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John Murray

From: Stephen Anderson
Sent: Monday, May 08, 2006 11:55 AM
To: Don Johnson; John Murray
Subject: Acton/GenSel: Stay of Liquor License Suspension
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Gentlemen:

With respect to the revocation or suspension of a liquor license, Chapter 138, s. 67 provides that, "Pending a decision on the appeal, the action of the local licensing authorities shall have the same force and effect as if the appeal had not been taken."

The only reported appellate decision specifically discussing this sentence (based on a Westlaw search today) is *New Palm Gardens, Inc. v. Alcoholic Beverages Control Com'n*, 15 Mass.App.Ct. 963, *963, 446 N.E.2d 733, **734 (Mass.App.,1983), which held as follows (emphasis added):

The matter of the 1982 license has become moot. Questions with reference to the year 1982, by the passage of time, no longer have practical significance. There is no question open for 1982 as to NPG's failure to exhaust the administrative remedy before the ABCC for that body has acted favorably on NPG's appeal. The ABCC's action also has made now irrelevant whatever, if any, significance may be attached to the language in G.L. c. 138, § 67, as appearing in St.1962, c. 500, that "[p]ending a decision on appeal, the action of the local licensing authorities shall have the same force and effect as if the appeal had not been taken." **The Board has objected to the issuance (in two successive years) by two different Superior Court judges of a preliminary injunction to protect NPG's property interests from possible destruction.** The denial of a license had been ruled by the ABCC for 1982 to have been discriminatory. Cf. the preliminary injunction issued pending review of ABCC action in *Aristocratic Restaurant of Mass., Inc. v. Alcoholic Beverages Control Commn.*, 374 Mass. 547, 550, 374 N.E.2d 1181 (1978). **We would be slow on a record such as that before us to interpret § 67 (at least in the absence of much more explicit statutory language) as denying to a court of general equity jurisdiction power to preserve the existing situation pending the completion of administrative and judicial review of the Board's decision.** Particularly is this so where the complaint reasonably may be viewed as seeking relief on Federal constitutional grounds (appropriate for the invocation of 42 U.S.C. § 1983) against action likely to cause NPG irreparable injury under color of State law for which no adequate remedy at law exists. See discussion in *Porter v. Treasurer & Collector of Taxes of Worcester*, 385 Mass. 335, 431 N.E.2d 934 (1982); *Maine v. Thiboutot*, 448 U.S. 1, 4-11, 100 S.Ct. 2502, 2504-2508, 65 L.Ed.2d 555 (1980).

In the attached unreported decision *INTMB, Inc. v. Town of Westborough*, 2004 WL 2345081, *1 (Mass.Super.) (Mass.Super.,2004), the court issued a preliminary injunction for a stay pending appeal of a suspension of a liquor license. The Board had denied the licensee's request for a stay of the suspension pending resolution of the appeal by the ABCC. The licensee filed suit against the Board with a motion for a preliminary injunction against the Board's order. The court held:

Upon the complaint for injunctive relief and upon hearing oral argument from counsel for both parties, it is hereby ORDERED, that the order of the Board of Selectmen of the Town

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of Westborough dated September 15, 2004 directing a suspension of that certain All Alcoholic Innholder License is stayed pending the disposition of plaintiff's appeal of said order to the Alcoholic Beverage [sic] Control Commission; and it is further ORDERED, that the stay pending appeal shall commence immediately; and it is further ORDERED, that the plaintiff shall be in possession of the All Alcoholic Innholder License, except for the period of suspension, if any, ordered by this court. (Agnes, J.) (Sept. 16, 2004)).

Nor is it uncommon for the Appellate Courts to stay a suspension pending appeal, even where the ABCC and the Superior Court have upheld the suspension. See *Rum Runners, Inc. v. Alcoholic Beverages Control Com'n*, 43 Mass.App.Ct. 248, *248-249, 682 N.E.2d 897, **898 (Mass.App.Ct.,1997) ("A single justice of this court stayed the suspension pending the entry of a final judgment in the Superior Court and another single justice of this court stayed the suspension pending this appeal."). See also *Restaurant Consultants, Inc. v. Alcoholic Beverages Control Com'n*, 401 Mass. 167, *171, 514 N.E.2d 1322, **1325 (Mass.,1987) (ABCC suspended a liquor license for 28 days; the plaintiff commenced an action for judicial review and requested a preliminary injunction to stay the suspension; a Superior Court judge denied the request for a preliminary injunction; the plaintiff filed an amended complaint in the Superior Court, together with a motion to stay the suspension; another Superior Court judge denied the request for a preliminary injunction but did stay the suspension to allow appeal to a single justice of the Appeals Court; the single justice referred the matter to a panel of the Appeals Court and stayed temporarily the order of suspension; the SJC transferred the case on its own motion, affirmed the Superior Court judge's denials of injunctive relief, and remanded the case for reinstatement of the order of suspension.).

This provision of s. 67 contrasts with the requirements of G.L. c. 138, s. 12, stating that "If a [common victualler's all-alcoholic] license granted under this section to a person holding a license as an innholder or common victualler is suspended or revoked for any particular cause, no action shall be taken on account thereof by such authorities with respect to such innholder's or common victualler's license prior to the expiration of the period provided for an appeal under section sixty-seven in case no such appeal is taken, or prior to the disposition of any such appeal so taken, nor thereafter, except for further cause, in case such disposition is in favor of the appellant." See *United Food Corp. v. Alcoholic Beverages Control Commission*, 375 Mass. 238, *238, 376 N.E.2d 833, **834 (Mass.,1978) ("The BLB's order of revocation was automatically stayed pending the appeal to the ABCC (see G.L. c. 138, s 12, second paragraph). A judge of the Appeals Court stayed, pending appeal, the judgment of the Superior Court sustaining that order. The stay has remained in force. Besides the appeals from Superior Court judgments sustaining the revocation and suspension orders of the ABCC, we have an appeal from the denial by a judge of the Appeals Court of a stay of the judgment sustaining the suspension order, but that, like the judgment itself, has been mooted by the carrying out of the suspension.")

I read this authority to indicate that the Board's suspension under Section 67 takes effect pending appeal to the ABCC unless a court issues a preliminary injunction pending appeal to stay the suspension. The Board is not obligated to stay the suspension pending appeal. (The question whether the Board has the authority to stay the suspension pending the result of the appeal to the ABCC is a bit trickier, since an appeal to the ABCC technically divests the Board of jurisdiction over the matter on appeal. If the Board wanted to move in that direction, it would be possible to work out an appropriate stipulation, but counsel should be involved in drafting it.)

Steve

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PART I. ADMINISTRATION OF THE GOVERNMENT

TITLE XX. PUBLIC SAFETY AND GOOD ORDER

CHAPTER 138. ALCOHOLIC LIQUORS

DRUGGISTS

Chapter 138: Section 67. Appeals on refusal to grant or revocation of license; hearing; notice of approval; revocation by commission; reappeal

Section 67. Any applicant for a license who is aggrieved by the action of the local licensing authorities in refusing to grant the same, or by their failure to act within the period of thirty days limited by section sixteen B, or any person who is aggrieved by the action of such authorities in modifying, suspending, cancelling, revoking or declaring forfeited the same, may appeal therefrom to the commission within five days following notice of such action or following the expiration of said period, upon petition in writing, setting forth all the material facts in the case.

The commission shall hold a hearing upon each such appeal, requiring due notice to be given to all interested parties. The decision of the commission shall be made not later than thirty days after the completion of the hearing.

If the commission approves the action of the local licensing authorities it shall issue notice to them to that effect, but if the commission disapproves of their action it shall issue a decision in writing advising said local authorities of the reasons why it does not approve, and shall then remand the matter to the said local authorities for further action. The commission shall not in any event order a license to be issued to any applicant except after said applicant's application for license has first been granted by the local authorities.

Pending a decision on the appeal, the action of the local licensing authorities shall have the same force and effect as if the appeal had not been taken. Upon the petition of twenty-five persons who are taxpayers of the city or town in which a license has been granted by

such authorities, or who are registered voters in the voting precinct or district wherein the licensed premises are situated, the commission shall, or upon its own initiative the commission may, investigate the granting of such a license or the conduct of the business being done thereunder, and shall, after a hearing, modify, suspend, revoke or cancel such license if, in its opinion, circumstances warrant.

If the local licensing authorities fail to suspend, revoke, cancel or declare forfeited a license or to perform any other disciplinary act when lawfully ordered so to do by the commission upon appeal or otherwise, within such reasonable time as it may prescribe, the commission may itself revoke such license or perform such act, with the same force and effect as if issued or performed by the local licensing authorities, but no license shall be issued by the commission except in ratification of a prior issuance to the same party by the local authorities.

In any case in which the commission finds during said hearing that the licensee pursuant to section 12 has served or sold alcohol or alcoholic beverages to either a person under 21 years of age in violation of section 64 or to an intoxicated person in violation of section 69 within the 24 months immediately preceding the date of the alleged violation which is the subject of the hearing, said commission may, in addition to any other sanctions or conditions it may impose, require as a condition precedent to any modification, reinstatement or renewal of said license thereafter that the licensee provide a certificate of insurance for liquor liability of the licensee to a limit of not less than \$100,000 to any one person and \$200,000 to all persons. In any other case in which the commission may act pursuant to this section, it may increase, but not decrease, the limits of liquor liability insurance, if any, required by the local licensing authorities as a condition precedent to the modification, reinstatement or renewal of a license.

After receipt by the local licensing authorities of a decision from the commission as set forth in the third paragraph hereof, any applicant for renewal of a license or any licensee who is aggrieved by the action of the local licensing authorities modifying, cancelling, revoking or declaring forfeited a license or failing to issue a license, which would in effect renew for one year a license held during the previous year by the applicant may, if the said local licensing authority fails within five days after receipt of said decision to take the action recommended therein, again appeal to the commission, upon petition in writing setting forth all the material facts in the case. In the event of such reappeal, the commission shall hold a hearing on such reappeal, requiring due notice to be given to all interested parties. If the commission, on such reappeal approves the action of the local licensing authorities, it shall issue notice to them to that effect, but if the commission disapproves their action, it shall issue a decision in writing advising said local authorities of the reasons why it does not approve. This decision of the commission on reappeal shall be final; provided, that in no event shall the commission order the local licensing authorities to issue any licenses to an applicant not a party to the appeal. If the local licensing authorities fail to issue a license which would have the effect of renewing for one year a license held by the applicant during the previous year, subject to the limitation set forth herein, or to perform any other act when lawfully ordered so to do by the commission upon reappeal, within such time as it may prescribe, the commission may

itself, after such reappeal, issue such license to a party to the appeal or perform such act, with the same force and effect as if issued or performed by the local licensing authorities.

Hearings by the commission on appeals as required by the provisions of this section may be held in the discretion of the commission when required by public convenience or shall be held upon written request of twenty-five persons who are taxpayers of the city or town in which the license is intended to be exercised, in the nearest of the following cities or towns to the city or town in which the license is intended to be exercised:—Pittsfield, Greenfield, Springfield, Worcester, Fitchburg, Boston, Barnstable, New Bedford, Brockton, Lowell or Salem.

Upon the receipt of such appeal the commission shall forthwith notify the local licensing authorities thereof by mailing registered mail and said request shall be made within ten days of such mailing.