

*Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
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Jean M. Lorizio, Esq.
Chairman

DECISION

**TRUE FLAVORS LLC D/B/A SAPORE VERO
944-946 MAIN STREET
WALPOLE, MA 02081
LICENSE#: 131400059
HEARD: 05/31/2017**

This is an appeal of the action of the Town of Walpole Board of Selectmen (the "Local Board" or "Walpole") for suspending the M.G.L. c. 138, § 12 all alcoholic beverages license of True Flavors LLC d/b/a Sapore Vero ("Licensee" or "True Flavors") located at 944-946 Main St., Walpole, Massachusetts for two (2) days. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a hearing was held on Wednesday, May 31, 2017.

The following documents are in evidence as exhibits:

1. ABCC 2016 Compliance Check Guidelines;
2. Walpole Police Department's Alcohol Compliance Check Directive;
3. Color Enlarged Photocopy of Rhode Island Driver's License for Undercover Operative;
4. Black and white Photocopy of Rhode Island Driver's License for Undercover Operative;
5. Walpole Police Department Notice of Compliance Check Operations, April 2016;
6. Local Board's Notice of Hearing, 5/26/2016;
7. Local Board's Decision, 7/22/2016;
8. Local Board Meeting Minutes, 7/19/2016;
9. Local Board's Policy on Penalties for Sales to Minors; and
10. DVD Recording of Local Board Hearing, 7/19/16.

At the close of the hearing, the Commission left the record open until June 14, 2017, for the submission of a video recording of the Local Board hearing. The Commission timely received the video and marked it as Exhibit 10. Upon receipt of said video, the record was closed.

There is one (1) audio recording of this hearing, and four (4) witnesses testified.

The Commission took Administrative Notice of the Licensee's Commission file.

FINDINGS OF FACT

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

1. True Flavors LLC d/b/a Sapore Vero ("Licensee" or "True Flavors") located at 944-946 Main St., Walpole, Massachusetts, holds a § 12 all alcoholic beverages license. (Commission File)
2. True Flavors purchased the license from a bankruptcy listing, and the ABCC approved the license transfer on February 3, 2016. The sole officer, director, and stockholder of the corporation is Yvonne DeFazio. Ms. DeFazio is also the license manager of record. On approximately May 5, 2016, the Walpole Police Department conducted liquor license compliance checks. (Commission File, Testimony, and Exhibit 6)
3. Walpole has in effect a Directive on Alcohol Compliance Checks. According to said directive, "a notice of intent to conduct an underage compliance check or sting operation will be announced in the local media prior to the start date." (Exhibit 2)
4. Prior to May 5, 2016, Walpole published notice of upcoming compliance checks in the local newspaper, and in April 2016, Walpole sent notice to licensees regarding its intent to conduct compliance checks in the near future. (Testimony and Exhibit 5)
5. On May 5, 2016, an underage operative, working with Police Officers, entered the licensed premises of True Flavors. Upon request, the underage operative presented her true identification, actual date of birth 2/20/1996 (age 20). (Exhibit 6, Testimony)
6. The bar server reviewed the Rhode Island driver's license presented by the underage operative, which indicated her age was *not* 21. The license presented was in a vertical format and included a notice, "Under 21 Until 2/20/2017." (Exhibits 2, 3 and 6)
7. The underage operative was served an alcoholic beverage, a beer. (Testimony and Exhibit 6)
8. When a plainclothes Walpole Police Officer entered the premises to deliver the violation notice to the Licensee, the manager of record, Yvonne DeFazio, asked to see the license identification which had been presented. The Officer refused. (Testimony)
9. The Local Board sent a Notice of Hearing to the Licensee for a hearing on alleged violations of M.G.L. c. 138, § 34, Sale or delivery of an alcoholic beverage to a person under twenty-one (21) years of age; and 204 CMR 2.05 (2) – Permitting an illegality on the licensed premises. (Exhibit 6)
10. The hearing was held on July 19, 2016. By decision dated July 22, 2016, the Local Board found the Licensee violated both the statute and regulation and suspended True Flavor's license for a period of two (2) days. (Exhibit 7)
11. On July 29, 2016, the Licensee appealed the Local Board's decision to the ABCC. (Commission Files)
12. The Licensee has no history of any prior violations. (Commission File; Testimony)
13. Walpole's Administrative Penalties for Violation of Alcoholic Beverages Sales to Minors Policy sets forth guidelines to be used in determining penalties: 1st Violation, Warning up to a 2 day suspension. (Exhibit 9)

14. Since 2011, and possibly earlier, the Local Board has consistently imposed 2 day suspensions for every licensee found in violation of M.G.L. Ch. 138, § 34 and 204 CMR 2.05(2). (Testimony) In fact, other licensees who were found in violation of compliance checks the same day as True Flavors were given 2 day suspensions. (Testimony)

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 Local Board charged the licensee with violating M.G.L. c. 138, § 34 Sale or delivery of an alcoholic beverage to a person under twenty-one (21) years of age; and 204 CMR 2.05 (2) – Permitting an illegality on the licensed premises. Said alleged sale or delivery of an alcoholic beverage to a person under twenty-one (21) years of age occurred during a compliance check operation, or “sting,” conducted by the Walpole Police Department.

Massachusetts General Law Chapter 138 provides a comprehensive scheme for the regulation of alcoholic beverages. Pursuant to M.G.L. c. 138, § 34 the sale of alcohol to minors is prohibited, and imposes both criminal and civil sanctions. G.L. c. 138, § 34 provides: “Whoever makes a sale or delivery of any alcoholic beverages or alcohol to any person under 21 years of age, either for his own use or for the use of his parents or any other person...or whoever furnishes any such beverages or alcohol for a person under 21 years of age shall be punished by a fine of not more than \$2,000 or by imprisonment for not more than one year or both.” To enforce the provisions of M.G.L. Ch. 138, § 34, both the Commission and the local licensing authorities commonly perform compliance checks on licensed establishments.

Courts have upheld compliance checks, or “stings” as constitutionally permissible. Fran’s Lunch v. Alcoholic Beverages Control Comm’n, 45 Mass. App. Ct. 663, 665 (1998). “It is generally recognized that absent entrapment or other abuses violative of fundamental fairness, government involvement in criminal activity for the purposes of investigating possible violations of law is permissible.” Id. Reliance on strict procedure retains the constitutionality of compliance checks. Donovan v. City of Woburn, 65 Mass. App. Ct. 375, 383-383 (2006). The legality of the use of a minor to conduct underage stings was decided in Fran’s Lunch, Inc. v. Alcoholic Beverages Control Commission, 454 Mass. App. Ct. 663 (1998). The Appeals Court 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.” Fran’s Lunch, 45 Mass. App. Ct. at 665.

Here, there is no dispute that the Licensee violated M.G.L. c. 138 § 34 by selling beer to a person who was not twenty-one years old.

True Flavors argues that they did not receive notice of upcoming compliance checks. Walpole has in effect a Directive on Alcohol Compliance Checks. According to said directive, “a notice of intent to conduct an underage compliance check or sting operation will be announced in the local media prior to the start date.” (Exhibit 2) Notice was published in a local newspaper. (Testimony) In addition, the Walpole Police Department obtained a list of all license holders in the town and in April of 2016 sent notice regarding their intent to conduct compliance checks in the near future. (Testimony)

The Licensee’s argument that they did not receive notice is based upon claims that they do not receive mail at their licensed premise and do not read the local newspaper. The Commission is not persuaded by this argument. Walpole complied with its directive by publishing notice of its intent to conduct compliance checks, and Walpole went one step further by sending individual notices to each license holder in the town. (Testimony, Exhibit 5)

The Commission finds that Walpole properly conducted the compliance check in conformity with the promulgated guidelines.¹

The Licensee further argues that the penalty is excessive given that this was their first violation. Therefore, the Commission must review whether the sanction imposed by the Local Board for this violation was reasonable. Walpole’s Administrative Penalties for Violation of Alcoholic Beverages Sales to Minors Policy sets forth guidelines to be used in determining penalties: 1st Violation, Warning up to a 2 day suspension. (Exhibit 9) The Local Board argues that it promulgated its own written progressive discipline policy and that the suspension it issued to the Licensee was consistent with that policy. The Commission heard testimony that since 2011, and possibly earlier, every licensee found in violation of M.G.L. Ch. 138, § 34 and 204 CMR 2.05(2) has received a 2 day suspension. (Testimony) In fact, other licensees who were found in violation during the same day of compliance checks were given 2 day suspensions. (Testimony and Exhibit 10)

The Commission is persuaded and finds that the penalty of a two (2) day suspension imposed by the Local Board in this matter was fair and rational, and consistent with the sanctions imposed on other licensees for committing the same violation of failing a compliance check.

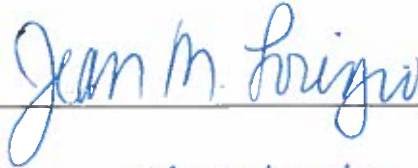
¹ True Flavors argues that Walpole’s Directive on Alcohol Compliance Checks is not in compliance with Commission Compliance Check Guidelines as claimed. The Commission notes that there is no statutory requirement that a local licensing authority adopt the Commission’s guidelines.

CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **APPROVES** the action of the Local Board.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman



Elizabeth A. Lashway, Commissioner



Dated: October 2, 2017

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: Bruce H. Lint, Esq. via facsimile 508-543-0214
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Frederick G. Mahony, Chief Investigator
Local Licensing Board
Administration, File