remove the duct tape blocking the smoke detectors mounted in the basement of the premises.
50. On or approximately one week later, Lt. Turowski investigated the premises and observed no gaming tables in the basement.
51. On August 20, 2011 at approximately 14:00 hours [2:00 p. m.], Lt. Turowski received an anonymous complaint about Ming Seafood.
52. The anonymous caller stated that Ming Seafood was serving cold tea.
53. Lt. Turowski asked the caller to clarify what was meant by that description.
54. The anonymous caller stated that Ming Seafood was serving cold beer in tea pots.
55. Lt. Turowski went to the premises but did not see any obvious signs that cold beer was being served.

56. On November 22, 2011, at the local license board hearing, Lt. Turowski supplied to the owner, Ms. Yu Hua Chen, a copy of the rule and regulations pertaining to the sale of alcohol within the City of Quincy.
57. On November 22, 2011, at approximately 21:45 hours [9:45 p. m.], Lt. Turowski delivered two (2) placards from the Alcoholic Beverages Control Commission, pertaining to the OUI Laws and Persons Under 21 Yrs. attempting to purchase alcohol.
58. Lt. Turowski informed the staff at Ming Seafood that the placards did not need to be posted until they had received their beer and wine license.
59. Lt. Turowski informed the staff that as they did not presently have a beer and wine license, they were not yet allowed to serve alcohol, beer, or wine.
60. Lt. Turowski asked if the staff understood they could not serve beer and wine until the beer and wine license was in hand.
61. The staff at Ming Seafood stated that they understood fully.
62. Based on this most recent incident (January 19, 2012) and the fact that on at least two (2) occasions they were warned they were not allowed to serve any alcohol, Lt. Turowski recommends that the wine and beer license be denied.

ISSUE

Whether the application of Yu Hua Chen, d/b/a Ming Seafood Restaurant, for a Wine and Malt Beverages license, located at 297 Newport Avenue, Quincy, Massachusetts should be approved by the Commission?

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. See 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 23 states, in part that "The provisions for the issue of licenses and permits hereunder imply no intention to create rights generally for persons to engage or continue in the transaction of the business authorized by the licenses or permits respectively, but are enacted with a view only to serve the public need and in such a manner as to protect the common good and, to that end, to provide, in the opinion of the licensing authorities, an adequate number of places at which the public may obtain, in the manner and for the kind of use indicated, the different sorts of beverages for the sale of which provision is made." M.G.L. chapter 138, section 23.

The Massachusetts Appeals Court has held that the statute is not about the definition of need "in the literal sense of a requirement, rather, the test includes an assessment of public want, and the appropriateness of a liquor license at a particular location. In determining whether an application for an alcoholic beverages license should be granted, "a licensing authority may take into account a wide range of factors, including the sort of operation that carries the license, and the reputation of the applicant." Ballarin, Inc. v. The Licensing Board for the City of Boston, 49 Mass. App. Ct. 506 (2000).

The Alcoholic Beverages Control Commission, defined as a "licensing authority" in M.G.L. chapter 138, section 1, can make a determination whether this license should be approved, and in doing so, consider the sort of operation that carries the license, and the reputation of the applicant. In this case the Commission is very concerned whether this applicant, Yu Hua Chen, will conduct lawful operations if this license is approved. Yu Hua Chen, d/b/a Ming Seafood Restaurant, based on the evidence presented to the Commission, allowed alcoholic beverages to be served on the premises, in violation of the law. M.G.L. chapter 138, section 2, paragraph 1; section 41.

Based on the totality of the facts, evidence, and taken in conjunction with the request from the Quincy Licensing Board, the Commission finds that Yu Hua Chen, d/b/a Ming Seafood Restaurant, is not the sort of operation which should be approved to hold an alcoholic beverages license. The Commission thereby DISAPPROVES this application of Yu Hua Chen, d/b/a Ming Seafood Restaurant.

CONCLUSION

The Commission hereby **DISAPPROVES** of the application of Yu Hua Chen, d/b/a Ming Seafood Restaurant, for a Wine and Malt Beverages License.

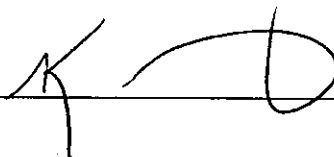
ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kathleen McNally, Commissioner



I, the undersigned, hereby certify that I have reviewed the hearing record and concur with the above decision.

Kim S. Gainsboro, Chairman



Dated: March 30, 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
Frederick G. Mahony, Chief Investigator
John Carey, Investigator
Jack Moriarty
Administration
File