



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

Steven Grossman
Treasurer and Receiver General

Kim J. Gainsboro, Esq.
Chairman

DECISION

MALVIS ENTERPRISES, INC. DBA WESTFORD WINE & SPIRITS
9 CORNERSTONE SQUARE
WESTFORD, MA 01886
LICENSE#: 144200020
HEARD: 05/28/2013

Malvis Enterprises, Inc. dba Westford Wine & Spirits (the "Applicant" or "Malvis") applied for the transfer of ownership of an all alcoholic beverages license pursuant to M.G.L. c. 138, §15 to be exercised at 9 Cornerstone Square, Westford, Massachusetts.¹ The Alcoholic Beverages Control Commission (the "Commission") held an informational hearing on Tuesday, May 28, 2013, to determine whether the application under Massachusetts General Laws Chapter 138 should be approved or disapproved.

The following documents are in evidence:

1. Malvis Enterprises Inc. application for transfer of license; and
2. Five photographs of alcoholic beverages inside the proposed premises.

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

The Commission took administrative notice of the Applicant's application; the Credit Delinquency List as of May 24, 2013 for Liquid Luck, LLC; the Credit Delinquency List as of May 24, 2013 for Malvis Enterprises Inc.; the Commission records for Westford LC, LLC; and the Commission records for Malvis Enterprises Inc.

FACTS

1. On November 5, 2012, Malvis submitted to the Local Licensing Authority ("LLA"), a transfer application for an M.G.L. c. 138, §15 license. (Ex. 1)
2. The corporate officers and stockholders of Malvis are Visoth Nvon and Malavy King. (Ex. 1)
3. Malvis proposed that the Commission approve Khemara Kang as the license manager. The LLA had already approved Mr. Kang as the license manager. (Ex. 1)

¹ Commission records show that the last-approved holder of this license is Parents, Inc. ("Parents"). Westford LC, LLC ("Westford LC") filed an application to transfer the ownership and location of the Parents' license to Westford LC. This application by Westford LC has yet to be approved by the Commission. Malvis applied for the transfer of ownership and change of location from Westford LC. This application by Malvis is dependent upon the application by Westford LC being approved by the Commission.

4. Mr. Kang completed the manager application, which he signed on November 1, 2012. (Ex. 1)
5. Mr. Kang graduated from Suffolk University in 2007, and worked in the financial services industry for State Street Bank in Boston from 2007-2009. (Ex. 1, Testimony)
6. Thereafter, Mr. Kang worked at Crossroads Liquors in Burlington from 2009-2011. (Ex. 1)
7. Subsequently, Mr. Kang became the owner and sole member of Liquid Luck, LLC dba Crossroads Beer and Wine ("Liquid Luck"). That premises was located at 34 Cambridge St., Burlington, MA and held an all alcoholic beverages license pursuant to M.G.L. c. 138, §15. (Liquid Luck Commission Records, Testimony)
8. Liquid Luck held an alcoholic beverages license from 2011-2012. (Ex. 1)
9. Applications for renewal of retail alcoholic beverages licenses must be filed "during the month of November" pursuant to M.G.L. c. 138, § 16A. If a licensee chooses not to renew its license, by signing and submitting a one page renewal form, it expires by operation of law on December 31, 2012 pursuant to M.G.L. c. 138, § 23.
10. Mr. Kang, the only individual with signatory authority for Liquid Luck chose not to renew its license for 2013. Consequently, as of midnight December 31, 2012, Liquid Luck was no longer in business. (Ex. 1, Liquid Luck Commission Records, Testimony)
11. Yet, shortly before going out of business, Liquid Luck ordered substantial quantities of alcohol from several licensed wholesalers.
12. Those wholesalers and delivery dates include:
 - a. A.A. Busch & Co.: 6 deliveries on 11/21/12, 11/27/12, 11/29/12, 12/11/12, 12/18/12, and 12/29/12;
 - b. Atlantic Importing: 1 delivery on 12/21/2012;
 - c. Burke Distributing: 9 deliveries on 11/30/2012, 12/04/2012, 12/05/2012, 12/07/2012, 12/11/2012, 12/13/2012, 12/19/2012, 12/21/2012, and 12/28/2012;
 - d. Carolina Wine Co.: 7 deliveries on 11/27/12, 11/30/12, 12/06/12, 12/12/12, 12/13/12, 12/18/12, and 12/20/12;
 - e. Classic Wine Imports: 4 deliveries on 11/27/12, 11/30/12, 12/12/12, and 12/18/12;
 - f. Coastal Beverage: 2 deliveries on 12/7/12 and 12/27/12;
 - g. Commonwealth Wine: 5 deliveries on 11/27/12, 11/30/12, 12/06/12, 12/12/12, and 12/18/12;
 - h. Craft Brewers: 6 deliveries on 11/29/12, 12/5/12, 12/12/12, 12/14/12, 12/20/12, and 12/27/12;
 - i. M.S. Walker: 1 delivery on 11/27/12;
 - j. Ruby Wines: 1 delivery on 11/29/12;
 - k. United Liquors: 6 deliveries on 11/27/12, 12/06/12, 12/12/12, 12/18/12, 12/20/12, and 12/27/12;
 - l. Winebow: 5 deliveries on 11/29/12, 12/05/12, 12/19/12, 12/20/12, and 12/21/12. (Credit Delinquency List as of May 24, 2013)

13. As a result of these purchase orders, Liquid Luck has been posted on the credit delinquency list for 120 days as of May 24, 2013 for these 53 deliveries that all remain unpaid. (Credit Delinquency List as of May 24, 2013)
14. Liquid Luck received most of these deliveries (38 of 53 deliveries) in the 4 weeks after Mr. Kang chose not to renew his alcoholic beverages license for 2013. (Credit Delinquency List as of May 24, 2014, Liquid Luck Commission records, Testimony).
15. Liquid Luck received all 53 deliveries (that were reported as unpaid) in the last 40 days that the Liquid Luck license existed.
16. During the summer and into the fall of 2012, Mr. Kang and Mr. Nvon were in conversations with Westford to purchase its license. Indeed, in September of 2012, Malvis Enterprises, Inc. dba Westford Wine & Spirits entered into a lease agreement with Westford LC, LLC ("Westford LC") for premises at 9 Cornerstone Square, Westford, MA. (Ex. 1, Testimony)
17. As a result of the application filed by Malvis on November 5, 2012, the Local Board granted the transfer of Westford LC's license to Malvis on November 27, 2012. (Ex. 1)
18. On Thursday, February 21, 2013, at approximately 12:35 p.m., Investigators Teehan and Carey investigated the proposed licensed premises of Malvis in Westford, MA in response to a complaint filed with this Commission. (Malvis Enterprises Burlington Commission Records, Testimony)
19. The premises were unlicensed at this time, and remain unlicensed as of the date of this decision. (Malvis Enterprises Burlington Commission Records, Testimony)
20. The store was not open for business but the store was already substantially stocked with wine and malt beverages. (Ex. 2, Malvis Enterprises Burlington Commission Records, Testimony)
21. Investigators entered these unlicensed premises and identified themselves to Visoth Nvon. Mr. Nvon stated that he and his sister, Malavy Kang, were the owners. (Malvis Enterprises Burlington Commission Records, Testimony)
22. Mr. Nvon stated that the alcoholic beverages came from Liquid Luck, Mr. Kang's defunct business. (Malvis Enterprises Burlington Commission Records, Testimony)
23. The alcoholic beverages are worth approximately \$160,000.00 to \$180,000.00. (Testimony)
24. Mr. Kang did not apply for or receive a license to liquidate Liquid Luck's alcoholic beverages inventory pursuant to M.G.L. c. 138, §22A, as required by chapter 138. (Malvis Enterprises Burlington Commission Records, Testimony)
25. Mr. Nvon stated that he had rented a U-Haul trailer and transported all the alcohol from Liquid Luck to the proposed store in Westford. (Malvis Enterprises Burlington Commission Records, Testimony)
26. Mr. Nvon stated that neither he nor his nephew Mr. Kang had a transportation permit for the vehicle or trailer. (Testimony)
27. Malvis is also on the Credit Delinquency List. (Credit Delinquency List as of May 24, 2013)

28. Malvis Burlington is subject to other proceedings before this Commission for its participation in these illegalities. Malvis was charged with 4 violations.²

DISCUSSION

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Connolly v. Alcoholic Beverages Control Comm'n, 334 Mass. 613, 619 (1956), Opinion of the Justices, 368 Mass. 857, 861 (1975). The procedure for the issuance of licenses to sell alcoholic beverages is set out in G.L. c. 138. Licenses must be approved by both local licensing authorities and the ABCC. G.L. c. 138, §§12, 67. See Beacon Hill Civic Assn. v. Ristorante Toscano, Inc., 422 Mass. 318, 321 (1996).

G.L. c. 138, §23 provides, in pertinent part: "Any license under this chapter held by an individual, partnership, or corporation may be transferred to any individual, partnership or corporation qualified to receive such a license in the first instance, if, in the opinion of the licensing authorities, such transfer is in the public interest." In reviewing the authority of the Commission, the Supreme Judicial Court has held that [t]he powers of the States in dealing with the regulation of the sale of intoxicating liquors are very broad. What they may wholly prohibit, they may permit only on terms and conditions prescribed by the Legislature. Supreme Malt Products Co., Inc., v. Alcoholic Beverages Control Commission, 334 Mass. ---; Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138-139; Carter v. Virginia, 321 U.S. 131, 137-143. In dealing with a trade, which, because of its great potential evils, can be wholly prohibited, a wide power is given to the Legislature with respect to the delegation of discretionary powers. Particularly in view of the extent to which the policy of c. 138, and the basis for action under it, have been specified, as already indicated, there is no invalid delegation of authority to the commission in leaving to it, as was done in §[15], the power to approve or disapprove applicants for licenses. See Butler v. East Bridgewater, 330 Mass. 33, 36-37. Connolly v. Alcoholic Beverages Control Commission, 334 Mass. 613, 619 (1956).

The SJC further held that "[t]he legislative history of [the Commission's enabling act], and of G.L. C. 138, as amended, clearly shows that the powers of the commission were not intended to be perfunctory or limited. In the very respect here in issue, the approval or disapproval of the action of local licensing authorities, that history [footnote omitted] indicates that the commission was charged with important responsibilities and that it was not to be narrowly restricted in performing them." Id. at 617.

The Appeals Court has discussed the statutory standard to grant a license and the factors that a licensing authority may properly consider in its decision whether to grant or deny a license application. In Ballarin Inc., v. Licensing Board of Boston, 49 Mass. App. Ct. 506 (2000), the Appeals Court held that

The statute authorizing the issuance of liquor licenses speaks in terms of serving "the public need and in such a manner as to protect the common good and, to that end, to provide, in the opinion of the licensing authorities, an adequate number of places at which

² M.G.L. c. 138 §2-Storage of Alcoholic Beverages without Authorization Pursuant to this Chapter; M.G.L. c. 138 §2-Exposing for Sale Alcoholic Beverages without Authorization Pursuant to this Chapter; M.G.L. c. 138 §2-Transportation of Alcoholic Beverages without Authorization Pursuant to this Chapter; and M.G.L. c. 138 §23 Purchasing of Alcoholic Beverages from a Source other than that Authorized Pursuant to this Chapter; A Licensee under §18 or 19, or from a Holder of a Special Permit under §22A. These violations are addressed in a separate decision to be issued by the Commission.

the public may obtain, in the manner and for the kind of use indicated, the different sorts of beverages for the sale of which provision is made.”

In making its discretionary determination, a licensing authority may take into account a wide range of factors -- such as traffic, noise, size, the sort of operation that carries the license, and **the reputation of the applicant**. [Emphasis supplied]. See Connolly, supra at 617-618; Great Atlantic & Pac. Tea Co. v. Board of License Commrs. of Springfield, 387 Mass. 833, 837 (1983); Beacon Hill Civic Assn. v. Ristorante Toscano, Inc., 422 Mass. at 322 n. 4; Hub Nautical Supply Co. v. Alcoholic Bevs. Control Commn., 11 Mass. App. Ct. 770, 772-774 (1981). Ballarin, supra.

Malvis applied for Mr. Kang to be the license manager of record pursuant to G.L. c. 138, §26, which states in pertinent part that a license manager must be “... **with respect to his character, satisfactory to the licensing authorities.**” (Emphasis supplied) The obligation established by §26 is the necessity of appointing a manager whose character is satisfactory to both the authority granting the license and also to the authority approving the license, and vesting in the manager full authority and control of the licensed premises, including the sale of alcoholic beverages. See Gottlin v. Herzig & others, 40 Mass. App. Ct. 163, 167 (1996). The evident purpose of this provision is to assure the licensing authority that each licensee will be managed by a responsible person satisfactory to the licensing authorities, and that the licensing authorities, in executing its responsibilities under c. 138, will have available at all times a person whose responsibility for the conduct of the licensed business will be beyond challenge by any corporate licensee. Id., See New Palm Gardens, Inc. v. Alcoholic Beverages Control Commn., 11 Mass. App. Ct. 785, 788 (1981) (the statutory scheme of c. 138 is designed to give the commission authority necessary to serve the public need and to protect the common good, and the purpose of its powers, including the authority to revoke and suspend licenses, is “not retribution but the protection of the public”).

Although Mr. Kang is a prior alcoholic beverages licensee and license manager, and has worked in the industry since 2009, in testimony before the Commission he admitted that he is not familiar with G.L. c. 138, the “Liquor Control Act.” This is the statutory scheme which constitutes the framework under which he was operating Liquid Luck. He did nothing to educate himself and ensure compliance with the laws surrounding his business. This ignorance of a licensee’s compliance obligations raises substantial questions of his qualifications to be a license manager under M.G.L. c. 138, §26. See BAA Massachusetts, Inc. v. Alcoholic Beverages Control Comm’n, 49 Mass. App. Ct. 839 (2000).

However, this ignorance is only the tip of the iceberg regarding Mr. Kang’s issues. Mr. Kang, along with his uncle and mother, entered into contract negotiations with Westford LC to purchase its package store license, some time prior to September 19, 2012, the date the lease agreement was executed between the parties. The application, which included the corporate vote to appoint Mr. Kang as license manager was filed with the Local Board on November 5, 2012. The manager’s application signed by Mr. Kang is dated November 1, 2012. The Local Board granted the application on November 25, 2012.

The length of the term of a license, like Liquid Luck’s \$15 annual license, is set by G.L. c. 138, §23. Renewal of an annual license is also controlled by statute. Id. “Licenses issued under section ... fifteen shall be automatically renewed for the next annual license period upon application by the holder thereof during the month of November ... provided that said license is of the same type as the expiring license and covers the same licensed premises.” G.L. c. 138, §16A. Given that Mr. Kang signed Malvis’ manager license application November 1, 2012, and listed his prior experience as the owner of Liquid Luck 2011-2012, it is clear that as of November 1, 2012, at the very latest, Mr. Kang chose not to renew Liquid Luck’s license for 2013. However, he continued to purchase and receive deliveries of alcoholic beverages from licensed wholesalers until December 27, 2012.

In the normal course, alcoholic beverages are purchased on credit. Retail establishments have sixty days to pay for the product. G.L. c. 138, §25. If the retailer does not pay for the alcoholic beverages, they are posted on the credit delinquency list between the sixty-first and sixty-third day of monies owed. *Id.* The credit period is calculated from the date of the delivery of the alcoholic beverages. *Id.*

As of May 24, 2013, Liquid Luck had been posted on the credit delinquency list for 120 days, and remained on the credit delinquency list on the date of the hearing. Essentially, all of the orders Mr. Kang placed as the license manager and sole member of Liquid Luck, after the Local Board approved the transfer to Malvis, were made under duplicitous circumstances. Mr. Kang ordered the alcoholic beverages with the knowledge that he was going to let his license lapse, and that the payments for the 53 alcoholic beverages deliveries were not due until after he was out of business.

Compounding these concerning behaviors are his actions after he closed Liquid Luck. Thereafter, Mr. Kang in concert with Mr. Nvon acting on behalf of Malvis, took these alcoholic beverages, that had not been paid for, and illegally transported them to the unlicensed premises of Malvis in Westford. G.L. c. 138, §2 provides, in pertinent part: “No person shall ... sell ... expose or keep for sale, store, [or] transport alcoholic beverages or alcohol, except as authorized by this chapter [...] ... Violation of any provision of this section shall be punished except as provided in section twenty-two [for unlawful transportation of alcoholic beverages] by a fine of not less than one hundred nor more than one thousand dollars or by imprisonment for not more than one year, or both.” Malvis may not sell any alcoholic beverages except those directly purchased from an authorized source of supply. M.G.L. c. 138, §23, ¶ 3 (“[n]o license issued under section ... fifteen ... shall authorize the sale of any alcoholic beverages other than those purchased from a licensee under section eighteen, nineteen or 19F or nineteen C or from a holder of a special permit to sell issued under section twenty-two A.”) A defunct business that does not hold any license or permit issued pursuant to chapter 138 of the General Laws, be it one that is about to close or one that has already closed like Mr. Kang’s Liquid Luck, is not an authorized source of supply to a §15 licensee, like Malvis. M.G.L. c. 138, §23. Malvis had, and even today has, no legal authority to possess on its unlicensed premises in Westford any alcoholic beverages. M.G.L. c. 138, § 2. Malvis continues to have no legal authority to expose or keep for sale on its unlicensed premises in Westford any alcoholic beverages. M.G.L. c. 138, §2.

In addition, the application filed by Malvis lists \$150,000 as the initial start-up costs to acquire inventory. Clearly this does not include the alcoholic beverages, which were valued by Mr. Kang between \$160,000-\$180,000. Mr. Nvon signed the application under the pains and penalties of perjury. These alcoholic beverages that were unlawfully obtained by Malvis from Mr. Kang’s defunct business Liquid Luck are not listed or detailed in any portion of this application. Commission regulations provide, in pertinent part, that “any false statement contained in any application shall be a cause or ground for refusing to grant the license or permit or for suspending, cancelling or revoking a license or permit already granted.” 204 C.M.R. 2.01(8).

The Commission is very concerned whether this Applicant will conduct lawful operations if this license is approved. These concerns are exacerbated by Malvis’ involvement with Mr. Kang, and Malvis’ expressed desire to retain the services of Mr. Kang in Malvis’ operation if this license is approved. The Commission’s concerns are increased by Malvis’ choice to request that Mr. Kang be approved to hold the unique role of authority that comes with being the license manager pursuant to M.G.L. c. 138, §26. The Commission finds that Mr. Kang is an individual, who illegally sold, transported, and stored alcoholic beverages at this Westford location, prior to it being licensed. The totality of these facts, information and circumstances present for the Commission a close case as to whether this application by Malvis should even be disapproved.

CONCLUSION


Only after strict compliance with, and subject to strict compliance with, the following conditions, will the Commission consider at a future date approving this application. These conditions are:

1. Malvis will not directly or indirectly enter into any type of partnership agreement, management contracts or agreements, franchise agreement or purchase agreements with Mr. Kang for any activity arising out of the licensed business;
2. Khemara Kang shall not be allowed in the licensed premises at any time, for any reason;
3. Malvis shall within 48 hours of receipt of this decision, provide the Commission with an inventory of the alcoholic beverages which are the subject of this decision;
4. Malvis and/or Mr. Kang shall within 7 days from the date Malvis receives this decision furnish the Commission with a copy of the invoice for each of the 53 deliveries identified above in paragraph 12;
5. Malvis shall within 48 hours of receipt of this decision, apply for a transportation permit;
6. Once the transportation permit is approved by the Commission, Malvis shall transport the alcoholic beverages at issue to a duly licensed public warehouse licensed to store alcoholic beverages pursuant to M.G.L. c. 138, §20A; Malvis shall bear all costs of storage at this public warehouse;
7. Thereafter, Malvis and/or Mr. Kang shall within 60 days from the receipt of this decision by Malvis to take all steps necessary to have Liquid Luck removed from the credit delinquency list by fully discharging the indebtedness, including all accrued interest charges that are due pursuant to the invoice that accompanied the alcoholic beverages at the time they were delivered;
8. Malvis shall also within 60 days from the receipt of this decision by Malvis take all steps necessary to have Malvis removed from the credit delinquency list by fully discharging the indebtedness, including all accrued interest charges that are due pursuant to the invoice that accompanied the alcoholic beverages at the time they were delivered;
9. Once Liquid Luck has been removed from the credit delinquency list, Mr. Kang shall either apply for a permit to have the alcoholic beverages destroyed at his and/or Malvis' expense or apply for a special permit pursuant to M.G.L. c. 138, §22A to sell the alcoholic beverages identified in paragraph 15 above to any existing licensee in Massachusetts;
10. Once the § 22A special permit is approved and issued by the Commission, Mr. Kang shall sell the inventory to an existing licensee in Massachusetts and provide the Commission with proof of sale as well as the purchase orders evidencing that the inventory matches the sales.

Once the conditions numbered 1 through 9 above are satisfied, the Commission will consider advancing the application for consideration of approval. Any Commission approval that issues in the usual administrative process will be subject to the 2 conditions numbered 1 and 2 above as well as condition number 10 above. The document issued by the Local Licensing Authorities shall bear on the face of the document for every year the license is issued the language of the second condition, viz., "Khemara Kang shall not be allowed in the licensed premises at any time, for any reason."

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman _____



Kathleen McNally, Commissioner _____



DATE: June 12, 2013

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: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Jack Carey, Investigator
Ed Hintlian, Esq. via Facsimile 781-587-1713
Administration
✓ File