

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

*Steven Grossman*  
*Treasurer and Receiver General*

*Kim L. Grinsboro, Esq.*  
*Chairman*

**DECISION**

**KAREN A. MCGOVERN DBA PUFFIN'S RESTAURANT**  
**95 MAIN ST**  
**MILLBURY, MA 01527**  
**LICENSE#: 071200029**  
**HEARD: 3/12/2013**

This is an appeal of the action of the Town of Millbury Board of Selectmen (the "Local Board" or "Millbury") in revoking the M.G.L. c. 138, § 12 All Alcohol Pouring license application of Karen A. McGovern dba Puffin's Restaurant (the "Licensee" or "Puffin") located at 95 Main Street, Millbury, MA. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission") and a hearing was held on Tuesday, March 12, 2013.

The following documents are in evidence:

1. Joint Pre-Hearing Memorandum;
2. Licensee's 1997 Common Victualer license;
3. Local Board's Letter dated November 20, 2002 to Licensee;
4. ABCC Notice of Compliance Initiative to All Retail Licensees dated September 28, 2004;
5. Licensee's 2005 Renewal Application;
6. Local Board's Notice dated December 16, 2011 for Hearing to be held January 24, 2012;
7. Local Board's Notice dated March 28, 2012 for Hearing to be held April 10, 2012;
8. Local Board's Notice dated May 29, 2012 for Hearing to be held June 12, 2012;
9. Minutes for Local Board Meeting April 10, 2012;
10. Licensee's Letter dated June 7, 2012 to Local Board;
11. Local Board's Notice dated November 5, 2012 for Hearing to be held November 13, 2012;
12. Local Board's Notice dated November 14, 2012 for Hearing to be held November 27, 2012;
13. Local Board's Notice of Revocation dated November 28, 2012;
14. Licensee's Notice of Appeal dated December 4, 2012; and
15. Licensee's 2011 Common Victualer license.

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

**FACTS**

1. The Millbury Board of Selectmen (the "Local Board") is the local licensing authority for the Town of Millbury.
2. The Licensee, Karen McGovern d/b/a Puffin's Restaurant ("Licensee") is the holder of an All Alcoholic Beverages Restaurant-type License issued pursuant to G.L. c. 138, § 12 for the premises located at 95 Main Street, Millbury, Massachusetts.

3. The Local Board issued an All Alcoholic Beverages Restaurant-type Section 12 License to the Licensee on December 30, 1997. This license stated that the hours that she would be selling alcoholic beverages would be Monday - Wednesday, 12:00 p.m. - 1:00 a.m.; Thursday - Saturday, 12:00 p.m. - 2:00 a.m.; Sundays, 1:00 p.m. - 1:00 a.m. (Exhibit 2)<sup>1</sup>
4. The Local Board issued an All Alcoholic Beverages Restaurant-type Section 12 License to the Licensee on December 13, 2011. This license contained extended hours of licensed operation: Monday - Wednesday, 8:00 a.m. - 1:00 a.m.; Thursday - Saturday, 8:00 a.m. - 2:00 a.m.; Sundays, 11:00 a.m. - 1:00 a.m. (Exhibit 15)
5. The Licensee accepted this license for calendar year 2012 with these extended hours of operation.
6. On December 16, 2011, the Local Board submitted a letter to the Licensee providing notice of an informal hearing to be held on January 24, 2012 for the purpose of "discussing the hours of operation and the underutilized liquor license." (Exhibit 6)
7. On March 28, 2012, the Local Board submitted a letter to the Licensee providing notice of a second informal hearing to be held on April 10, 2012 for the purpose of discussing the hours of operation and the underutilized liquor license. (Exhibit 7)
8. On May 29, 2012, the Local Board submitted a letter to the Licensee providing notice of a third informal hearing to be held on June 12, 2012 for the purpose of discussing the "hours of operation concerning the underutilized liquor license." (Exhibit 8)
9. At the informal hearing on April 10, 2012, Selectman Schold stated that the Licensee needed to utilize the license and increase her hours. (Exhibit 9)
10. At said hearing, Chairman Plante stated that the Alcoholic Beverages Control Commission expected the Local Licensing Board to make sure that the hours of operation are utilized. (Exhibit 9)
11. At said hearing, Chairman Plante explained that the Licensee's options are to operate for the licensed hours; transfer the license and comply with the hours or transfer the ownership to someone who will operate the license on days and times authorized. (Exhibit 9)
12. In a letter dated June 7, 2012, the Licensee provided to the Local Board a "Notice of Updated Hours of Operation." The hours of operation, according to the Licensee would be extended to comply with the Local Board's concerns.<sup>2</sup> (Exhibit 10)

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<sup>1</sup> The Commission notes that the hours of sale set by the Local Board in 1997 conflicts with the state law because the Local Board set the opening hour for Monday through Saturday at noon, not 11:00 am as is the Licensee's right under M.G.L. c. 138, § 12, paragraph 7. By § 1.04 of its regulations (Exhibit 14), the Local Board specifies that "[t]he hours of operation shall be restricted (emphasis added) to those set by the [Local Board] and stated on on [sic] the face of the license."

<sup>2</sup> The Commission also notes the hours planned by the Licensee as set in Exhibit 10 also conflicts with state law. The Licensee may not sell or expose for sale alcoholic beverages before the hours set on its license and not before 11 AM, Monday through Saturday, as a matter of right. M.G.L. c. 138, § 12, paragraph 7. The Local Board has the discretion to allow the Licensee to operate as early as 8 AM, Monday through Saturday.



13. On November 5, 2012, the Local Board submitted a letter to the Licensee providing notice of an informal hearing to be held on November 13, 2012. The letter warned the Licensee that the Local Board "may not renew your existing liquor license" due to the underutilized hours. (Exhibit 11)
14. A hearing was held on November 13, 2012 in which the Licensee was not present. Due to a car accident and subsequent surgery, the Licensee sent her husband to represent her at the hearing. Because the Local Board wanted to hear from the Licensee, the hearing was continued for two weeks. (Testimony)
15. On November 14, 2012, the Local Board submitted a letter to the Licensee requesting the Licensee bring to the November 27, 2012 meeting of the Local Board "copies of any and all receipts from distributors for liquor purchases for the past year." (Exhibit 12)
16. A meeting occurred before the Local Board on November 27, 2012. A hearing notice for this date was not submitted into evidence before the Commission. (Exhibits 12, 13)
17. On November 28, 2012, the Local Board submitted a letter to the Licensee informing her that the Local Board unanimously voted to revoke the license at the meeting on November 27, 2012. The notice of revocation detailed the reason for revoking the Licensee's as being "underutilization" pursuant to M.G.L. c. 138 § 77. (Exhibit 13)
18. By letter dated December 4, 2012, the Licensee appealed the Local Board's decision. (Exhibit 14).

#### DISCUSSION

Under M.G.L. c. 138 § 77, a local licensing authority may cancel a license "after hearing or a reasonable opportunity therefor....if the licensee ceases to conduct the licensed business." The question before us is the meaning of "the licensed business" and whether "underutilization" can be considered a "failure to conduct the licensed business" within the meaning of M.G.L. c. 138 § 77. In prior cases in which the ABCC has rendered decisions, the Licensee usually has completely ceased utilizing the license. See, e.g., Board of Selectmen of Saugus v. Alcoholic Beverages Control Commission, 32 Mass. App. Ct. 915 (1992); In re: Empresas Guanacas, Inc. dba Mango Grill Fine Latin Cuisine, (ABCC decision dated March 13, 2009); In re: Italian-American Restaurant, (Boston) (ABCC Decision dated July 2008); In re: Turnpike At Wynaona, (ABCC decision dated May, 2010).

In this instance, the Licensee has not completely ceased using the license that she possesses; rather, she is using it for a number of hours that is reduced from the hours first established in 1997, (Exhibit 2), and most recently established on the face of the license issued for calendar year 2012. (Exhibit 15) According to the Licensee's testimony, she has, on several occasions, attempted to extend her hours of operation, but it has not been economically successful. She then reverted back to her reduced hours of business. During these reduced hours, according to her testimony, the license is fully utilized. She acquired the license in 1995 and has never ceased using it. According to the local licensing authority, the licensee has not utilized the license to its full extent because she has not been open the hours that she is allowed to be under her license. There was no evidence in this case before the Commission demonstrating that the licensee was not using the license at all. The evidence showed the licensee utilized the license during the reduced hours she was operating her establishment. Because the Local Board believed in their own



collective opinion that she was not operating the full hours she could under the law, they felt they had the authority to revoke<sup>1</sup> her license.

Once a local board has determined that a license holder risks cancellation of its license under M.G.L. c. 138, §77 as a result of non-use of the license, this Commission evaluates the amount of time the board has given the licensee to cure the non-use to ensure its reasonableness. The Commission's practice of granting a reasonable time to transfer a license is in step with the Board of Selectmen of Saugus v. Alcoholic Beverages Control Commission, 32 Mass. App. Ct. 915 (1992). "Under the authority of M.G.L. c. 138, §77, this statute explicitly gives the Commission the authority to review the license cancellation by the Local Board." Id. In Saugus, this Commission gave this Licensee six (6) months to transfer the license once he received notice of the risk of cancellation. Id.

It is this Commission's practice to allow the licensee six (6) months from the date of the notice of the risk cancellation to cure the non-use by either operating its premises or filing the appropriate application to transfer the license. Id. The Commission's sense of fairness is forward looking and the time within which the Licensee must act does not begin to run until the Licensee is first put on notice that there is a potential enforcement of Massachusetts General Laws chapter 138, §77. In re: Empresas Guanacas, Inc. dba Mango Grill Fine Latin Cuisine, (ABCC Decision dated March 13, 2009). "A Licensee cannot cease operations, sit silent and avoid contact with the Local Board without facing the real peril of the cancellation of its license." In re: Italian-American Restaurant, Inc. dba Italian American Restaurant, (ABCC Decision dated July 2008); In re: Turnpike @ Winona, LLC, (ABCC decision dated May 10, 2009); In re: 45 Province Restaurant, LLC, (ABCC Decision Dated March 10, 2011)

In this case, the Local Board provided no evidence that it gave the Licensee any written notice that on November 27, 2012 the Licensee faced the risk of having her license cancelled. Although the Local Board was in written communication with the Licensee through a series of five (5) letters, (Exhibits 6, 7, 8, 11, and 12), none of these letters state that the Licensee risked cancellation of her license under M.G.L. c. 138, §77. This is a flaw that undermines the Local Board's decision.

The holder of a license is clothed "with a constitutionally protected interest of which he may not be deprived without procedural due process." Konstantopoulos v. Whately, 384 Mass. 123, 132, 424 N.E. 2d 210, 217 (1981). In Konstantopoulos, the Supreme Judicial Court held "... [o]nce licenses are issued, ... their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses ... involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." Konstantopoulos, 384 Mass. at 132; 424 N.E. 2d at 217 quoting Barry v. Barchi, 443 U.S. 55, 69-70, 99 S. Ct. 2642, 2652, 61 L.Ed. 365 (1979) (Brennan, J., concurring in part). Procedural due process requires "notice and a hearing", Konstantopoulos, 384 Mass. at 137; 424 N.E. 2d at 220, and includes "adequate notice setting forth the charge which forms the basis" of the action by the local licensing authority, Konstantopoulos, 384 Mass. at 135; 424 N.E. 2d at 218, and "an opportunity to call witnesses and cross-examine the opposing witnesses, if any, in a reasonable fashion." Konstantopoulos, 384 Mass. at 135; 424 N.E. 2d at 218 citing Foster from Gloucester, Inc. v. City Council of Gloucester, 10 Mass. App. 284, ---, 407 N.E. 2d 363 (1980).

The Supreme Judicial Court has held that a letter warning a licensee of "adverse action" if it failed to comply with a condition imposed by a local licensing authority did not meet the requirements of

<sup>1</sup> M.G.L. c. 138 § 77 authorizes the licensing authorities to "cancel" a license, not "revoke" it. This is a distinction with a substantial legal difference given the plain language of M.G.L. c. 138 § 64, paragraph 2 that specifies a substantial continuing impact if disqualification from future licensing when the licensing authorities do "revoke" a license.



procedural due process where the letter relied on did not provide the licensee with the "time or place of a hearing nor did it indicate that a revocation hearing would ensue if [the licensee] failed" to comply with the licensing authority's condition. Konstantopoulos, 384 Mass. at 135; 424 N.E. 2d at 219. This Commission has been found to be in error when it rejected an appeal of an action taken by a local board that had failed to provide required notice. "In Piona v. Alcoholic Beverages Control Commission, 332 Mass. 53, 123 N.E. 2d 390 (1954), [the Supreme Judicial Court] held that in failing to allow an appeal from a local board which had omitted to provide a notice required by statute ... '(the commission) countenanced and gave effect to the error which the board had committed.'" Board of Selectmen of Barnstable v. Alcoholic Beverages Control Commission, 373 Mass. 708, 717, note 14, 369 N.E. 2d 1017 (1977). In reaching its decision, the Supreme Judicial Court also cited to M.G.L. c. 30A, § 14(8)(d) that authorizes a reviewing court to overturn an agency action when the court finds that the agency action was "[m]ade upon unlawful procedure." In re: Atara Bistro, LLC, (ABCC Decision dated October 17, 2003).

In this case from Millbury, the Local Board did not provide the constitutionally required notice of hearing informing the Licensee that she risked the termination of her license by the Local Board.

The Local Board did not put the licensee on notice that she had to increase her hours of operation or they may terminate her license. At best, the Local Board told the Licensee in a letter dated November 5, 2012 that they "may decide not to renew your existing liquor license." This notice is insufficient to inform a license holder that the license may be cancelled pursuant to Section 77 of chapter 138. Indeed, this notice is not sufficient to deny renewal of a license under section 16A of chapter 138 of the General Laws. In re: Atara Bistro, LLC, (ABCC Decision dated October 17, 2003).

The Local Board put the Licensee on notice at the informal hearing on January 24, 2012 that it had to use the license and the Local Board was concerned about the Licensee's "underutilized" license. The Local Board afforded the Licensee at least a six (6) month period of time that the Commission is persuaded is fair and reasonable. At a minimum<sup>4</sup>, the Licensee had almost eleven (11) months after it first attended a Local Board hearing in January 2012 in which the Licensee knew or should have known that the Local Board was concerned with the Licensee's failure to operate fully during its authorized hours of operation. Under M.G.L. c. 138, § 77 the Local Board gave the Licensee notice of the Local Board's concerns and a reasonable amount of time to address those concerns. But for this procedural issue caused by the lack of a proper notice, the Commission may have reached a different result on the merits of this case. See In re: Atara Bistro, LLC, (ABCC Decision dated October 17, 2003).


### CONCLUSION

The Alcoholic Beverages Control Commission **DISAPPROVES** the action of the Local Board in cancelling the license of KAREN A. MCGOVERN DBA PUFFIN'S RESTAURANT. The Commission remands the matter to the Local Board and directs the Local Board to re-instate the license effective November 27, 2012, *nunc pro tunc*.

If the Licensee Karen A. McGovern failed to file for renewal timely during the month of November 2012, the Licensee must file within ten (10) calendar days of the date of this decision an application for a so-called "late renewal", i.e., a new license application as required by M.G.L. c. 138, §16A. This "late renewal"/new license application must be processed by the Local Board according to the required statutory process.

<sup>4</sup> The evidence shows that the Local Board put the Licensee on notice that non-use of the license risked termination as far back as December 16, 2011. (Exhibit 6)

## ALCOHOLIC BEVERAGES CONTROL COMMISSION

Susan Corcoran, Commissioner, 

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

Kathleen McNally, Commissioner 

Dated: April 9, 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: John P. Connell, Esq. via Facsimile 617-227-3222  
Jeffrey T. Blake, Esq. via Facsimile 617-654-1735  
Frederick G. Mahony, Chief Investigator  
Administration  
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