

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

Jean M. Lorizio, Esq.
Chairman

DECISION

ZAMIAH RESTAURANT INC. D/B/A MALECON RESTAURANT
137 CHESTNUT STREET
SPRINGFIELD, MA 01105
LICENSE#: 03505-RS-1226
HEARD: 6/23/2021

This is an appeal from the action of the City of Springfield Licensing Board (the "Local Board" or "Springfield") revoking the § 12 all alcoholic beverages license of Zamiah Restaurant Inc. d/b/a Malecon Restaurant ("Licensee" or "Malecon") located at 137 Chestnut Street, Springfield, MA. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a remote hearing was held via Microsoft Teams on Wednesday, June 23, 2021.

At the close of the June 23, 2021 hearing, the Commission left the record open for the City of Springfield to submit an additional document by close of business on June 25, 2021. The Local Board submitted its document in a timely manner. The record is now closed.

The following documents are in evidence as exhibits:

- A1. Letter from Springfield Police Commissioner Clapprood, 1/21/2021;
- A2. Springfield Police Officer Delemarter's Special Report, 1/21/2021;
- A3. Springfield Police Officer Placanico's Report, 12/25/2020;
- A4. Springfield Police Officer Marsh's Report, 12/25/2020;
- A5. Springfield Police Officer Ruyffelaert's Report, 12/26/2020;
- A6. Six (6) Photographs of Exterior of Licensed Premises;
- B1. Local Board's Notice of Hearing, 3/25/2021;
- B2. Local Board's Notice of Hearing, 2/25/2021;
- B3. Local Board's Notice of Hearing, 1/28/2021;
- C. Local Board's Findings and Decision, 4/30/2021;
- D. Local Board's Rules and Regulations Manual;
- E. City of Springfield Video Surveillance.

There is one audio recording of this hearing, and four (4) witnesses testified.

FINDINGS OF FACT

1. Zamiah Restaurant Inc. d/b/a Malecon Restaurant ("Licensee" or "Malecon"), holds an all-alcoholic beverages license and operates a business at 137 Chestnut Street, Springfield, Massachusetts. Ms. Dominga Pujols is President, Treasurer, and Director of the corporation.
2. On Wednesday, April 28, 2021, the Local Board held a virtual hearing on the Licensee's alleged violations of 204 CMR 2.05 (2) No licensee for the sale of alcoholic beverages shall permit any disorder, disturbance, or illegality of any kind to take place in or on the licensed premises. Licensee shall be responsible therefore whether present or not, TWO counts, to wit: 1) failure to call the police to report a disturbance, and 2) failure to provide adequate security plan (armed patrons entering the licensed premises.) (Exhibit B1)
3. By decision dated April 30, 2021, the Local Board found the Licensee in violation and voted to revoke its license, effective Friday, April 30, 2021. (Exhibit C)
4. The Licensee timely appealed the Local Board's decision to the ABCC. (Commission Records)
5. On December 25, 2020, at approximately 9:00 p.m., Springfield Police Officer Marsh along with Officers Carrasquillo and Placanico ("Officers") responded to a shot spotter activation in the area of the licensed premises. The shot spotter is a system by which live gun fire is detected and police are notified as to the location. (Testimony, Exhibits A4, C)
6. Because of COVID-19 protocols, Officers were driving in single-man vehicles, so Officer Marsh drove himself to the scene. The three officers arrived approximately 1 to 1.5 minutes after the shot spotter activation. The officers canvased the area and found multiple shell casings on the sidewalk near Malecon and across the street on Pearl Street. Officer Marsh called for a detective and a supervisor to respond. Id.
7. Officer Marsh neither entered the licensed premises nor spoke with the Licensee or any Licensee employees on the night of the alleged violation. (Testimony)
8. Office Marsh spoke with an employee of a business located across the street from Malecon. The employee reported seeing a male individual reach into an SUV and exchange gun fire with another individual. (Testimony, Exhibit A4)
9. Officer Barry Delamarter of the Springfield Police Department conducts investigations into all incidents occurring in the city's licensed premises. Officer Delamarter obtained video footage recorded by city cameras in the area of the licensed premises from the night of the alleged violation. (Testimony, Exhibits A2, C, E)
10. The video footage depicts the front entrance of Malecon, from three different angles. The video runs approximately 20.5 minutes, showing a span of approximately 6.8 minutes from each of the three angles. The video does not have any audio. The people shown in the video were not identified. (Testimony, Exhibit E)
11. In the video, a male is seen holding a gun in the vestibule area at the entry way of the licensed establishment. He is standing with two other males and the group is seen moving towards the

door of the licensed establishment. The man with the gun appears to be pulled inside the establishment by two other males. *Id.*

12. Officer Delamarter was not present at the licensed premises on the night of the alleged violation but did conduct a follow-up investigation. (Testimony)
13. Officer Delamarter later interviewed both Genesis Pujols and Josue Pujols about the events of December 25, 2020. Neither of them reported a disturbance inside the premises.
14. Mr. Jose Pujols is a relative of the Licensee and often helps at the licensed premises providing general oversight of the establishment and sometimes works as the disc jockey. He was working on December 25, 2020. (Testimony, Exhibit A2)
15. Capacity restrictions due to COVID-19 were in effect on the night of the alleged incident. There were approximately 25 to 30 people inside the licensed establishment. (Testimony)
16. Mr. Pujols did not observe any incident or fight inside the licensed premises. No one reported a fight or disturbance to him. (Testimony)
17. Justin Crespo is Malecon's head of security on weekends and he was working on the night of December 25, 2020. Mr. Crespo was working the front door. He remained at the door for the majority of the night but also spent time walking throughout the licensed premises. He did not observe any fight or disturbance inside the licensed premises. No patrons or employees reported a fight or incident to him. Mr. Crespo never spoke with police regarding the alleged violation. (Testimony)

DISCUSSION

Pursuant to M.G.L. Ch. 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 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); Devine v. Zoning Bd. of Appeal of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Bd. of Appeals of Brookline, 362 Mass. 290, 295 (1972)). 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)." *Id.*

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 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.

The Licensee’s obligation under 204 C.M.R. 2.05(2) to maintain control over the premises and to comply with Chapter 138 and local regulations is well-settled. The responsibility of the Licensee is to “~~exercise sufficiently close supervision so that there is compliance with the law on the premises.~~” Rico’s of the Berkshires, Inc. v. Alcoholic Beverages Control Comm’n, 19 Mass. App. Ct. 1026, 1027 (1985) (table). A licensee who sells alcohol is “bound at his own peril to keep within the condition of his license.” Burlington Package Store, Inc. v. Alcoholic Beverages Control Comm’n, 7 Mass. App. Ct. 186, 190 (179); accord Commonwealth v. Gould, 158 Mass. 499, 507 (1893). “It is, thus, quite possible for a Licensee to offend the regulatory scheme without scienter.” Rico’s of the Berkshires, 19 Mass. App. Ct. at 1027.

For the Commission to make a finding, there must be substantial evidence that a violation has occurred. “Substantial evidence of a violation is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Consol. Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 229 (1938); accord Charlesbank Rest. Inc. v. Alcoholic Beverages Control Comm’n, 12 Mass. App. Ct. 879 (1981).

The Local Board has the burden of producing satisfactory proof that the Licensee committed the violation that is alleged to have occurred on December 25, 2020.

The Springfield Licensing Board found the Licensee permitted a violation of 204 CMR 2.05(2) No licensee for the sale of alcoholic beverages shall permit any disorder, disturbance, or illegality of any kind to take place in or on the licensed premises. Licensees shall be responsible therefore whether present or not, TWO counts, to wit: (1) Failure to call the police to report a disturbance; (2) Failure to provide adequate security (armed patrons entering the premises).

The licensee has a duty of care to prevent only foreseeable harm to its patrons and others. Westerback v. Harold F. Leclair, Co., 50 Mass. App. Ct. 144, 145 (2000); Carey v. New Yorker or Worcester, Inc., 355 Mass. 450, 451 (1969); Kane v. Fields Corner Grille, Inc., 341 Mass. 640, 641 (1961). The Supreme Judicial Court has held that 204 C.M.R. 2.05(2),

describes a preexisting common law duty which licensees owe to their patrons or guests. A bar owner, for example, has the duty to protect persons on or about the premises from the dangerous propensities of its patrons, served or unserved. When the bar has served a potentially dangerous patron, the duty may extend beyond the premises. When the bar has not served the patron, however, the duty is based merely on a duty to keep the premises safe, and the duty applies on or about the premises. See Gustafson v. Matthews, 109 Ill. App. 3d 884, 65 Ill. Dec. 475, 441 N.E. 2d 388 (1982) (bar owner had no duty to prevent intoxicated patron from driving away with his five children in the car); Locklear v. Stinson, 161 Mich. App. 713, 411 N.W. 2d 834 (1987) (bar owner not liable when one patron was killed by another patron off the premises). O’Gorman v. Antonio Rubinaccio & Sons, Inc., 408 Mass. 758, 761 n.2 (1990) (citations omitted).

“The duty to protect patrons ... does not require notice of intoxication but may be triggered when the conduct of another person puts a tavern owner or its employees on notice that harm is imminent.” Christopher v. Father’s Huddle Café, 57 Mass. App. Ct. 217, 222-223 (2003). However, a licensee may discharge its duty to protect patrons by taking steps to prevent the harm – such as denying service to a person who appears intoxicated or who has requested too many drinks, or calling police when a fight occurs or an aggressive patron threatens assault. See, e.g., Greco v. Sumner Tavern, Inc., 333 Mass. 144, 145 (1995); Carey, 355 Mass. at 451.

The Local Board presented evidence through the testimony of Springfield Police Officers Marsh and Delamarter.

The Commission found Officers Marsh and Delamarter to be professional and credible. However, neither of them has first-hand knowledge regarding the alleged violation. Officer Marsh responded to the licensed premises upon being notified shots had been fired. Officer Marsh testified he did not enter the licensed premises on the night of the alleged violation, nor did he speak with the Licensee or any of its employees. Officer Delamarter was not present on the night of the incident. Neither Officer Marsh nor Officer Delamarter have personal knowledge as to what took place inside the licensed premises on the night of December 25, 2020.

On the other hand, the Licensee presented two percipient witnesses in Mr. Pujols and Mr. Crespo. Both were working at the licensed premises on December 25, 2020. Both testified they did not observe any disturbance or fight inside the licensed premises and no fight or disturbance was reported by any patron or employee.

In order for the Licensee to have permitted an illegality on its premises, the Licensee must have had notice that the harm or disturbance was imminent, and the Licensee must have been able to foresee the disturbance and prevent it. The record before the Commission is lacking in any evidence that the Licensee should have foreseen an incident occurring. There was no evidence of any disturbance inside the licensed premises. In fact, uncontroverted eyewitness testimony to the contrary was presented. There was nothing presented that would have alerted the Licensee to the possibility of an imminent disturbance. See Kane, 341 Mass. at 641; Carey, 355 Mass. at 451; Greco, 333 Mass. at 145.

The Local Board produced video evidence which shows the area outside the licensed premises in the several minutes leading up to the shooting. However, the Local Board did not produce eyewitnesses or direct evidence regarding any conduct in or on the licensed premises that would have put the Licensee or its employees on notice of imminent harm. The video shows a male with a gun in his hand outside Malecon, seemingly being pulled into the licensed premises by two males. The angle and position of the camera is such that the man’s right side is visible, but the gun was in his left hand. As a result, it is not clear if the gun was still in his hand when he went back into Malecon.

The events of December 25, 2020, outside of Malecon, as depicted in the video (Exhibit E), are of serious concern. The public safety was greatly threatened but without evidence that the Licensee should have foreseen what took place and thus should have called the police, it cannot be found responsible. The Local Board has not proved by legally competent evidence that the Licensee permitted an illegality to wit a violation of 204 CMR 2.05(2).

The Commission is not persuaded that the Licensee committed the alleged violation of 204 CMR 2.05(2).

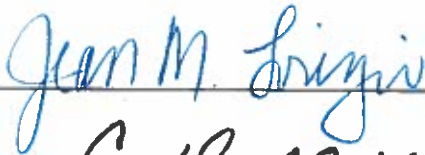
CONCLUSION

The Alcoholic Beverages Control Commission ("Commission") **DISAPPROVES** the action of the City of Springfield Licensing Board in finding that Zamiah Restaurant Inc. d/b/a Malecon Restaurant committed a violation of 204 CMR 2.05(2).

The Commission **DISAPPROVES** the action of the City of Springfield in revoking the license of Zamiah Restaurant Inc. d/b/a Malecon Restaurant. As such, the Commission remands the matter to the City of Springfield with the recommendation that it find no violation and that no further action be taken against the Licensee, as any penalty would be discrepant with this decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman



Crystal Matthews, Commissioner



Deborah Baglio, Commissioner



Dated: February 16, 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: Daniel C. Hagan Jr., Esq.
Alesia H. Days, Esq.
Local Licensing Board
Frederick G. Mahony, Chief Investigator
Administration, File