

Alcohol and Entertainment: Keys to Local Control via Licensing

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Introduction



- Alcoholic Beverages Licensing:
 - General Laws Chapter 138
 - 204 CMR 2.00 – 20.00
 - Alcoholic Beverages Control Commission (ABCC)
 - Annual On-and Off-Premises Licenses
 - Special (“One Day”) Licenses
 - ABCC Issued Licenses
- Entertainment Licensing
 - General Laws Chapter 140, §181A and §183
 - MA case law
- Other Applicable Laws
 - General Laws c.30A, §§18-25 (Open Meeting Law)
 - General Laws c.4, §7, clause 26 and G.L. c.66, §10 (Public Records Law)
 - General Laws c.268A (Conflict of Interest Law)



Alcohol Licensing

General Laws Chapter 138:

- Sec. 12 = on premises (restaurant or pouring licenses)
- Sec. 15 = off premises (“package store”)
- Sec. 14 = special [“one day”]
- Sec. 15A = hearing requirement for new licenses
- Sec. 23 = disciplinary hearings
- Sec. 67 = ABCC appeals
- Sec. 77 = cancellation of “pocket license”



Alcohol Licensing - Standards

- Local Licensing Authority (LLA) has discretion. Obligated to act on application within 30 days. This is statutory requirement, but in practice often not followed and apparently not often appealed to the ABCC.
- Statute refers to “public want” or “need.” Appeals Ct. in Ballarin: “traffic, noise, size, the sort of operation that carries the license, and the reputation of the applicant,” as well as “the number of existing dispensaries in a locality” and “the views of the inhabitants of the locality” may all be considered.



Alcohol – LLA Decisions

- ABCC: local licensing authority must state basis for decision (denial or disciplinary action), but afforded broad discretion – “public need,” appropriateness of location, violation of statutes or license conditions.
- Conditions: Board may impose conditions as to operation – for example, last call ½ hour before closing. May restrict hours beyond statutory minimum hours:
 - On premises = 11:00 a.m. - 11:00 p.m. Mon.-Sat; Sunday mornings depends on local acceptance statute, c.138, §33B
 - LLA may permit hours to extend to 2:00 a.m.
 - Off premises = 8:00a.m. - 11:00 p.m.



ABCC Appeals

- APPEALS – If application is denied or discipline ordered, decisions must be sent in writing, stating basis; Licensee has 5 business days to file appeal with ABCC.
- *Bring a member of LLA; years ago, BOS chastised for no representative & one day suspension was overturned. Current ABCC still seems interested to hear LLA reasoning. *
- Administrative hearing – no hearsay rule, so LLA member can testify as police incidents reports relied on, audience comments, etc. “De novo” hearing” – live testimony and exhibits required.
- ABCC = three Commissioners, but two may sit on hearing.



Significant Court Decisions

1. Ballarin v. Licensing Board of Boston, 49 Mass. App. Ct. 506 (2000)
 - “Seminal” case for disapproving applicants, routinely cited by ABCC. City denied multiple times, trial court ultimately ordered license to issue [a relatively rare occurrence]. Court details valid considerations for LLA: public need/want, appropriateness of location, number of nearby establishments, views of inhabitants, traffic, noise, size, the “sort of operation” and the reputation of the applicant.



Significant Court Decisions (cont'd)

2. Casa Loma v. ABCC, 377 Mass. 231 (1979)

- Notable for saying that for hours outside of pouring license statutory minimum [11:00 a.m. - 11:00 p.m.], = strictly local discretion and cannot be appealed to court (or ABCC); court/ABCC will only consider whether LLA provided fair hearing. May be effective for a problematic licensee if revocation may not be affirmed by ABCC [serving intoxicated patrons, for example; tough to prove].



Significant Court Decisions (cont'd)

3. BOS of Saugus v. ABCC, 32 Mass. App. Ct. 914 (1992)

- Not a very significant case, concerned facts behind cancellation order of BOS, overturned by ABCC. However, ABCC found licensee that closed not given “reasonable time” to seek a transfer, ABCC remanded and said give additional 6 months; App. Ct. says this was an appropriate decision. Ever since, ABCC requires **minimum of 6 months written notice** before holding a hearing to cancel per c.138, §77; anything less is subject to reversal.

*****This is the “pocket license” case; ABCC says do not allow to linger, but requires 6 month rule.*****



Significant ABCC Decisions

A. J.C. Fenwick's Pub [Leominster], 8/13/14

- LLA issued 7 day suspension for 3rd violation in one year [but first under new Manager].
- Violation = non-employees on premises after closing hour. ABCC affirmed suspension –
 - (i) consistent with LLA's written penalty schedule;
 - (ii) after hours = statutory restriction; and
 - (iii) new management should have been on alert.



Significant ABCC Decisions (cont'd)

B. Evvisa Cucina [Westford], 1/23/15

- BOS received notice of ABCC compliance check failure and hearing (ABCC issued warning); BOS did not like “ignoring” violation and had its own hearing, relying only on ABCC investigator’s report and imposed three day suspension.
- ABCC intrigued/confused about how to handle this, but ultimately reversed BOS order – res judicata and/or collateral estoppel.
- ABCC notes that it holds de novo hearing on LLA appeals; here, de novo hearing was on incident for which ABCC had already ruled.



Significant ABCC Decisions (cont'd)

C. PJC of Mass/Rite Aid [Braintree], 7/21/15

- Pharmacy seeks off-premises license, LLA denies. Board cites traffic and “appropriateness,” but mainly 4 licensees in area already [2 within 500 feet, 2 others within 2 mile radius]. Rite Aid argued it would be “different,” one-stop shopping for customers, etc. – ABCC affirms denial, LLA decision was reasonable.



Significant ABCC Decisions (cont'd)

D. East Gate Liquors [N. Reading], 7/22/15

- Failed compliance check, 3-day suspension despite first offense [none in prior 5 years]. ABCC affirmed, because BOS was consistent in its penalties.
- Somewhat surprising decision! – ABCC treats compliance checks as educational rather than punitive. But gives LLAs “reasonable deference” and affirms “relatively small suspension” and 3 days held to meet this.



One Day Licenses

- Special Licenses: G.L. c.138, §14: “One day licenses”, but may authorize same licensee and location for up to 30 days per year.
- Available to any “responsible manager” of an event for beer/wine; only nonprofit organization can get all alcohol license.
- No regulations on these licenses – denial of special license may not be appealed to ABCC.



Selling an Alcohol License

- Some LLAs do not like concept of a current license being purchased from a prospective transferee. ABCC position = this is not governed by Chapter 138, private agreement between two individuals/business entities.
- LLAs (and ABCC) always have reasonable discretion over whether to approve transferee, regardless of terms of agreement with current licensee.

ABCC Advisories



- Many useful advisories at <https://www.mass.gov/lists/abcc-advisories>

- Examples:
 - Package store limit increase [G.L. c.138, §15]. For decades, limit of 3 statewide for any person or combination of persons (corporations).
 - In 2012, raised to 5, on 1/1/16 will be 7, as of 1/1/20 limit raised to 9.
 - Really an ABCC enforcement issue, does not increase quota.

ABCC Advisories



- Caterers' license: state issued, must be certified by ABCC and have a food service permit in home municipality. No need for G.L. c.138, §14 license if caterer selling alcohol; required to give PD 48 hours notice but no other local enforcement. Must be “private event not open to public” – if not, need a G.L. c.128, §14 license.

*****Can use caterer license only in municipalities that are authorized to issue G.L. c.138, §12 licenses; however, cannot be used at location holding a G.L. c.138, §12 license.*****

“BYOB”



- Patrons allowed to bring their own alcohol on premises.
- ABCC position = this issue is outside of Chapter 138, up to local licensing authority/municipal ordinance, bylaw or regulation.
- Some municipalities have a BYOB “permit” requirement. Another option = handle as condition of common victualler license (typically restaurants that want to allow it).
- If no local regulation, **BYOB is allowed.**

Enforcement



- No requirement for written guidelines, but may assist Board in demonstrating consistency.
Sample:
 - The Licensing Board may, pursuant to its authority under G.L. c.138, §23, impose disciplinary penalties for a licensee's violation of any General Law, state or local regulation, license conditions or Board guidelines relative to conducting the licensed business. The Board hereby establishes the following guidelines for uniform liquor violation penalties:
 - First Offense: Warning to one-day suspension
 - Second Offense: Warning to five-day suspension
 - Third Offense: One or more day suspension to revocation
 - **Notwithstanding the foregoing, the uniform liquor violation penalties shall be deemed to be guidelines, and shall not limit the Licensing Board's discretion to apply stricter or more lenient penalties as the Board may deem appropriate.**
 - Second, third or subsequent offenses shall constitute such if occurring or determined within two (2) years of a first offense.

ENTERTAINMENT LICENSING



- **Chapter 140, §181** [concert or special event charging admission] or **§183A** [entities holding common victualler and/or alcohol license]. Statutory presumption in favor of granting license – First Amendment considerations. Section 183A licenses include adult entertainment.
- Burden is on LLA to justify denial; must be substantial evidence on the record of the hearing to support a denial.

ENTERTAINMENT LICENSING



Konstantopoulos v. Whately, 384 Mass. 123 (1981).

- “We recognize that the purpose of s 183A is the preservation of public order at public entertainments... However, in addition to whatever property rights a licensee has in his entertainment license, the statute implicates as well the licensee's rights under the First Amendment to the United States Constitution, and art. 16 of our Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution... Accordingly, we construe “hearing” in G.L. c. 140, s 183A, as requiring, at a minimum, the procedure set forth by the judge providing for a revocation hearing, preceded by adequate notice setting forth the charge which forms the basis for the revocation.”

ENTERTAINMENT LICENSING



- Denial *must* be based on public health or safety concerns: *unreasonable* increased traffic, disruptive conduct or noise may justify denial – but presumption is that conditions on license can alleviate these problems.
- Section 183A – can deny if event *cannot* be conducted so as to protect public from disruptive conduct, criminal activity or health/safety/fire hazards. But again, presumption that license conditions can avoid such consequences.
- Board may impose conditions on these licenses related to traffic, conduct and/or noise – police details, closing hour, noise limitations, etc., and may suspend/revoke license for such violations if not based on content of “speech.”

ENTERTAINMENT LICENSING



The Black Rose v. Boston, 433 Mass. 501 (2001)

- Boston Licensing Board suspended entertainment license of bar/restaurant (one day) when employee assaulted two patrons. Bar challenged suspension, claiming that suspension required to be related to the entertainment.
- SJC disagrees: purpose of §183A is to preserve public order and safety. If that is threatened by licensee's activities, license can be suspended or revoked for “*any violation of law*.”

ENTERTAINMENT LICENSING



Sunday Entertainment

- Sunday entertainment governed by G.L. c.136, §4, a holdover of the Commonwealth’s “Blue Laws.” It requires not only approval of a separate Sunday license by the Board of Selectmen/Mayor/LLA and separate fee [up to \$20 per event], but also the approval of the Commonwealth’s Department of Public Safety and payment of a fee to the Department [\$5 per event]. DPS link below for “Sunday License” section, includes license form and some “FAQs” on the subject:
- <http://www.mass.gov/ocabr/government/oca-agencies/dpl-lp/opsi/regulated-activities-special-licensing-.html>



Open Meeting, Public Records, and Conflict of Interest Law Considerations

- These three so-called “sunshine laws” apply to the licensing process, including meetings, records made or received by the municipality in the process, and the financial and other interests of those acting on the license.
- In general, care should be taken that any such licensing matter be an “arms length”, transparent, interaction.
- Be reminded that in accord with the Open Meeting Law, G.L. c.30A, §§18-25, all meetings of a public body must be open to the public, held in an accessible location, and no less than 48 weekday hours notice must be provided; no e-mailing or talking amongst a quorum outside of such a meeting

Practical Tips: Limit use of e-mail; speak clearly at meeting; avoid discussing matter outside of meeting, even if less than a quorum



Open Meeting, Public Records, and Conflict of Interest Law Considerations

- Under OML, no additional notice requirements
- Under licensing laws, however, the grant of a new license or transfer of location requires a public hearing, no less than 10 days after published notice, and written notice to abutters (as well as any school, hospital or church within 500 feet). All proceedings (hearing and deliberating decision) must occur in open session – meaning that the discussion by the local licensing authority must be at an audible level
- OML does not mandate that members of the public participate in any meeting of a public body. However, where a public hearing is required, abutters are presumed to have an opportunity to be heard. Chair continues to control ability for any party to address the LLA at meeting.

Open Meeting, Public Records, and Conflict of Interest Law Considerations



- Under the Public Records Law, any records made or received by the municipality in “exchange” for a license will be public records; however, certain exemptions may be applicable, depending on the reason for and form of the submission:
 - Applicant’s financial records may be subject to **Exemption (g)** to the extent that they are not a requirement of the submission and are submitted voluntarily [“trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit”]
 - Be reminded that only CORI certified officials, typically the Chief of Police, may view CORI records. If a Chief recommends against granting the license, the LLA either has to accept recommendation without any details, or could offer executive session, Executive Session Purpose 7, to comply with another law [CORI], to the applicant for limited purpose of discussing Chief’s recommendation
 - If application materials are requested and are not exempt, be reminded that private information may be redacted, such as social security numbers, bank account information, or unlisted telephone numbers designated as such.

Practical Tip: Avoid creating unnecessary records relative to licensing matters; only certain information can be shared concerning applicants in open session, so do not ask for specific information about criminal history information; review all local forms to determine whether information being sought is necessary

Open Meeting, Public Records, and Conflict of Interest Law Considerations



- Municipal employees, regardless of whether they are elected or appointed or receive compensation, and including LLA members, are subject to the Conflict of Interest Law.
- The Conflict of Interest Law provides that no municipal official may take action in their official capacity on a matter affecting their financial interest, those of their immediate family, or of their business partner or employer (see G.L. c.268A, §19).
- Thus, if a member of the LLA is an elected official with such a financial interest, the member cannot participate in such matter in any way and will need to leave the table during the discussion and vote on the license.
- If a member of the LLA is an appointed official, they, too are prohibited from acting in their official capacity on any such matter; however, an appointed official can request from their appointing authority, prior to taking action on the matter, a G.L. c.268A, §19(b)(1) exemption.
- In the licensing context, particularly if the municipality does not have an excess of available license, the State Ethics Commission is likely to assume that anyone in the municipality with a license, or seeking a license, has a financial conflict of interest. To participate, therefore, the LLA member with a license would need to demonstrate that the grant or rejection of the license application would have no financial impact on their own licensed activity.

Practical Tip: Before calling the State Ethics Commission with questions, you can review guidance materials at the website:

<https://www.mass.gov/educational-materials-learn-more-about-the-conflict-of-interest-law>

Open Meeting, Public Records, and Conflict of Interest Law Considerations



- The Conflict of Interest Law also prohibits a municipal employee from representing the interests of others before the municipality generally, or, if a special municipal employee, before their own board. G.L. c.268A, §17.
- Thus, no LLA member may appear on behalf of any other person or corporation with respect to licensing matters; an LLA member would not be prohibited, however, from representing themselves before the LLA (although this may raise other conflict of interest questions)
- To the extent that an LLA member does not have a financial interest in such a matter, but it would “appear” that they might vote for or against the license application for reason of kinship, bias, or otherwise, rather than in the best interests of the municipality, the individual should consider filing a G.L. c.268A, §23(b)(3) disclosure, which action renders it “unreasonable” to conclude that they acted otherwise than in the best interests of the municipality. If elected, the disclosure should be filed with the municipal clerk; if appointed, the disclosure should be filed with the appointing authority.
- When a member of the LLA, or a person with whom they do business or have any kind of preexisting relationship, appears before the LLA on behalf of themselves, or must recuse themselves from the LLA because of a conflict, the other members of the LLA should consider filing disclosures under the provisions of G.L. c.268A, §23(b)(3) indicating that they will act in the best interests of the municipality, and without regard to the fact that the individual is a member of the LLA or has a relationship with a member of the LLA. Such a filing renders unreasonable the conclusion that they would act or fail to act for some reason other than in the best interests of the municipality.



Resources

ABCC:

<https://www.mass.gov/orgs/alcoholic-beverages-control-commission>

OML:

KP Law: www.k-plaw.com/resources/eupdates

Attorney General's website: <https://www.mass.gov/the-open-meeting-law>

PRL:

KP Law: www.k-plaw.com/resources/publicrecordsresources

Secretary of the Commonwealth Public Records Law:

<http://www.sec.state.ma.us/pre/preidx.htm>

COI--State Ethics Commission:

<https://www.mass.gov/orgs/state-ethics-commission>

Questions?

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