



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

J. Duarte Limited Company dba Overtime Sports Pub
549 American Legion Highway
Westport, MA 02790
Heard: May 31, 2011

This was an informational hearing before the Alcoholic Beverages Control Commission (the "Commission") to determine whether to approve or disapprove the application of J. Duarte Limited Company dba Overtime Sports Pub for an annual, all alcoholic beverages restaurant license under M.G.L. c. 138, § 12 to be located at 549 American Legion Highway, Westport, MA. Based on the information presented at the hearing, the Commission finds the following facts and

FACTS

1. On December 13, 2010, J. Duarte Limited Company was organized in Massachusetts as a limited liability company for the authorized purpose of engaging in the ownership and management of a restaurant. DUARTE'S principal office is located at 549 American Legion Highway, Westport, MA.
2. An application by DUARTE for a new § 12 license was signed and filed with the local licensing authority on December 28, 2010.
3. At the time DUARTE was organized and had signed and filed an application for a new, annual, all alcoholic beverages restaurant license, a license was already in existence at 549 American Legion Highway, Westport, MA and available for transfer.
4. This existing license was held by LSM ENTERPRISES, LLC ("LSM").
5. By Commission decision dated October 28, 2010, LSM's license was indefinitely suspended after finding that LSM transferred its license to an undisclosed and unapproved entity, NUNES-BENN CORPORATION ("NUNES-BENN"), in violation of Massachusetts General Laws c. 138, §23 and had illegally transferred an interest in LSM's license to NUNES-BENN in violation of Massachusetts General Laws c. 138 §15A. The findings of these violations were based, in part, on an illegal, written management agreement between LSM and NUNES-BENN. Mindi Bennivedse signed the illegal, written management agreement on behalf NUNES-BENN.
6. Mindi Bennivedse is documented as a stockholder, director and officer of NUNES-BENN. It appears from the public records of the Bristol Superior Court that in August

2004 Mindi Bennivedse was convicted under the name of Mindi Cadieux of a violation of a state drug law, a conviction that statutorily disqualifies her from being issued a license under section 12 of chapter 138 of the General Laws¹.

7. LSM chose not to renew its license for calendar year 2011 and the LSM license expired by operation of law on December 31, 2010.
8. The Local Board granted DUARTE'S application for a new license and forwarded it to the Commission for its approval as required by statute.
9. The Commission received the application on or about February 8, 2011 and this application was assigned for investigation. The investigation identified many pertinent facts.
10. DUARTE proposed to purchase equipment for the licensed business from NUNES-BENN and have NUNES-BENN finance the acquisition. The equipment to be bought by DUARTE from NUNES-BENN is the same equipment NUNES-BENN owned and used in its illegal operation of the license of LSM.
11. On May 3, 2011, Jane Duarte, a principal of DUARTE, stated to the investigator that Ms. Bennivedse approached her and asked to be hired. DUARTE proposes to employ Ms. Bennivedse to conduct the licensed business of DUARTE.
12. Ms Duarte admitted in an interview with the investigator that Ms Duarte was employed for a time in the past at the prior business, the licensed business of LSM that was illegally operated by NUNES-BENN. This statement of employment by Ms. Duarte is not consistent with her application signed under the pains and penalties of perjury.
13. In a "Manager Application" signed by Ms. Duarte on December 28, 2010, she stated under oath that she has been "unemployed" from December 2009 to the Present.
14. On May 11, 2011 a Commission investigator filed a written report dated May 11, 2011 and recommended a hearing to determine whether the Commission should approve the application of DUARTE.
15. A hearing was held on May 31, 2011.
16. Subsequent to the hearing, DUARTE amended its application regarding the purchase of equipment. No longer would DUARTE be buying from NUNES-BENN and have NUNES-BENN finance the deal. Now, NUNES-BENN would sell the equipment to a retired State Trooper for \$18,000.00 cash and the retired State Trooper would sell the equipment to DUARTE for \$20,000.00, payable with a promissory note requiring monthly payments at 7% per year.

¹ Public records reveal that Mindi Cadieux was arraigned in the Bristol Superior Court on February 12, 2002 on a 3-count indictment: 1) MGL c. 94C, § 32E(b)(2), Traffic in controlled substances, 28099g; 2) MGL c. 94C, § 32J, controlled substance, school property; and, 3) MGL c. 94C, § 40, Controlled substance, conspiracy. On August 17, 2004, this individual pled guilty to a lesser offense of MGL c. 94C, § 32A(a), unlawful possession of cl B with intent to distribute, and pled guilty to the conspiracy charge. The charge of controlled substance, school property was "nolle pros'd." Upon conviction after the plea of guilty, the individual was sentenced to probation that terminated in 2007.

17. Subsequent to the hearing, DUARTE agreed to the modification of the license, if approved by the Commission, by the imposition of a condition on the license that "J. Duarte Limited Company will not enter into any type of partnership agreement, management contracts or agreements, franchise agreement or purchase agreements with Nunes-Benn Corp."

ISSUE

Whether the Commission will approve the application of DUARTE?

DISCUSSION

General Laws chapter 138, section 12 provides, in pertinent part, that an applicant like DUARTE "may be licensed by the local licensing authorities, subject to the prior approval of the commission. "It was essential to the validity of ... a license that it be approved by the commission." Coyne v. Alcoholic Beverages Control Com'n, 312 Mass. 224, 227, 44 N.E.2d 692, 694 (1942). The Supreme Judicial Court long ago established that "[t]he legislative history of ... G.L.(Ter.Ed.) 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." Connolly v. Alcoholic Beverages Control Commission, 334 Mass. 613, 618 (1956).

The Supreme Judicial Court has held further that "[i]t is clear, however, that the results of the exercise by the local licensing authorities of their discretion as to the number of licenses to be granted may be changed by the action of the commission in disapproving the granting of licenses by the local licensing authorities. Town of Webster v. Alcoholic Beverages Control Com'n, 295 Mass. 572, 575 (1936).

In Ballarin, Inc. v. Licensing Board Of Boston, 49 Mass. App. Ct. 506 (2000), the Appeals Court reviewed the factors that may properly be considered by a licensing authority in determining the "public need." These factors include "the appropriateness of a liquor license at a particular location," "the sort of operation that carries the license" and "the reputation of the applicant."

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).

In this case, the Commission is very concerned whether this applicant DUARTE will conduct lawful operations if this license is approved. These concerns are exacerbated by DUARTE'S involvement with, and expressed desire to retain in DUARTE'S operation of this license if approved, an individual who is statutorily disqualified from being issued a license, who illegally operated the prior license at this location, who proposed to sell equipment to DUARTE that was owned and used by the illegal operator of the prior license and who participated in a deal that indirectly sold that equipment to DUARTE. The totality of these facts, information and circumstances present for the Commission a close case as to whether this application should be disapproved.

The Commission finds DUARTE'S agreeing to the imposition of the condition specified above is a mitigating factor that cuts against the judgment to disapprove the application. Yet, that one (1) condition is not sufficient to persuade the Commission that DUARTE'S application should be approved.

CONCLUSION

Therefore, subject to strict compliance with two conditions: 1) J. Duarte Limited Company will not directly or indirectly enter into any type of partnership agreement, management contracts or agreements, franchise agreement or purchase agreements with Nunes-Benn Corp. or any individual who is or has been a shareholder, director or officer of Nunes-Benn Corp. for any activity arising out of the licensed business; and, 2) Mindi Bennivedse a/k/a Mindi Cadieux shall not be employed by the Licensee for the licensed business, the Commission will advance the application for consideration of approval, as modified by the 2 conditions, in the usual administrative process.

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., "Mindi Bennivedse a/k/a Mindi Cadieux shall not be employed by the Licensee for the licensed business."

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman

Susan Corcoran, Commissioner

Robert H. Cronin, Commissioner

Dated: July 20, 2011

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: Glenn E. Mauk, Esq.
Frederick G. Mahony, Chief Investigator
Local Licensing Board
File