

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

Steven Grossman
Treasurer and Receiver General

DECISION

Kim J. Gainsboro, Esq.
Chairman

VIJETA CORPORATION DBA PROSPECT LIQUORS
1226 CAMBRIDGE STREET
CAMBRIDGE, MA 02139
LICENSE#: 016600208
HEARD: 10/16/2013

This is an appeal of the action of the City of Cambridge Licensing Board (the "Local Board" or "Cambridge") for revoking the M.G.L. c. 138, §15 all alcohol package store license of Vijeta Corporation dba Prospect Liquors (the "Licensee" or "Prospect Liquors") located at 1226 Cambridge Street, Cambridge, MA. The Licensee timely appealed the Local Board's decisions to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Wednesday, October 16, 2013.

By way of background, the Local Board held two hearings regarding this matter. This first hearing was held in October of 2012, and the second in March of 2013. As a result of the hearing, the Local Board revoked the license. Subsequently, the Licensee appealed both decisions of the Local Board. Thereafter, the Licensee filed a motion to consolidate both matters, which the Commission allowed.

At the commencement of the hearing, the Licensee withdrew the appeal of the Local Board's March 2013 decision. In addition, the Licensee admitted that it had committed the violations alleged in the Local Board's decision of October 9, 2012, (the "Decision") and that the penalty imposed, namely revocation, was appropriate. As a result, the sole issue before the Commission was whether the Local Board administered its penalty in accordance with its October 9, 2012 decision.

The following documents are in evidence:

1. Transcript of Local Board's Hearings on October 10, 2012 and March 19, 2013 with:
 - Local Board's Decision dated September 19, 2012;
 - Chief Investigator Boyer's Report dated September 27, 2012;
 - Chief Investigator Boyer's Report dated September 28, 2012;
 - Local Board's Hearing Notice dated October 02, 2012;
 - Local Board's Decision dated October 09, 2012;
 - Local Board's Decision dated January 19, 2013;
 - Chief Investigator Boyer's Report dated March 06, 2013;
 - Local Board's Hearing Notice dated March 12, 2013 with Notice of Hand Delivery;
 - Local Board's Decision dated March 25, 2013;
 - Notice of Appeal Letter dated March 28, 2013 from Attorney Finn;
 - Local Board's Notice dated May 16, 2013 for the Removal of Alcohol from the Licensed Premises with a Notice of Hand Delivery.
2. Rules and Regulations of the Cambridge Licensing Commission Related to Alcoholic Beverages and Entertainment (the "Local Rules");
3. Local Board's Decision dated October 09, 2012;
4. Purchase and Sale Agreement dated November 11, 2012 for Licensee and Bipin K. Patel;

5. Purchase and Sale Agreement dated 1/21/2013 for Licensee and Mahesh Rai and Shanti Rai;
6. Local Board's Decision dated March 25, 2013;
7. Legal Notice published in the Cambridge Chronicle on February 07,2013 for Transfer Application (M. Rai, S. Rai);
8. Letter dated April 24, 2013 from Attorney Goldberg, withdrawing Transfer Application; and
9. Memo [undated] from E. Watson to Chief Investigator Boyer.

There is one (1) audio recording of this hearing, and three witnesses testified.
The Commission took Administrative Notice of the Licensee's Commission records.

FACTS

1. The Licensee is the holder of an all alcoholic beverages license located at 1226 Cambridge Street, Cambridge, MA.
2. Dhiru Patel is the sole shareholder of the Licensee. He is also the approved license manager.
3. On January 10, 2012, the Local Board held a hearing to determine whether the Licensee sold alcoholic beverages to an intoxicated individual in violation of M.G.L. c. 138 §69 and Rule 25 of the Rules and Regulations of the Cambridge License Commission.
4. At the conclusion of the hearing, the Local Board found Prospect Liquors had committed the violations alleged and imposed a 20-day license suspension. In addition, the Local Board imposed conditions ordering the Licensee to "keep all nips [small bottles of alcohol] out of sight," and to "set your opening hour no earlier than 11:00 a.m."
5. On September 18, 2012, the Licensee and Local Board entered into an agreement reducing the license suspension to 14 days. The conditions previously imposed, namely to open no earlier than 11:00 a.m. and keep the "nips" out of sight, remained in effect.
6. On October 9, 2012, the Local Board held another hearing regarding allegations that Mr. Patel sold alcoholic beverages prior to 11:00 a.m., and allowed individuals to consume alcoholic beverages on the premises in violation of M.G.L. c. 138, §15. (Ex. 3, Testimony)
7. After hearing the evidence, the Local Board found that the Licensee committed both violations and voted to revoke its license. (Ex. 3, Testimony)
8. However, the Local Board stayed the imposition of the revocation and provided the Licensee with 90 days, specifically to January 15, 2013, to find a suitable buyer for its business. (Ex. 3, Testimony)
9. Further, the Local Board voted to allow the Licensee to continue operating its business subject to the conditions imposed in its decision dated January 10, 2012. Specifically, the Licensee could continue operating the business if it did not open prior to 11:00 a.m., kept "nips" [small bottles of alcohol] out of sight, and served the suspension dates which were agreed upon in the September settlement agreement. (Ex. 3, Testimony)
10. The Licensee did not contest the findings of facts and rulings of law contained in the October 9, 2012 decision, or the penalty imposed by the Local Board. (Testimony)
11. The Licensee was represented by counsel throughout all of the proceedings before the Local Board and the Commission.
12. During the hearing before the Commission, Mr. Patel admitted that he understood that the Local Board was permitting Prospect Liquors to remain open while attempting to find a suitable buyer as long as the Licensee did not open prior to 11:00 a.m. and kept the nips out of sight. (Testimony)
13. Mr. Patel further admitted that he did not follow those conditions of the license every day after they were imposed. (Testimony)

14. In November 2012, Mr. Bipin Patel, Mr. Patel's brother, submitted an application to transfer Prospect Liquor's M.G.L. c. 138, §15 all alcoholic beverages license to Priya Liquors. (Ex. 4, Testimony)
15. The matter was scheduled for a hearing before the Local Board on February 12, 2013. (Testimony)
16. Prior to the hearing, Mr. Bipin Patel withdrew the application. (Testimony, Ex. 8)
17. Subsequently in late January 2012, Mahesh Rai and Shanti Rai submitted an application to transfer Prospect Liquor's M.G.L. c. 138, §15 all alcoholic beverages license to Shanti Liquors, Inc. (Exs. 5, 7, Testimony)
18. The matter was scheduled for a license application hearing before the Local Board on February 26, 2013. (Testimony)
19. Prior to the hearing, at the request of the applicant, the matter was continued until March 5, 2013. (Testimony)
20. The applicant requested the continuance because it did not have financing or a location for the license, i.e. a lease or letter of intent. (Testimony)
21. Prior to the March 5, 2013 license application hearing, the applicant requested another continuance. The request was based upon the fact that the applicant still had not obtained financing and still did not have a location to operate the premises. The matter was continued until March 19, 2013. (Testimony)
22. Subsequently on February 27, 2013 and again on March 6, 2013, Christopher O'Neil, an investigator of the Local Board, purchased alcoholic beverages from Mr. Patel prior to 11:00 a.m.
23. Thereafter, the matters were scheduled for a disciplinary hearing on March 19, 2013. (Exs. 1, 6 Testimony)
On March 19, 2013, the Local Board held a disciplinary hearing regarding the Licensee's selling alcoholic beverages before their allowable opening hour of 11:00 a.m. An investigation of the establishment showed that the Licensee was operating prior to this hour. (Exs. 1, 6 Testimony)
24. The Local Board found the Licensee had sold alcoholic beverages before 11:00 a.m. and voted to revoke the all alcohol package store license effective immediately due to "reckless disregard of the Local Board's orders and the Licensee's inability to abide by M.G.L. c. 138." (Exs. 1, 6)
25. The Licensee does not contest this finding. (Testimony)

DISCUSSION

Pursuant to M.G.L. Ch. 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).

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. Ch. 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. Board of Registration in Medicine, 383 Mass. 299, 317 (1981). The Commission is given "comprehensive powers of supervision over licensees," Connolly v. Alcoholic

Beverages Control Comm., 334 Mass. 613, 617 (1956), as well as broad authority to issue regulations. The Local Board has authority to enforce Commission regulations. New Palm Gardens, Inc. v. Alcoholic Beverages Control Commission, 11 Mass. App. Ct. 785, 788 (1981).

These “comprehensive powers” are balanced by the requirement that the Local Board and the Commission provide notice to the licensee of any violations, as well as an opportunity to be heard. M.G.L. c. 138, §64. In addition, the Local Board has the burden of producing satisfactory proof that the licensee violated or permitted a violation of any condition thereof, or any law of the Commonwealth. M.G.L. c. 138, §§ 23, 64.

The Commission’s decision must be based on substantial evidence. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 528 (1988). “Substantial evidence” is “such evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* Evidence from which a rational mind might draw the desired inference is not enough. See Blue Cross and Blue Shield of Mass. Inc., v. Comm’r of Ins., 420 Mass 707, 710 (1995). Disbelief of any particular evidence does not constitute substantial evidence to the contrary. New Boston Garden Corp. v. Bd. of Assessor of Boston, 383 Mass. 456, 467 (1981). In addition, the Local Board has the burden of producing satisfactory proof that the licensee violated or permitted a violation of any condition thereof, or any law of the Commonwealth. M.G.L. c. 138, §§ 23, 64.

On October 9, 2012, the Local Board voted to revoke Prospect Liquors’ alcoholic beverages license. However, the Local Board also voted to stay the imposition of the revocation and allow the Licensee to continue operating its business subject to four conditions. The licensing authorities after notice to the licensee and reasonable opportunity for him to be heard ... may modify ... [or] revoke ... his license upon satisfactory proof that he has violated ... any condition thereof, or any law of the commonwealth. M.G.L. c. 138, §64. The first condition was that the Licensee find a suitable buyer to transfer its license to by January 15, 2013, the second condition was that the Licensee not open until 11:00 a.m., the third condition was that the Licensee keep nips out of sight, and the fourth condition was that it serve the agreed upon previously imposed suspension dates. The Licensee does not argue that these conditions were unreasonable.

The sole issue before the Commission is whether the Local Board administered its penalty in accordance with its Decision. Therefore, the Commission will examine the conditions set by the Local Board and determine whether they were followed. We turn to the first condition, whether the Licensee found a suitable buyer by January 15, 2013.

Bipin Patel filed a license transfer application in November of 2012, and the clerk at the Local Board scheduled a hearing on the application for February 12, 2013. Prior to the hearing, Bipin Patel withdrew the application. Although the Licensee alleged that the Local Board would not have permitted the transfer because the applicant and the Licensee were related, there was no credible evidence supporting this allegation. In fact, the licensing clerk for the Local Board testified that the Local Board did not have a policy prohibiting alcoholic beverages license transfers between relatives. Moreover, if Bipin Patel had concerns that the Local Board was going to act arbitrarily and capriciously, he should have gone forward with the license application process and appealed a negative decision. See M.G.L c. 138, §§23 and 67, (discussing the appeal process when a Local Board denies a license application.)

Bipin Patel could have availed himself of this process, but did not. The Commission will not engage in speculation regarding what may or may not have transpired had Bipin Patel gone forward on February 12, 2013 with the license application hearing. Instead, where Bipin Patel

voluntarily withdrew the license transfer application, there was nothing for the Local Board to consider.

Thereafter, in late January of 2013, Mahesh Rai and Shanti Rai submitted an application to transfer Prospect Liquor's M.G.L. c. 138, §15 all alcoholic beverages license to Shanti Liquors, Inc. Typically, it takes between 27 and 28 days for an alcoholic beverages license hearing to proceed, once an application is filed. The licensing clerk scheduled the application hearing before the Local Board for February 26, 2013. Counting backwards from the date of the hearing, it is clear that Shanti filed its transfer application after January 15, 2013, the Licensee's deadline to find a suitable buyer.

Therefore, the Licensee did not comply with the first condition of the Decision to find a suitable buyer for the license. However, the Local Board did not use this failure as a trigger to revoke the license. Instead the Local Board allowed the Licensee to continue operating and searching for a suitable buyer. This was a reasonable exercise of the Local Board's discretion, and in no way infringed upon any rights of the Licensee. To the contrary, the Local Board assisted the Licensee. The Local Board's failure to revoke Prospect Liquor's license on January 15, 2013 because it did not have a suitable buyer did not constitute a waiver of the Local Board's right to revoke the license at some later date. Further, in order for the stay of the revocation to remain in place, and for Prospect Liquors to continue operating its business, it was still required to comply with the remaining conditions the Local Board imposed in its October 9, 2012 decision.

Shanti requested a continuance for the February 26, 2013 license application hearing because it did not have financing or a location to operate the business. The Local Board allowed the request and continued the matter until March 5, 2013. During this period, the Local Board continued to allow the Licensee to operate its business subject to the same conditions.

Prior to the March 5, 2013 hearing, Shanti requested a second continuance because it was still plagued by its inability to find financing and a location to operate the business. The Local Board allowed the request and rescheduled the matter for March 19, 2013. Again, the Local Board continued to allow the Licensee to operate its business subject to the same conditions.

On February 27, 2013 at 10:16 a.m. and again on March 6, 2013 at 9:16 a.m., Chris O'Neil a member of the Local Board's Investigative Division went to Prospect Liquors to purchase alcoholic beverages. In both instances, Mr. Patel sold Mr. O'Neil alcoholic beverages prior to 11:00 a.m. Therefore, Mr. Patel violated the second condition the Local Board imposed.

The Local Board held a hearing on March 19, 2013 regarding these violations. Mr. Patel does not contest that he violated this condition, twice. "Whenever, in the opinion of the local licensing authorities ... any holder of such a license fails to maintain compliance with this chapter or it appears that alcoholic beverages are being or have been sold, served or drunk therein in violation of any provision of this chapter, they may, after hearing or opportunity therefor, modify, suspend, revoke or cancel such license, ..." M.G.L. c. 138, §23. In this instance it is clear that the Licensee did not comply with the conditions imposed by the Local Board's Decision.

The Licensee did not have a suitable buyer by January 15, 2013. The Local Board cannot be faulted because Mr. Bipin Patel withdrew his application. The Local Board also cannot be faulted because Shanti Liquors could not find financing or a location for its premises. However,

the Local Board chose to overlook this condition and permit the Licensee to continue its search for a suitable buyer, as long as the Licensee abided by the other conditions imposed by the Decision. The Licensee failed to abide by the other conditions. The owner of the Licensee sold alcoholic beverages on two occasions before 11:00 a.m.

The stay of the revocation allowed the Licensee a reasonable period of time to find a buyer and was an extremely benevolent act by the Local Board. Moreover, the Local Board continued to allow Prospect Liquors to seek a buyer while allowing it to remain open subject to certain conditions. The Local Board was generous to the Licensee.

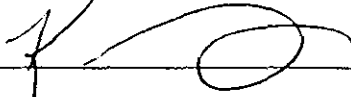
Prospect Liquors was not treated unfairly. The Local Board adhered to the requirements of its decision, and gave the Licensee several opportunities to comply with its Decision and the conditions it willingly accepted in order to continue operating its business.

CONCLUSION

Based on the evidence, the Alcoholic Beverages Control Commission **APPROVES** the action of the City of Cambridge Licensing Board in **REVOKING** the license of Vijeta Corporation dba Prospect Liquors.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman, _____



Susan Corcoran, Commissioner _____



Kathleen McNally, Commissioner, _____



Dated: March 20, 2014

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: Kenneth Finn, Esq. via Facsimile
Elizabeth Lint, Esq. via Facsimile 617-349-3148
Frederick G. Mahony, Chief Investigator
Administration
File