



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

Jean M. Lorizio, Esq.
Chairman

NOTICE OF SUSPENSION

January 26, 2021

**APPLE NEW ENGLAND LLC
D/B/A APPLEBEE'S NEIGHBORHOOD GRILL & BAR
85 MAIN STREET
TEWKSBURY, MA 01876
LICENSE#: 00051-RS-1270
VIOLATION DATE: 10/30/2020
HEARD: 12/03/2020**

After a hearing on December 3, 2020, the Commission finds Apple New England LLC d/b/a Applebee's Neighborhood Grill & Bar violated:

- 1) 204 CMR 2.05 (2) Permitting an Illegality on the Licensed Premises, to wit: Massachusetts Executive COVID-19 Order No. 37 (June 6, 2020) - Violation of sector specific workplace safety standards for restaurants to address COVID-19;
- 2) 204 CMR 2.05 (2) Permitting an Illegality on the Licensed Premises, to wit: Massachusetts Executive COVID-19 Order No. 40 (June 19, 2020) - Violation of sector specific workplace safety standards for restaurants to address COVID-19;
- 3) 204 CMR 2.05 (2) Permitting an Illegality on the Licensed Premises, to wit: Violation of Mass. Exec. COVID-19 Order No. 52 (September 29, 2020);
- 4) 204 CMR 2.05 (2) Permitting an Illegality on the Licensed Premises, to wit: Ch. 138 § 34C - Possession of an alcoholic beverage by a person under twenty-one (21) years of age (6 Counts).

On the first – third violations, 204 CMR 2.05 (2), to wit: Massachusetts Executive COVID-19 Orders No. 37, No. 40, and No. 52, the Commission **suspends the license of Apple New England LLC d/b/a Applebee's Neighborhood Grill & Bar for a period of fourteen (14) days to be served, effective forthwith. No Offer in Compromise will be considered for this 14-day suspension.**

On the fourth violation, 204 CMR 2.05(2) C. 138, § 34C (6 Counts), the Commission **suspends the license for a period of six (6) days to be served after the 14-day suspension above. The Licensee will serve a total of 20 days.**

The six-day suspension shall commence on Monday, March 15, 2021 and terminate on Saturday, March 20, 2021. The license will be delivered to the Local Licensing Board or its designee on Monday, March 15, 2021 at 9:00 a.m. It will be returned to the licensee on March 21, 2021.

You are advised that pursuant to the provisions of M.G.L. c.138 § 23, you may petition the Commission to accept an offer in compromise in lieu of suspension within twenty (20) calendar days following such notice of such suspension. If accepted, you may pay a fine using the enclosed form which must be signed by the Licensee and a Massachusetts Licensed Accountant.

You are advised that you have the right to appeal this decision under M.G.L. c. 30A to Superior Court within thirty (30) days upon receipt of this notice.

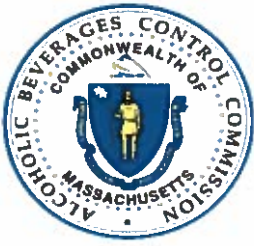
ALCOHOLIC BEVERAGES CONTROL COMMISSION



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Chairman

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cc: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Kyle E. Gill, Esq., Associate General Counsel
Joseph Di Cicco, Investigator
Robert Gardner, Investigator
Dennis Keefe, Investigator
Christopher Temple, Investigator
Michael Flanagan, Dept. of Labor Standards
John Connell, Esq.
Administration, File



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DECISION

**APPLE NEW ENGLAND LLC
D/B/A APPLEBEE'S NEIGHBORHOOD GRILL & Bar
85 MAIN STREET
TEWKSBURY, MA 01876
LICENSE#: 00051-RS-1270
VIOLATION DATE: 10/30/2020
HEARD: 12/03/2020**

Apple New England LLC d/b/a Applebee's Neighborhood Grill & Bar (the "Licensee") holds an alcoholic beverages license issued pursuant to M.G.L. c. 138, § 12. The Alcoholic Beverages Control Commission ("ABCC" or "Commission") held a remote hearing via Microsoft Teams on Thursday, December 3, 2020, regarding alleged violations of:

- 1) 204 CMR 2.05 (2) Permitting an Illegality on the Licensed Premises, to wit: Massachusetts Executive COVID-19 Order No. 37 (June 6, 2020) - Violation of sector specific workplace safety standards for restaurants to address COVID-19;
- 2) 204 CMR 2.05 (2) Permitting an Illegality on the Licensed Premises, to wit: Massachusetts Executive COVID-19 Order No. 40 (June 19, 2020) - Violation of sector specific workplace safety standards for restaurants to address COVID-19;
- 3) 204 CMR 2.05 (2) Permitting an Illegality on the Licensed Premises, to wit: Violation of Mass. Exec. COVID-19 Order No. 52 (September 29, 2020);
- 4) 204 CMR 2.05 (2) Permitting an Illegality on the Licensed Premises, to wit: Ch. 138 § 34C - Possession of an alcoholic beverage by a person under twenty-one (21) years of age (6 Counts).

The above-mentioned occurred on October 30, 2020 according to Investigator Di Cicco's Report.

The following documents are in evidence:

1. Investigator Di Cicco's Report;
2. Copy of Form 43 License Approval, 10/25/2011;
3. Copy of Fraudulent Driver's Licenses;
4. Bar Receipt, 10/30/2020;

5. Photo of Interior of Licensed Premises;
 6. Applebee's Facebook Post;
 7. Massachusetts Executive COVID-19 Order No. 37, 6/6/2020;
 8. Massachusetts Executive COVID-19 Order No. 40, 6/19/2020;
 9. Massachusetts Executive COVID-19 Order No. 52, 9/29/2020;
 10. Massachusetts Sector Specific Workplace Safety Standards for Restaurants to Address COVID-19, 10/01/2020;
 11. ABCC Enforcement Memorandum, 12/1/2020.
- A. Massachusetts Restaurant Association email to Licensee, 9/28/2020;
 - B. Massachusetts Restaurant Association Restaurant Recovery Update, 9/24/2020;
 - C. Bar Receipts, 11/30/2020;
 - D. Apple American Group's Manager Guide 2020.

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

FINDINGS OF FACT

1. On Friday, October 30, 2020, at approximately 10:45 p.m., Investigators Gardner, Keefe, Temple, and Di Cicco ("Investigators") conducted an investigation of Apple New England LLC d/b/a Applebee's Neighborhood Grill & Bar to determine the manner in which its business was being conducted, and to ensure compliance with Massachusetts Governor Charles Baker's Executive COVID-19 Orders. (Testimony, Exhibit 1)
2. Investigators entered the licensed premises and observed customers seated at the bar without a barrier between them and employees working behind the bar. Investigators observed that the bar was being utilized as a workstation with ingredients to make drinks and bottles directly behind the bar. The workstation was less than 6 feet from customers sitting at the bar. Investigators also observed employees behind the bar serving customers seated at the bar. Id.
3. Investigators observed one table (Table #63) of four (4) youthful appearing individuals, all in possession of what appeared to be alcoholic beverages. Investigators identified themselves and asked to see proof of legal age. Id.
4. Underage #1, actual date of birth 7/09/2001 (age 19), was in possession of a glass of Blue Moon beer. He informed Investigators that he did not present any identification when he ordered an alcoholic beverage. Id.
5. Underage #2, actual date of birth 7/17/2002 (age 18), was in possession of a Captain Mama mixed drink. She informed Investigators that she did not present any identification when she ordered an alcoholic beverage. Id.
6. Underage #3, actual date of birth 5/21/2001 (age 19), was in possession of a Tito's [vodka] mixed drink. She informed Investigators that she did not present any identification when she ordered an alcoholic beverage. Id.

7. Underage #4, actual date of birth, 10/21/2001 (age 19), was in possession of a Tito's [vodka] mixed drink. He informed Investigators that he did not present any identification when he ordered an alcoholic beverage. Id.
8. Investigators observed a nearby table (Table #62) occupied by two (2) youthful appearing individuals in possession of what appeared to be alcoholic beverages. Investigators identified themselves and asked to see proof of legal age. Id.
9. Underage #5, actual date of birth 6/13/2002 (age 18), was in possession of a glass of wine. She informed Investigators that she did not present any identification when she ordered an alcoholic beverage. Id.
10. Underage #6, actual date of birth 5/01/2002 (age 18), was in possession of a Tito's [vodka] mixed drink. She informed Investigators that she did not present any identification when she ordered an alcoholic beverage. Id.
11. The youthful individuals first presented to Investigators fraudulent Massachusetts driver's licenses but after further discussion were eventually properly identified. Id.
12. Investigators spoke to the employee who provided service to Tables #62 and #63. The server stated that all individuals had ordered alcoholic beverages but were not asked for identification as they had shown identification in past visits. Id.
13. Investigators spoke with the manager on duty, the server and other staff members and showed them the fraudulent Massachusetts identifications. The Investigators reviewed tips to help them identify fraudulent identifications in the future. Id.
14. Investigators informed the manager on duty that a report of the COVID-19 violations and the minors in possession of alcoholic beverages would be submitted to the Chief Investigator for review. Id.
15. Sean Noonan, General Manager for the Licensee, attended the Commission hearing. Mr. Noonan testified that he interviewed the server about the six (6) underage patrons found to be in possession of alcoholic beverages. Mr. Noonan admitted the patrons had not been asked to produce identification and explained a determination had been made by the server that she had examined their identification on a prior visit to the licensed premise. The server has since been terminated from her position. (Testimony)
16. The Licensee no longer offers bar seating but rather has tables up against the bar for seating. The Licensee has also hired a sanitation specialist to ensure the establishment is cleaned in accordance with the COVID-19 guidelines. (Testimony)
17. The Licensee has held a license under M.G.L. c. 138, § 12 since 2011 with no prior violations. (Commission Records)

DISCUSSION

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Comm'n, 334 Mass. 613, 619 (1956), for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Opinion of the Justices, 368 Mass. 857, 861 (1975). The procedure for the issuance of licenses and required conduct of licensees who sell alcoholic beverages is set out in Massachusetts General Laws, Chapter 138.

Chapter 138 gives the Commission the authority to grant, revoke and suspend licenses. Chapter 138 was “enacted ... 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, 334 Mass. at 617.

The Licensee is charged with 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.” 204 CMR 2.05 (2). More specifically the Licensee is charged with permitting an illegality on the licensed premises, to wit:

Massachusetts Executive COVID-19 Order No. 37 (June 6, 2020) - Violation of sector specific workplace safety standards for restaurants to address COVID-19;

Massachusetts Executive COVID-19 Order No. 40 (June 19, 2020) - Violation of sector specific workplace safety standards for restaurants to address COVID-19; and

Violation of Massachusetts Executive COVID-19 Order No. 52 (September 29, 2020).

The Executive COVID-19 Orders require adherence to all Sector Specific Workplace Safety Standards for Restaurants to Address COVID-19 (October 1, 2020) including:

Bar seating is permitted provided that either: there are no active work areas or working staff behind the bar at least 6 feet away; or there is a physical barrier (e.g. Plexiglas) separating customers from the bar space that is at least 30 inches high and a gap/opening at the bottom of the barrier is allowed for food and drink service as long as the gap/opening is no more than 8 inches high.

Sector Specific Workplace Safety Standards for Restaurants to Address COVID-19 (October 1, 2020)

Direct evidence was presented through the testimony of Investigators DiCicco and Keefe as to patrons sitting at the bar within 6 feet of employees working behind the bar. Employees were serving patrons over the bar without a plexiglass or any other type of barrier between the patrons and employees. The Commission is persuaded by the evidence that a violation of 204 CMR 2.05(2) to wit Massachusetts Executive COVID-19 Orders 37, 40 and 52 did occur.

The Licensee is also charged with a violation of 204 CMR 2.05 (2) - Permitting an illegality on the licensed premises, to wit: Chapter 138, § 34C- Possession of an alcoholic beverage by a person under twenty-one (21) years of age. A Commission regulation promulgated at 204 CMR 2.05(2) provides in pertinent part, that “[n]o 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. The licensee shall be responsible therefore, whether present or not.” The law is well-settled that,

under the regulation [204 C.M.R. 2.05(2)], the responsibility of the licensee is to exercise sufficiently close supervision so that there is compliance with the law on the premises. A vendor who sells alcohol is “bound at his own peril to keep within the condition of his license.” Commonwealth v. Gould, 158 Mass. 499, 507 (1893); Burlington Package Liquors, Inc. v. Alcoholic Beverages Control Comm’n, 11 Mass. App. Ct. 785, 788 (1981). It is, thus, quite possible for a licensee to offend the regulatory scheme without scienter.

Rico’s of the Berkshires, Inc. v. Alcoholic Beverages Control Comm’n, 19 Mass. App. Ct. 1026, 1027 (1985). A licensee is responsible for illegalities that occur on the licensed premises. See id.

Massachusetts General Laws, Chapter 138, § 34C states, in pertinent part, that: “Whoever, being under twenty-one years of age and not accompanied by a parent or legal guardian, knowingly possesses any alcohol or alcoholic beverages, shall be punished.” M.G.L. c. 138, § 34C.

Direct evidence was presented through testimony of Investigator Di Cicco as to six (6) individuals under the age of 21 found to be in possession of alcoholic beverages. The Licensee acknowledged the patrons were not asked to produce proof of age and did not dispute they were in possession of alcoholic beverages.

The Commission is persuaded by the evidence that six (6) individuals were younger than 21 years of age and were in possession of an alcoholic beverage on the licensed premise. The Commission finds that the Licensee committed a violation of 204 CMR 2.05(2) – Permitting an illegality on the licensed premises, to wit: M.G.L. c. 138 §34C – Possession of an alcoholic beverage by a person under 21 years of age (6 Counts).

CONCLUSION

Based on the evidence, the Commission finds the Licensee violated:

- 1) 204 CMR 2.05 (2) Permitting an Illegality on the Licensed Premises, to wit: Massachusetts Executive COVID-19 Order No. 37 (June 6, 2020) - Violation of sector specific workplace safety standards for restaurants to address COVID-19;
- 2) 204 CMR 2.05 (2) Permitting an Illegality on the Licensed Premises, to wit: Massachusetts Executive COVID-19 Order No. 40 (June 19, 2020) - Violation of sector specific workplace safety standards for restaurants to address COVID-19;
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- 4) 204 CMR 2.05 (2) Permitting an Illegality on the Licensed Premises, to wit: Ch. 138 § 34C - Possession of an alcoholic beverage by a person under twenty-one (21) years of age (6 Counts).

On the first – third violations, 204 CMR 2.05 (2), to wit: Massachusetts Executive COVID-19 Orders No. 37, No. 40, and No. 52, the Commission **suspends** the license of Apple New England LLC d/b/a Applebee's Neighborhood Grill **for a period of fourteen (14) days to be served, effective forthwith. No Offer in Compromise will be considered for this 14-day suspension.**

On the fourth violation, 204 CMR 2.05(2) C. 138, § 34C (6 Counts), the Commission **suspends the license for a period of six (6) days to be served after the fourteen (14) day suspension above. The Licensee will serve a total of 20 days.**

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Crystal Matthews, Commissioner



Jean M. Lorizio, Chairman



Dated: January 26, 2021

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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