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CJ Restaurant Enterprises, LLC  
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### **DECISION**

This is an appeal of the action of the Northborough Licensing Board ("the Board") for denying the transfer of an all alcohol license issued under M.G.L. c. 138, §12 to CJ Restaurant Enterprises, LLC, ("the Applicant"). The Board voted to deny the application at a public hearing that convened on March 8, 2010.

CJ Restaurant Enterprises appealed the Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on June 2, 2010.

The following exhibits are in evidence:

Application packet with supporting documentation.  
Letter from John Coderre, Town Administrator dated March 1, 2010.  
Letter from Bowditch & Dewey, LLP dated March 8, 2010.  
Board of Selectmen Meeting Minutes for March 8, 2010.  
Letter from Det. Sgt. Brian Griffin dated March 2, 2010  
CD & Transcript of recorded interview of Kenneth Koury on February 26, 2010.  
Board of Selectmen Notice of Decision concerning March 8, 2010 hearing.  
Letter from Bowditch & Dewey, LLP dated March 16, 2010.  
Letter from John Coderre dated March 23, 2010.  
Statement of Kenneth Koury to Det. Sgt. Griffin dated February 26, 2010.  
Commercial Lease dated March 14, 2006.  
Unlimited Guaranty with Loan Agreement & Promissory Notice  
Forbearance and Loan Modification Agreement dated September 30, 2009.  
Transfer Agreement dated October 7, 2009.  
Assignment and Assumption of Lease dated December 29, 2009.  
Newspaper Article.  
Letter from Attorney John L. Sousa dated May 17, 2010.

### **FACTS**

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

On March 8, 2010, the Board held a meeting to consider transferring the all alcohol beverages license held by KLRR Foods, Inc. (“KLRR”) to the Applicant for the restaurant located at 45 Belmont Street and known as the Celtic Tavern.

Christopher Muello, the sole member of the Applicant, testified during the meeting regarding the application.

The Board also received testimony from a member of the Northborough Police Department, as well as documentary evidence regarding Mr. Muello’s criminal history.

One of the exhibits that the board considered was Mr. Muello’s CORI. The CORI contains three entries, one from 1991, one from 1993, and another from 2008. The only conviction is from 1991, it does not involve narcotics.

The Northborough Police Department also provided a written summary of Mr. Muello’s alleged crimes, which included information that was not contained in the official CORI.

Both the Northborough Police Chief and Detective Sergeant recommended that the transfer of the alcohol license not be approved.

In open session, a March 2, 2010 report from the Northborough Police Department was also presented to the Northborough Licensing Board. The report details the investigation into whether Ken Koury of KLRR, who is designated by KLRR, the current license holder, as the manager of the Celtic Tavern, has been managing the licensed premises. The report reveals that Mr. Muello told Mr. Koury that Mr. Muello had hired Niche Hospitality to manage the restaurant in October of 2009, and that Mr. Koury had not participated in the day-to-day operations of the Celtic Tavern since that time. Mr. Koury also confirmed that he had not been completely truthful with the Board when he and Mr. Muello met the with Licensing Board on October 19, 2009 to address the status of the business in connection with a request for a change to the name of the restaurant.

The Board considered a written agreement, which submitted in connection with the application for transfer of the alcohol license, and signed by Mr. Muello and Mr. Koury on December 29, 2009. The agreement required Mr. Muello to not operate the licensed business during the pendency of the application for transfer. It also provided the parties with notice that “operation without a license can be considered evidence of that applicant’s unfitness for a license.” Notwithstanding this agreement, Mr. Muello acknowledged during his testimony to the Board that Mr. Koury had not participated in the day-to-day operations of the Celtic Tavern since October of 2009. Mr. Muello disputed that Mr. Koury was forced out of the business as Mr. Koury claims in the report from the Northborough Police Department. Legal counsel to CJ Restaurant Enterprises acknowledged that the change of manager was not done properly.

Mr. Koury also informed the Northborough Police Department that Mr. Muello owns a trucking company and he has no experience in the restaurant business. In the course of his testimony to the Board, Mr. Muello

acknowledged this fact. Mr. Muello also testified that he would be providing assistance and guidance to Niche Hospitality in the running of the Celtic Tavern, as outlined in the revised Business Plan that he submitted to the Board.

After the hearing, the Board voted three (3) to zero (0), with one (1) abstention, as follows:

Based on Christopher Muello's background check, including information that is confidential and was therefore reviewed in executive session with the applicant, including a report from the Police Department, and the evidence of Mr. Muello's participation in a change of management at the Celtic Tavern for a period of approximately four months, with no notice to the Town and no application for approval of a change in manager, the Board found the Mr. Muello does not have the sufficient good character to hold an alcohol license, or an interest in an alcohol license, as required by section 12 of Chapter 138 of the General Laws;

Based on Christopher Muello's background check, including information that is confidential and was therefore reviewed in executive session with the applicant, including a report from the Police Department, and the evidence of Mr. Muello's participation in a change of management at the Celtic Tavern for a period of approximately four months, with no notice to the Town and no application for approval of a change in manager, the Board found that Mr. Muello is not a person of good character, as required by section 26 of Chapter 138 of the General Laws, so as to be eligible and proper to participate in the management of premises licensed for service of alcohol, as proposed in the business plan included with the transfer application;

Based on the findings made regarding Christopher Muello, and the fact that Mr. Muello is the sole member of CJ Restaurant Enterprises, LLC, which is proposed to hold the license for the Celtic Tavern, as set forth in the transfer application, the Board found that the transfer of the alcohol license for the Celtic Tavern would not, as a whole, serve the public need in such a manner as to protect the common good; and

Based on all the findings the Board made on the application to transfer the alcohol license of the Celtic Tavern from KLRR Foods, Inc. to the Applicant, the Board voted to deny the transfer application.

## **DISCUSSION**

As Mr. Muello's underlying transaction concerned the transfer of an existing alcoholic beverages license to his corporation from KLLR Foods, Inc, the Board was statutorily obligated to consider whether the transfer was in the "public interest" and met the "public interest" test set forth in M.G.L. c. 138, §23, para. 9. The statute provides in relevant 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 this case, the Board used the wrong standard. Instead of using the "public interest" standard for a license transfer, the Board used the "public need" standard, which applies to a new license application. See Ballarin Inc. v. Licensing Board of Boston, 49 Mass.App.Ct. 506 (2000). As such, the Board should have looked to whether Mr. Muello is an individual qualified to receive a license in the first instance.

In order to determine if the transferee was qualified to receive a license in the first instance, the local licensing authority shall cause an examination to be made that the applicant is not less than twenty-one years of age and a person of good character in the city or town in which he seeks a license hereunder. No license shall be issued to any applicant who has been convicted of a violation of a federal or state narcotic drugs law. M.G.L. c. 138, §12. Mr. Muello is of sufficient age, a United States Citizen, and has never been convicted of a federal or state narcotic drugs law violation. Therefore, the only remaining question posed is whether Mr. Muello is of good character in the city or town in which he seeks a license.

The Board contends that Mr. Muello's criminal background and his prior business involvement with KLLR, Inc. demonstrated that he lacked the requisite character to hold an interest in CJ's. The issue of Muello's character arises in the context of M.G.L. c. 138, §12 which provides that: "Before issuing a license to any applicant . . . under this section . . . the local licensing authority shall cause an examination to be made . . . to determine . . . that the applicant is . . . a person of good character."

### Does A Criminal Conviction Automatically Disqualify Someone From Holding A Liquor License?

A conviction may disqualify one from taking an ownership interest in a liquor license. Under M.G.L. c. 138, §12, a license may not be issued to "any applicant who has been convicted of a violation of federal or state narcotics drugs laws." However, a conviction on some other charge is not conclusive on the character issue. Mr. Muello's conviction was not a felony and was unrelated to narcotics violations. Moreover, the prohibition on the issuance of licenses in this narrow class of convictions necessarily means that persons convicted of other offenses are not automatically disqualified from holding an interest in a liquor license. The Board cites no cases holding otherwise. The Licensing Board for the City of Boston v. The Alcoholic Beverages Control Commission et al. Lower Washington Street Neighborhood Task Force v. The Alcoholic Beverages Control Commission et al., 16 Mass. L. Rep. 777; 2003 Mass. Super. LEXIS 289 (October 6, 2003).

Other than Mr. Muello's admitted sixteen-year-old misdemeanor conviction, the evidence before the Local Board on the character issue was based entirely on impermissible hearsay and opinion evidence. In reviewing such evidence, the determination of credibility is within the Commission's discretion. Vinal v. C.R.A.B., 13 Mass.App.Ct. 85, 101 (1982). A police officer testified about facts surrounding some of the entries on Mr. Muello's CORI, as well as incidents that were not contained within Mr. Muello's CORI. The officer testified about allegations that were contained in police reports. Incidents that Mr. Muello was never criminally charged with or convicted of. As such this evidence offered by the Board is "totem pole" hearsay. While hearsay is admissible in hearings pursuant to M.G.L. c. 30A, "totem pole" hearsay such as this is not reliable and thus not persuasive. See In re: Readville Tavern, Inc. dba Cappy's, Boston (ABCC Decision dated June 2, 2005) citing Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass.App.Ct. 470, 473-476 (1989) cited in Dolphino Corp. v. Alcoholic

Beverages Control Comm'n, 29 Mass.App.Ct. 954, 955(1990)(rescript); compare Commonwealth v. Durling, 407 Mass. 108 (1990).

The Commission rejects the hearsay allegations and instead, finds that the documentation from law enforcement and elected officials that Mr. Muello is an intelligent, motivated individual and has always demonstrated a commitment to safety. Moreover, Mr. Muello has been appointed a Reserve Deputy Sheriff in Worcester County. The Commission considered the assault and battery conviction from 1994. This conviction occurred over sixteen years ago and Mr. Muello has had no other convictions.

On the matter of Mr. Muello's character and fitness to own CJ's license the Commission finds that when Mr. Muello's total character is taken into consideration, he meets the requirements of M.G.L.c. 138. Some of those considerations are:

- a. his admitting to the wrongdoing in 1994 <sup>1</sup>;
- b. his otherwise clean record without criminal convictions;
- c. his legally and successfully managing all of his business interests;
- d. the recommendations as to his good character from law enforcement individuals; and
- e. his appointment as a Reserve Deputy Sheriff.

Consequently, the Commission disapproves the action of the Local Board in finding that Mr. Christopher Muello does not meet the fitness of character requirement to hold an interest in CJ Restaurant Enterprises, LLC. This action is not based on facts, and reasonable inferences to be drawn from those facts, in the record before the Local Board

### **Was There Persuasive Evidence of a License Transfer?**

Among the subsidiary facts before the Local Board were the following: in October of 2009, KLLR, Inc. and CJ enterprises executed a proposed Transfer Agreement with KLLR, Inc and Ken & Rod Realty, LLC. KLLR, Inc. requested the assistance of Mr. Muello in bringing it back from the brink of financial ruin, which included introducing them and assisting them in hiring Niche Hospitality Group to manage the Celtic Tavern for the owners. Mr. Muello became actively involved with the restoration of the Celtic Tavern's standing with its suppliers and the Department of Revenue.

While those facts recited reflect a high level of cooperation between Mr. Muello and KLLR, Inc., it is less clear that those facts lead to the conclusion that KLLR, Inc. made a transfer of its license. It takes more than the involvement of others to affect a transfer of a business interest. Implicit is a surrender of control. Griffin's Brant Rock Package Store, Inc. v. Alcoholic Beverages Control Commission, 12 Mass.App.Ct. 768 (1981). So, for example, a transfer of a license occurs when there is a sale of a liquor business and the license is inseparable from the purchase price. Id., Kennedy v. Welch, 196 Mass 592, 595(1907). A transfer of a business takes place when the person introduced to it runs the business for his own account. Id. Entrusting management responsibilities to others, as the owners did with Mr. Muello, has not been regarded as a license transfer. Id.

No evidence appears in the record that Mr. Muello or an entity controlled by Mr. Muello, holds stock of KLLR, Inc. or a pledge of its stock. There is no evidence that anyone other than the last-approved owners are entitled to profits. So far as appears, Mr.

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<sup>1</sup> Assault and battery

Muello received no income from the Celtic Tavern. So far as appears, the business of the Celtic Tavern was run for the account of no one other than the last-approved owners. While the record justifies the Local Board in having prudent suspicions of more than friendly interests by others, suspicions are an insufficient basis for licensing sanctions. Griffins Brant Rock, supra. The activity of Mr. Muello, for example, could be viewed as consistent with the efforts of persons working out a troubled business situation in expectation of financial rewards short of ownership of the enterprise. Id.

## CONCLUSION

Based on the foregoing, the Commission disapproves the action of the Northborough Licensing Board in denying the application to transfer the all-alcoholic beverages license under M.G.L. c. 138, §12 from KLLR, Inc. to CJ Restaurant Enterprises, Inc. and remands this matter to the Local Board with the recommendation that the application be granted and forwarded to the Commission in the time-frame required by law.

## ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman \_\_\_\_\_

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

Robert H. Cronin, Commissioner \_\_\_\_\_

Susan Corcoran, Commissioner \_\_\_\_\_

Dated in Boston, Massachusetts this 22nd day of September 2010.

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 days of receipt of this decision.

cc: Northborough Licensing Board  
Donna Truex, Esq. via facsimile  
David J. Doneski, Esq. via facsimile  
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