



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

Jean M. Lorizio, Esq.
Chairman

DECISION

MFJ MARKET INC. D/B/A THE VILLAGE MARKET
71 FRONT STREET
SCITUATE, MA 02066
LICENSE#: 00045-PK-1086
HEARD: 12/8/2021

This is an appeal of the action of the Town of Scituate Board of Selectmen ("Local Board" or "Scituate") in suspending the M.G.L. c. 138, § 15 annual wines and malt beverages retail package store license of MFJ Market Inc. d/b/a The Village Market ("Licensee" or "Village Market") located at 71 Front Street, Scituate, Massachusetts for one (1) day. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission ("Commission" or "ABCC"), and a remote hearing via Microsoft Teams was held on Wednesday, December 8, 2021.

The following documents are in evidence as exhibits:

1. Affidavit of Audrey Kelly;
2. Affidavit of Ray Peterson;
3. ABCC 2018 Compliance Check Guidelines;
- A. Memorandum of Police Report from Scituate Police Sergeant O'Brien to Lieutenant Norton, 8/20/2021;
- B. Local Board's Decision, 9/23/2021;
- C. Local Board's Notices of Hearing regarding public hearing on 9/21/2021;
- D. Minutes of Local Board's Hearing, 9/21/2021.

There is one (1) audio recording of this hearing, and three (3) witnesses testified.

FINDINGS OF FACT

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

1. MFJ Market, Inc. d/b/a The Village Market ("Licensee" or "Village Market") holds a retail package store wines and malt beverages license and operates a business at 71 Front Street, Scituate, Massachusetts.
2. An advertisement was published on July 14, 2021, in the Scituate Mariner Newspaper regarding upcoming compliance checks in Scituate. (Testimony)

3. On Friday, August 20, 2021, Sergeant O'Brien of the Scituate Police conducted compliance checks at licensed establishments in Scituate. (Testimony, Exhibits A, B)
4. The Town of Scituate follows the ABCC Compliance Check Guidelines. (Testimony, Exhibit 3)
5. The ABCC Compliance Check Guidelines are as follows:
 - 1) Notification that a compliance check will be taking place will be made in the media prior to the start date.
 - 2) The underage person taking part in the compliance check should reasonably look their age. Efforts to make them look older should be avoided.
 - 3) A photo of the underage person should be taken and attached to the information requested in #6.
 - 4) The underage person should not be carrying any identification when taking part in the compliance check.
 - 5) The underage person should not carry any money with them other than that provided by the ABCC Investigator or law enforcement officer supervising them.
 - 6) The underage person should sign a release form prior to starting participation in this program. The underage person and an ABCC Investigator or any other law enforcement officer should also sign and date a copy of these guidelines.
 - 7) Unless circumstances prohibit, the underage person shall be given a B.A.C. test¹ at the beginning and at the conclusion of each shift.
 - 8) The underage person shall enter the licensed premises under observation by an ABCC Investigator and/or a law enforcement officer.
 - 9) The underage person should attempt to purchase an alcoholic beverage. They should attempt to purchase the same item at each location.
 - 10) At no time shall the underage person attempt to misrepresent their age or provide identification.
 - 11) If asked for identification, the underage person should leave the establishment.
 - 12) If served at any on-premises establishment, the underage person should remain on the licensed premises for a period of time instructed by the ABCC Investigator or law enforcement officer. They should then exit the licensed premises leaving the alcoholic beverage. If served at an off-premises establishment, the underage person should carry the alcoholic beverages out to the ABCC Investigator and/or law enforcement officer.

¹ A B.A.C. test is a Blood Alcohol Content test.

- 13) At no time, under any circumstances, shall the underage person consume any alcoholic beverages.
- 14) The safety and welfare of all underage participants will be of the utmost importance to the ABCC Investigator and law enforcement personnel. Underage persons shall not be exposed to any unusual, unnecessary or unreasonable risks.
- 15) The underage person will not wear, exhibit or carry any ABCC or law enforcement identification or falsely represent themselves as an employee of this agency or any other law enforcement unit while participating in this program. They shall not under any circumstances carry a weapon.
- 16) ABCC Investigators and law enforcement personnel should only enter the premises to observe on an as needed basis when circumstances warrant.
- 17) Notice to licensees, if feasible, of any alleged violations will be given upon conclusion of the compliance check. Official notification of date, time and place of hearing will be sent to the licensee via US Mail.

Id.

6. Sometime after 11:00 a.m. on August 20, 2021, an underage male working with Sergeant O'Brien entered the Village Market and was able to purchase a 6-pack of Bud Light Beer. (Testimony, Exhibit A)
7. Scituate Police did not take a photograph of the underage person prior to his participating in the compliance check. (Testimony)
8. The underage person did not sign a release form prior to participating in the compliance check. Id.
9. The underage person was not given a B.A.C. test prior to participating in the compliance check. Id.
10. The underage male exited the licensed premises and informed Sgt. O'Brien that he had purchased a 6-pack of Bud Light Beer.
11. The licensee's clerk did not ask him to produce identification but did ask him for his date of birth. The underage male gave the clerk a false date of birth which would have made him over twenty-one years of age. Id.
12. On September 21, 2021, the Local Board held a remote hearing "...to consider a report of the Scituate Police Department received by the Board on September 1, 2021" and to determine if the licensee has "...violated the provisions of M.G.L. c. 138 or the state and local regulations issued thereunder in that alcoholic beverages were sold by you or one of your agents to a person or persons under twenty-one years of age." (Exhibit C)

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). The Commission is given “comprehensive powers of supervision over licensees,” Connolly v. Alcoholic Beverages Control Comm’n, 334 Mass. 613, 617 (1956), as well as broad authority to issue regulations. The Local Board has authority to enforce Commission regulations. New Palm Gardens, Inc. v. Alcoholic Beverages Control Comm’n, 11 Mass. App. Ct. 785, 788 (1981).

These “comprehensive powers” are balanced by the requirement that the Local Board and the Commission provide notice to the licensee of any violations, as well as an opportunity to be heard. M.G.L. c. 138, § 64. In addition, the Local Board has the burden of producing satisfactory proof that the licensee violated or permitted a violation of any condition thereof, or any law of the Commonwealth. M.G.L. c. 138, §§ 23, 64.

Pursuant to M.G.L. c. 138, §34, the sale of alcohol to minors is prohibited, and imposes both criminal and civil sanctions. M.G.L. c. 138, § 34 provides: Whoever makes a sale or delivery of any alcoholic beverages or alcohol to any person under twenty-one (21) years of age, either for his own use or for the use of his parent or any other person...or whoever furnishes any such beverage or alcohol for a person under twenty-one (21) years of age shall be punished by a fine of not more than two thousand (2,000) dollars or by imprisonment for not more than one (1) year or both. To enforce the provisions of M.G.L. c. 138, § 34, both the Commission and Local Boards commonly perform compliance checks, also known as “stings”, at licensed establishments.

The legality of using an underage operative to conduct compliance checks was established in Fran’s Lunch, Inc. v. Alcoholic Beverages Control Commission, 45 Mass. App. Ct. 663 (1998). The Appeals Court held that “[a]bsent entrapment or other abuses violative of fundamental fairness, government involvement in criminal activity for purpose of investigating possible violations of law is permissible, even if technical violations of law occur.” Id at 664. The Appeals Court further 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.” Id at 665.

Consequently, “conducting compliance checks in strict compliance to the written guidelines is essential to the validity of the checks. Local authorities’ failure to follow the guidelines ...for compliance checks undermines the legitimacy and integrity of the compliance checks throughout the state and fails to adequately preserve their fairness.” Fay, et al v. Jenkins et al, Middlesex Superior Court C.A. No. 2007002652-F (Muse. J.) See also Fran’s Lunch, Inc., 45 Mass. App. Ct.

at 655; 700 NE 2d 846 (1998) (sting operation conducted by ABCC was constitutional where strict procedure for fair control check was observed); BBRG Massachusetts, Inc. dba. Papa Razzi (ABCC decision May 21, 2007); Assinippi Liquors, Inc. (ABCC decision April 7, 2004); Epicure Package Store, Inc. (ABCC decision January 31, 2007).

Both Sgt. O'Brien and Karen Connolly, Select Board Chair, testified the ABCC guidelines are used by Scituate in conducting compliance checks. ABCC Guideline No. 3 states "[a] photo of the underage person should be taken and attached to the information requested in #6. Scituate Police did not take a photograph of the underage person. ABCC Guideline No. 6 states, "[t]he underage person should sign a release form prior to starting participation in this program..." The underage person did not sign a release prior to participating in the compliance check. ABCC Guideline No. 7 states "[u]nless circumstances prohibit, the underage person shall be given a B.A.C. test at the beginning and at the conclusion of each shift." The underage person was not given a B.A.C. test. ABCC Guideline No. 10 directs that "[a]t no time shall the underage person attempt to misrepresent their age or provide any identification." Here, the underage person provided a false date of birth to the licensee employee. Said false birth date would have made the underage person over twenty-one years of age on August 20, 2021. (Testimony, Exhibit 3) The Local Board by its own admission did not follow the guidelines.

As a result, the Commission finds the Local Board's compliance check was invalid and disapproves the action of Scituate.

CONCLUSION

The Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in finding a violation was committed by the Licensee. The Commission remands the matter to the Local Board with the recommendation that no further action be taken against this licensee, as any penalty or sanction would be discrepant with the Commission's decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman Jean M. Lorizio

Crystal Matthews, Commissioner Crystal Matthews

Deborah Baglio, Commissioner Deborah Baglio

Dated: September 12, 2022

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: Peter D. Pasciucco, Esq.
Cynthia L. Amara, Esq.
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration, File