The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Deborah B. Goldberg
Treasurer and Receiver General

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Chairman

**EVVIVA CUCINA LLC**
**7 CORNERSTONE SQ**
**WESTFORD, MA 01886**
**LICENSE#: 144200056**
**HEARD: 09/23/2014**

This is an Appeal and a concordant Motion to Dismiss/Disapprove resulting from an action of the Town of Westford Board of Selectmen (the "Local Board" or "Westford") for suspending the M.G.L. c. 138 §12 all-alcohol license of Evviva Cucina, LLC (the "Licensee" or "Evviva") located at 7 Cornerstone Square, Westford, MA, for three (3) 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 Tuesday, September 23, 2014.

The Licensee requested the dismissal of the decision of the Local Board with its letter seeking an appeal of the decision of the Local Board. Counsel for the Local Board agreed that it was proper to treat the Licensee's position as a Motion to Dismiss/Disapprove. As such, the Commission will treat this as a Motion to Dismiss.

The following documents are in evidence as exhibits:

1. Attorney Devlin's Letter, dated July 29, 2014, with attached letter from the Town of Westford, dated July 24, 2014, and original Commission Decision. (6 pages)

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

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

FACTS

1. Evviva Cucina, LLC is the holder of a Common Victualler 7-Day All Alcoholic Beverage license, located at 7 Cornerstone Square, Westford. (Commission Records)
2. On March 12, 2014, an underage operative, working with Commission Investigators, purchased a can of Budweiser beer on the licensed premises in violation of M.G.L. c. 138, §34. (Commission Records, Exhibit 1)
3. The Licensee was provided with notice of a violation. (Commission Records, Exhibit 1)

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4. Thereafter, the Commission scheduled a hearing on the violation and sent notice to the Licensee of the hearing date. (Commission Records, Exhibit 1)

5. The Commission held a hearing on June 24, 2014. (Commission Records, Exhibit 1)

6. Prior to the commencement of the evidence, the Licensee stipulated to the violation. (Commission Records)

7. On June 25, 2014, the Commission suspended Evviva's alcoholic beverages license for three (3) days, of which three (3) days were held in abeyance for a period of two (2) years, provided that no further violations of Chapter 138 or Commission Regulations occur. (Commission Records)

8. The Commission, per its customary practice, copied the Local Board in its letter notifying the Licensee of its decision.

9. Thereafter, the Local Board decided sua sponte to take additional action **on the same violation** and scheduled a hearing for the Licensee to attend on July 22, 2014. (Exhibit 1, Commission Records)

10. On July 22, 2014, Local Board held a hearing regarding the March 12, 2014 violation about which the Commission had already heard evidence, and about which the Commission had previously issued a disposition and penalty. (Commission Records, Exhibit 1)

11. At the hearing, the Local Board simply reviewed the Commission Investigator's Report and the Commission's decision. (Exhibit 1, Commission Records)

12. Although, the Licensee appeared, and agreed that the violation occurred, the Local Board did not hear any new evidence of any other violations. (Exhibit 1, Commission Hearing)

13. Relying upon the March 12, 2014 Commission investigation and decision, the Local Board voted to suspend Evviva's license for three (3) days. (Exhibit 1, Commission Records)

14. On July 24, 2014, the Local Board issued a written decision suspending the license for three (3) days. (Exhibit 1, Commission Records)

## 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." [United Food Corp v. Alcoholic Beverages Control Commission, 375 Mass. 240 (1978).] 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. See, e.g. Devine v. Zoning Bd. of Appeal of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 295 (1972); Dolphino Corp. v. Alcoholic Beverages Control Com'n, 29 Mass. App. Ct. 954, 955 (1990) (rescript). 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 Corp. v. Alcoholic Beverages Control Commission, 29 Mass. App. Ct. 954, 955 (1990) (rescript).

Adjudicatory findings must be "adequate to enable [a court] to determine (a) whether the order and conclusions were warranted by appropriate subsidiary findings, and (b) whether such subsidiary findings were supported by substantial evidence." Charlesbank Rest. Inc., v. Alcoholic Beverages Control Comm'n, 12 Mass. App. Ct. 879 (1981) quoting Westborough. Dep't of Pub. Util., 358 Mass. 716, 717-718 (1971). "General findings are insufficient, and if the licensing board does not make sufficient findings, it remains the Commission's obligation to articulate the findings of fact, which were the basis of the conclusions it drew, and not merely adopt the findings of the board. Charlesbank Rest. Inc., 12 Mass. App. Ct. at 879. Recitals of testimony do not constitute findings. Johnson's Case, 355 Mass. 782 (1968)." Exotic Restaurants Concept, Inc. v. Boston Licensing Board, Suffolk Superior Court C.A. No. 07-3287 (Borenstein, J.)

The Commission is treating this matter as a Motion to Dismiss at the joint request of the parties. The Commission must decide whether a Licensee may be found in violation of the law and punished for it by the Commission, and then subsequently be found in violation of the same law based entirely on the same set of facts, and punished for it a second time by the Local Board. In essence, the question presented is whether a licensee can be punished twice for the same incident, i.e., first by the Commission, then by a Local Board, keeping in mind that, "[T]he purpose of discipline is not retribution but the protection of the public." Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 317 (1981).

'Res judicata' is the generic term for various doctrines by which a judgment in one action has a binding effect in another." Massachusetts Prop. Ins. Underwriting Ass'n v. Norrington, supra., Heacock v. Heacock, 402 Mass. 21, 23 n.2 (1988). It comprises "claim preclusion" (traditionally known as "merger" or "bar," and also referred to as true res judicata) and "issue preclusion" (traditionally known as "collateral estoppel"). Ibid. See Anderson v. Phoenix Inv. Counsel of Boston, Inc., 387 Mass. 444, 449 (1982); Blanchette v. School Comm. of Westwood, 427 Mass. 176, 179 n.3 (1998).

The judicial doctrine of collateral estoppel provides that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Martin v. Ring, 401 Mass. 59, 61(1987), quoting Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A., 395 Mass. 366, 372(1985). See Jarosz v. Palmer, 436 Mass. 526, 530-531 (2002). The common-law doctrine of collateral estoppel is designed to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Massachusetts Prop. Ins. Underwriting Ass'n v. Norrington, 395 Mass. 751, 756 (1985), quoting Allen v. McCurry, 449 U.S. 90, 94 (1980).

Historically, mutuality of the parties was required in order for collateral estoppel to apply, See Home Owners Fed. Sav. & Loan Ass'n v. Northwestern Fire & Marine Ins. Co., 354 Mass. 448, 451-452 (1968), a requirement now abandoned in civil cases. Id. at 455. The application of

nonmutual estoppel in civil cases promotes "judicial economy and conserve[s] private resources without unfairness to the litigant against whom estoppel [is] invoked," Standefer v. United States, 447 U.S. 10 (1980). The doctrine may be applied with respect to administrative agency determinations so long as the tribunal rendering judgment has the legal authority to adjudicate the dispute.[1] Id.

Before applying the doctrine, a court must answer affirmatively four questions: (1) was there a final judgment on the merits in the prior adjudication; (2) was the party against whom estoppel is asserted a party (or in privity with a party) to the prior adjudication; (3) was the issue decided in the prior adjudication identical with the one presented in the action in question; and (4) was the issue decided in the prior adjudication essential to the judgment in the prior adjudication? Martin v. Ring, supra at 61-62. See Green v. Brookline, 53 Mass. App. Ct. 120, 123 (2001), and cases cited. Here, there is no question that there was a final order on the merits by the Commission. The issue before the Commission and the Local Board were identical, i.e. did the licensee violate M.G.L. c. 138, §34. The findings made by the Commission and the Commission Investigator's report were the sole evidence produced at the Local Board hearing, and relied upon by the Local Board in issuing its decision. The remaining question is whether the Commission and the Local Board are parties in privity.

"The guiding principle in determining whether to allow defensive use of collateral estoppel is whether the party against whom it is asserted 'lacked full and fair opportunity to litigate the issue in the first action or [whether] other circumstances justify affording him an opportunity to relitigate the issue.'" 401 Mass. at 62, quoting Fidler v. E.M. Parker Co., 394 Mass. 534, 541(1985). "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979). A non-party to a prior adjudication can be bound by it "only where [the nonparty's] interest was represented by a party to the prior litigation." Mongeau v. Boutelle, 10 Mass. App. Ct. 246, 249-250 (1980).

The Supreme Judicial Court has recognized, "that it would be an unwarranted fiction to treat all the branches of State government as a single unit for all purposes. Our books are full of cases of litigation between governmental agencies. But governmental agencies, like other litigants, are subject to "the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity." The Trustees of the Stigmatine Fathers, Inc. v. Secretary of Administration and Finance, 369 Mass. 562 (1976) quoting, Home Owners Fed. Sav. & Loan Ass'n v. Northwestern Fire & Marine Ins. Co., 354 Mass. 448, 455 (1968) (further citations omitted).

Whether or not a government agency is subject to the principle of trying its case on the merits only one time depends on whether or not in the earlier litigation the representative of the Commonwealth had authority to represent its interests in a final adjudication of the issue in controversy. Stigmatine Fathers, Inc., supra. While the Town of Westford did not litigate at the earlier Commission proceeding, this does not bar the doctrine of collateral estoppel. In

[1]It is settled law that "[a] final order of an administrative agency in an adjudicatory proceeding . . . precludes relitigation of the same issues between the same parties, just as would a final judgment of a court of competent jurisdiction." Green v. Brookline, 53 Mass. App. Ct. 120, 123-124 (2001), quoting Tuper v. North Adams Ambulance Serv., Inc., 428 Mass. 132, 135 (1998)

Stigmatine Fathers, the Supreme Judicial Court held that while there was "no doubt that the Board was a proper party defendant in the plaintiff's first suit, and the Commonwealth was not an indispensable party...." and while "the Board could not by its own action foreclose the question of its authority to bind the Commonwealth...," the Supreme Judicial Court, nonetheless held that the Commonwealth was foreclosed from bringing an action as it was represented by the Attorney General. M.G.L. c. 12, §3, Stigmatine Fathers, Inc., supra. The Attorney General is empowered "to set a unified and consistent legal policy for the Commonwealth." Secretary of Administration & Finance v. Attorney General, 367 Mass. 154, 163 (1975).

It is a well settled "general principle of statutory interpretation that a body of laws enacted at one time is to be construed so as to constitute, so far as practicable, an harmonious entity." Platt v. Commonwealth, 256 Mass. 539, 542 (1926). The Commission has long held that M.G.L. c. 138 must be read, understood, and taken as a whole. The path that the Local Board has chosen is strewn with faulty logic and a failure to understand M.G.L. c. 138.

It is clear from the facts of this case that the Local Board believed that the penalty imposed by the Commission was too lenient. As a result, the Local Board imposed its own penalty. In doing so, the Local Board substituted its judgment for that of the Commission's, which it cannot do. The Commission is entrusted with the authority under M.G.L. c. 138, §67 to review the Local Board's decisions; not the other way around.

In Cleary v. Cardullo's, the SJC provided that, "The duty of statutory interpretation is for the courts. Nevertheless, particularly under an ambiguous statute . . . the details of legislative policy, not spelt out in the statute, may appropriately be determined, at least in the first instance, by an agency charged with administration of the statute." 347 Mass. 337, 344 (1964). The path advanced by the Local Board would require the Commission to hold that a licensee may be subject to discipline first by the Commission in agency initiated proceedings, then by the Local Board relying upon a Commission finding of responsibility; which would then be subject to appellate review by the Commission through a de novo hearing pursuant to Chapter 138, §67 (all based on an original action by the Commission).

The Commission is of the opinion that reading M.G.L. c. 138 harmoniously would preclude such a circular and absurd result. As such, the actions of the Local Board are improper. M.G.L. c. 138, §1 defines the "Licensing Authorities" as "the commission or the local licensing authorities, or both, as the case may be." To interpret Chapter 138 harmoniously, the Commission concludes that the Commission and the Local Board must be considered together in this context. When considered together, the Local Board's action to discipline the Licensee a second time for the same act, and its subsequent appeal to bring it before the Commission a second time triggers the doctrine of collateral estoppel. This interpretation of the law forces a licensee to face the same charges, on the same set of facts twice before the Commission. As a result of the Local Board's action, the Licensee has been required to defend against, and be penalized by, two separate actions arising out of the same incident, facts, circumstances, and events. (Exhibit 1, Commission Records)

Likewise, the Commission brought the original action against the Licensee and pursuant to M.G.L. c. 138, is in a position "to set a unified and consistent legal policy" regarding the discipline of a licensee, as the Legislature did not intend for two parallel proceedings arising out of the same facts and circumstances. The Commission opines that the Legislature did not

contemplate an interpretation of Chapter 138 which would permit a party to be forced to relitigate the same issues before the same administrative agency.

"The powers of the commission were not intended to be perfunctory or limited. The approval or disapproval of the action of local licensing authorities ... indicates that the commission was charged with important responsibilities and that it was not to be narrowly restricted in performing them." Connolly v. Alcoholic Beverages Control Comm., 334 Mass. 613, 617 (1956). As a result, the Commission maintains that the Local Board is collaterally estopped from bringing such an action.

## CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in finding that Evviva Cucina, LLC committed a violation of M.G.L. c. 138, §34. The Commission remands the matter to the Local Board with the recommendation that no modification, suspension, revocation, or cancellation of this license be ordered by the Local Board.

The Commission found it unnecessary to determine the reasonableness of the penalty imposed by the Local Board since our disapproval would render any sanction by the Local Board discrepant with our decision.

**ALCOHOLIC BEVERAGES CONTROL COMMISSION**

Kathleen McNally, Commissioner Kathleen McNally

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

Kim Gainsboro, Chairman

Susan Corcoran, Commissioner Susan Corcoran

Dated: January 23, 2015

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: Joseph H. Devlin, Esq. via facsimile 781-592-4990
Brian Riley, Esq., via facsimile 617-654-1735
Frederick G. Mahony, Chief Investigator
Local Board
File, Administration