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CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

September 5, 2017

Louis A. DePasquale
City Manager
City Hall
Cambridge, MA 02139

Re: Awaiting Report No. 17-45 of 6/12/17 Re: Report on formulating a plan that will provide relief and fair compensation to liquor license holders that have been impacted by dramatic devaluing of their liquor licenses;
and
Awaiting Report No. 17-72 of 8/7/17 Re: That the City Manager is requested to provide an update to the City Council, at the first meeting in September, as to the progress and plan to address the concerns regarding the sale of liquor licenses

Dear Mr. DePasquale:

I am writing with respect to the two above referenced Council Orders. With respect to the first Council Order, Awaiting Report No. 17-45 of 6/12/17, please see attached response of License Commission Chair Nicole Murati-Ferrer in which she addressed issues relating to the Board of License Commissioners' issuance of liquor licenses and their monetary value. In addition to the issues addressed by Ms. Murati-Ferrer, I provide the following response.

Background

The License Commission was established pursuant to Chapter 95 of the Acts of 1922 (the "1922 Special Act"), which states that the authority previously "vested by law in cities or towns, or in the city of Cambridge or any official thereof, to grant, suspend or revoke any of the licenses ... shall ... be exercised in [Cambridge] by [the License Commission] exclusively.... under the authority of...chapter one hundred and thirty-eight of the General Laws." Pursuant to the provisions of the 1922 Special Act, the members of the License Commission include the Police Commissioner, the Fire Chief and a Chair appointed by the City Manager. The License Commission has the exclusive authority to issue liquor licenses in the City of Cambridge, all of which are subject to the prior approval of the state's Alcoholic Beverages Control Commission ("ABCC".)

Pursuant to the License Commission's exclusive authority to issue liquor licenses in the City of Cambridge pursuant to the provisions of G. L. c. 138, Section 12 specifically provides:

In any city or town wherein the granting of licenses under this section to sell alcoholic beverages or wines and malt beverages is authorized, a person may be granted a general on-premises license by the local licensing authorities, subject to the prior approval of the [Alcoholic Beverages Control C]ommission, authorizing him to sell alcoholic beverages without food to patrons and customers subject to all other relevant provisions of this chapter, provided that such beverages shall be drunk and sold in such rooms as the licensing authorities may approve in writing. The annual license fee for such general on-premises license shall be determined by the local licensing authority.

Also pursuant to G.L. c. 138 §12, in addition to the exclusive authority to determine whether to issue alcohol licenses, the License Commission has the exclusive authority over the setting and collection of the fees for such licenses; and G.L. c. 138 §70 establishes that licenses may not be granted by the License Commission unless the fee has been paid into the City treasury.

The License Commission cannot waive fees, mainly for these reasons:

- (1) All licenses must be treated the same way even if they are not currently "in use," pursuant to G. L. c. 138. If the Commission were to "waive" or "put on hold" the license fee for licenses that are not currently in use, that would be treating those licenses differently from other licenses in violation of G.L. c. 138; and
- (2) Even if the License Commission were to waive or put a hold on a license fee, the license could be subject to cancellation or revocation for failure to properly renew, as the license is not deemed renewed for the season until such time as it is paid (even when the payment is bi-annual). Therefore, the fact that a license is not in use does not exempt it from the renewal and payment requirements pursuant to G.L. c. 138 §16A.

The License Commission also has the authority, after hearing or reasonable opportunity therefor, to cancel any license issued under Chapter 138 if the licensee ceases to conduct the licensed business. The License Commission may not put a license "on hold" if the business has ceased, because that would be deemed a "pocket license," which under G.L. c. 138 §77 is not allowed, as confirmed by the Massachusetts Alcoholic Beverage Control Commission ("ABCC") and relevant case-law. See <http://www.mass.gov/abcc/pdf/pocketlicensepdf.pdf>. Pursuant to G.L. c. 138 §77, the License Commission can allow a license that is not in use to be held and not cancelled for a reasonable amount of time (which the ABCC and the courts have upheld is a minimum of 6 months), but cannot allow the license to continue to exist as a roving license for an indefinite period of time.

Based upon the above, as previously stated in my opinion on this issue dated June 14, 2017, it is my opinion that only the License Commission, not the City Manager or City Council, has the authority to establish fees for alcohol licenses, and that the License Commission does not have the authority to waive fees. In addition, the License Commission does not have the authority to put an alcohol license “on hold” if the licensee’s business has ceased.

For-Value Licenses vs. No-Value Licenses

For-value licenses are alcohol licenses¹ that were granted by the License Commission prior to February 28, 2008 pursuant to G.L. c. 138, § 12 without a condition attached to the license prohibiting its sale. If a for-value license holder ceases operation, or no longer wishes to sell alcohol, the license holder may transfer his or her license to another business with the approval of the License Commission. That ability to transfer alcohol licenses has created an environment where for-value license holders have traditionally been able to sell their licenses to other businesses for a price determined by the market demand and relative scarcity of such licenses.² However, the License Commission’s authority to approve such license transfers is discretionary.

In 1986, the License Commission began capping the number of alcohol licenses that could be issued in certain areas of the city. By 1990, 15 different areas were capped. The Commission’s rule allowed for the Commission to break the cap and issue a new license without any charge for the license itself, referred to as a “no-value license”, but only “as a LAST RESORT, after every effort to purchase an existing license is exhausted.” Rules and Regulations of the Cambridge License Commission Relating to Alcoholic Beverages and Entertainment (hereinafter, the “Rules”), Addendum D, “Amendment to Cambridge Cap Policy Addenda” (emphasis in original). Such licenses may not be transferred or sold. By issuing these licenses, the License Commission exercised its discretion not to approve the transfer of this category of licenses. The License Commission specified that “[t]he rationale for such policy (issuance of no-value, non-transferable licenses) is to allow issuance under the cap policy where all steps to override the cap are met under Addendum D and to allow so called ‘mom and pop operations’ or those catering to food oriented, non-bar and non-entertainment operations, to afford such licenses.” Rules, Addendum D, “Cap Areas.” Such no-value, non-transferable licenses are subject to the imposition of annual fees similarly to the imposition of annual fees upon other for-value licenses.

¹ For purposes of this memorandum, we use the phrase “alcohol licenses” to mean all-alcohol licenses as well as wine and malt licenses, as there is no distinction between them in this context.

² There is yet another category of licenses that have no value, but are transferable. It can be argued that these licenses do have value, since a business purchased with one of these licenses has more value than a business purchased without a license. Historically, businesses avoided the issue of value by assigning all of the value of the transaction to equipment, good will, etc. and zero value to the license itself. For purposes of this analysis, these licenses are considered to be “for-value” licenses, since they are transferable and command some market value, albeit a value intertwined with the business attached to it.

Over the years, some for-value license holders have objected to the Commission issuing no-value licenses, arguing that issuing no-value licenses, even subject to the limitations described above, allows new establishments to opt out of purchasing a license on the market, thereby decreasing demand and decreasing the prices that for-value licenses command at sale. The License Commission has ceased issuing such no-value licenses. More recently, some for-value license holders have objected to the Commission terminating the cap areas and issuing new transferable for-value licenses without first requiring that “every effort” have been made to purchase an existing license.

Under Massachusetts law, license applicants have no property interest when the license they seek is discretionary. See Roslindale Motor Sales, Inc. v. Police Commissioner of Boston, 405 Mass. 79, 82 (1989) (“[t]o have a property interest in a license, an applicant must ‘have a legitimate claim of entitlement to it.’”). Once the license is granted, deprivation of that license requires due process. See, e.g., Medina v. Rudman, 545 F.2d 244, 250 (1st Cir. 1976) (“once a license, or the equivalent, is granted, a right or status recognized under state law would come into being, and the revocation of the license would require notice and hearing....”)³

However, when the License Commission grants a no-value license or a new for-value license, it does not revoke or suspend the for-value licenses held by others. The holders of the for-value licenses still have the privileges conferred upon them by the license, including the ability to sell their license (albeit potentially for a lower price). The re-sale market for for-value licenses is a byproduct of the regulatory scheme, but is not itself a privilege or right conferred directly by that scheme (unlike, for example, the ability to serve the type of beverages governed by the license). Although the statute contemplates that some licenses may be transferred (see G. L. c. 138, § 23, paragraph 9), it does not specifically contemplate (or prohibit) the *sale* of those licenses. By extension, the regulatory scheme does not guarantee the license holder that he or she will be able to command a particular price (or any price at all, in fact) for the license if he or she chooses to transfer it to another party or entity. Many variables, some of them entirely outside the City’s control, affect the value of a license on the open market – for example, the number of other licenses on the market at the same time. Because selling the license for value is not a privilege directly conveyed by the regulatory scheme, decreasing that value is not a deprivation that would require the City to compensate or provide due process for the for-value license holder.

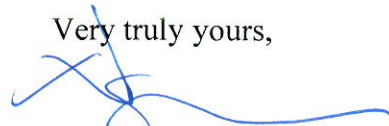
No Massachusetts court has analyzed the issue of whether a license holder has a legal interest in the value of her license on the open market such that she would be entitled to due process and/or civil recovery for the lost value. The Supreme Judicial Court has acknowledged that although a liquor license conveys “no vested interest to the licensee”,

³ Specifically in the context of alcohol licenses, G. L. c. 138, §23 provides that “[n]o holder of such a license or permit hereunder shall have any property right in any document or paper evidencing the granting of such license or permit and issued by the licensing authorities, and said authorities, upon the expiration, suspension, revocation, cancellation or forfeiture of such a license or permit shall be entitled upon demand to the immediate possession thereof.” However, this refers to the physical license, not the privileges conferred therein.

purchasers do consider the license to have value. Jubinville v. Jubinville, 313 Mass. 103, 106-107 (1943). In the criminal context, the Massachusetts Appeals Court has found that a liquor license has value such that a threat to devalue that license could be considered an injury to property for purposes of the extortion statute, G. L. c. 265, § 25. Commonwealth v. Downey, 12 Mass. App. Ct. 754, 757 (1981). However, Massachusetts courts have not extended that reasoning to the due process context.

Therefore, in my opinion, the License Commission has no legal obligation to provide compensation to alcohol license holders who may be experiencing a devaluation of their alcohol license on the private market. There may be ways that the License Commission could mitigate the devaluation of certain alcohol licenses, such as by exercising its discretion not to issue new alcohol licenses, but there is nothing of which we are aware that would require the License Commission to do so.

Very truly yours,




Nancy E. Glowa
City Solicitor



CAMBRIDGE LICENSE COMMISSION

831 Massachusetts Avenue, First Floor, Cambridge, Massachusetts 02139

RESPONSE TO COUNCIL ORDER

TO: Louis DePasquale, City Manager
 Lisa Peterson, Deputy City Manager
 Nancy Glowa, City Solicitor
FROM: Nicole Murati Ferrer, Esq. 
DATE: September 5, 2017
RE: Response to City Council Order O-9

The following is a response to City Council Order O-9 dated June 12, 2017, which asked that a plan be formulated to provide relief and fair compensation to liquor license holders that have been impacted by "dramatic devaluing" of their liquor license.

Liquor licenses have no attached value other than providing the holder the privilege of serving alcohol in accordance with the law. In addition, the "value" attached to such licenses has been "artificially" created by private parties engaged in private transactions. These "values" have fluctuated and continue to do so. All alcohol licenses have been purchased in the open market for as much as \$400K (1997-Red House) and as little as \$60K (2001-River Gods). Most recently, prior to the rules changing in 2016 (explanation below) an all alcohol license transferred for \$200K (2016-Sumiao), after the rules changed an all alcohol license transferred for \$175K (2017-Oaxaca).

Background/Standards:

The Board of License Commissioners for the City of Cambridge (the "Board"), issues licenses in accordance with G. L. c. 138. Pursuant to Section 12, the Board issues licenses for the sale/service of alcohol for the immediate consumption at the approved location. These are generally referred to as pouring licenses.

The standard to grant such licenses is established by G. L. c. 138, § 23: "The provisions for the issue of licenses and permits hereunder imply no intention to create rights generally for persons to engage or continue in the transaction of the business authorized by the licenses or permits respectively, but are enacted with a view only to serve the public need and in such a manner as to protect the common good and, to that end, to provide, in the opinion of the licensing authorities, an adequate number of places at which the public may obtain, in the manner and for the kind of use indicated, the different sorts of beverages for the sale of which provision is made." In Ballarin v. Licensing Board of Boston, 49 Mass. App. Ct. 506, 511 (2000), the Court explained the concept of public need and reiterated the Board's discretionary role in granting/denying licenses.

Need, in the literal sense of requirement, is not what the statute is about. Rather, the test includes an assessment of public want and the appropriateness of a liquor license at a particular location. For example, one might hesitate to authorize a license for a bar across the street from a public school. Consideration of the number of existing dispensaries in a locality is a proper concern, as are the views of the inhabitants of the locality in which a license is sought. In making its discretionary determination, a licensing authority may take into account a wide range of factors - such as traffic, noise, size, the sort of operation that carries the license, and the reputation of the applicant. In

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the case of liquor licenses, town and city boards may exercise judgment about public convenience and public good that is very broad, but it is not untrammelled.

The category/types of pouring licenses issued by the Board, either through an approval of a transfer or as a new license, are defined in G. L. c. 138, §§ 1 and 12. Chapter 138 does not assign values to a license or differentiate value between a license that was transferred or one that was newly issued. The only portion of the law that speaks of the value of a license is § 23 which states that licenses are transferrable and may be pledged for a loan. That section goes on to say, in part:

No holder of such a license or permit hereunder shall have any property right in any document or paper evidencing the granting of such license or permit and issued by the licensing authorities, and said authorities, upon the expiration, suspension, revocation, cancellation or forfeiture of such a license or permit shall be entitled upon demand to the immediate possession thereof.

It should be noted, that the State Courts have recognized that pouring licenses have value to the extent that they can be pledged, auctioned and levied.

No quota & adoption of caps:

Most municipal licensing authorities are limited by state law as to the number of pouring licenses that can be issued. The Acts of 1978, c. 377, § 17A, created an opportunity for municipalities and towns to “opt out” of the quota system. Cambridge, by vote of City Council, took advantage of that opportunity on May 18, 1981. Since that time, the Board has been exempted only from the portion of Chapter 138 which limits the number of pouring licenses it can issue.

In 1986, based on multiple complaints received from various community groups including but not limited to the Harvard Square Defense Fund, the Board decided to implement caps in three areas (Harvard Square, area between Massachusetts Avenue from Prescott Street and Putnam Square to Bigelow Street, and Central Square). These caps were implemented in accordance with G. L. c. 138, § 12: “The licensing authorities may refuse to grant licenses under this section in certain geographical areas of their respective cities or towns, where the character of the neighborhood may warrant such refusal.” They were implemented to ensure no further licenses were issued in those areas.

When implementing the caps, the Board published the standard for getting licenses within the capped zones, pursuant to G. L. c. 138, § 12 (setting limits in certain geographic areas) and § 23 (Board has right to adopt regulations and reasonable requirements related to licenses issued). Specifically, the Board stated there were two ways to get a license in a capped area. First, was through a transfer of an existing license in the capped area (purchase the license/business from an existing one). The transfer would have to be within the same cap –transfers from outside of the cap were not allowed. The second, was to “break the cap” showing an extraordinary public need for the issuance of the license and community support.

If the person was seeking to operate in a non-capped zone, the person could directly apply for a new license from the Board or could seek the transfer of a license through a purchase from an existing business. The Board published that any new license issued by it would be non-transferrable and inseparable from the licensee unless by written order from the Board. A review of the records shows

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that some purchased licenses, even though the business was not going into a non-capped area, while others applied directly to the Board and obtained a new license. Any new license issued was considered a “free license.”

In 1987 and 1990 more capped areas were created. The Board issued new licenses and “broke” the cap various times.

In 2006, the Board made amendments to the cap policies. Changes of relevant nature were allowing cap-to-cap transfers, and breaking the cap only after showing that all efforts to purchase an existing license had been exhausted in addition to the extraordinary public need and community support.

The implementation of the 2006 amendments, which were related to cap areas, extended to non-cap areas. Specifically, the Board started to apply the practice of issuing new licenses only after an applicant demonstrated that they had taken steps to purchase a license in the open market (regardless of whether a business was going into a cap/non-cap zone). Therefore, in practice it was as if the entire City was in a cap zone.

On April 9, 2007, the City Council Economic Development, Training, and Employment Committee Members (Decker, Murphy and Toomey) expressed concerns regarding the effects of caps in the City of Cambridge. Specifically, the report mentioned that the caps were not “assisting the City with its economic development goals. The effect of the Cap Policy is particularly hard on new restaurant owners because the Cap Policy keeps the costs of licenses extremely high.” A Task Force was created to address the issues raised by the Committee Report and related City Council Orders (O-20 dated February 5, 2007, and O-16, O-38, O-39 dated April 9, 2007).

On February 26, 2008, the Board adopted a policy which stated that new licenses would only issue if there was overwhelming neighborhood support (and provided guidelines of what could establish this prong), proof of need and lack of harm. Although the Board did not go on record to say it eliminated the cap zones, it continued the practice of applying this to the entire City and therefore the entire City was a “cap zone.” The Board also implemented a policy that any new license issued by it would be designated as no-value, non-transferrable, and gave those licenses an annual fee higher than those which issued as transfers. Finally, the Board made clear that the rule from 2006 (show that all efforts were made to purchase a license) continued to be in effect.

2016 Changes in Rules/Caps:

The License Commission started working on updating its rules and regulations as it related to alcohol licensees in 2015. In April 2016, after internal reviews with legal counsel and considering the current state of the law and practices, the Board released a draft of proposed changes to the Rules and Regulations. Those proposed changes were published in mid-April and an open meeting was held on April 25, 2016 to hear public comments on the proposed changes. Thereafter, they were placed on the agenda and for further discussion on: May 2, May 10, May 16, May 24, June 7 and June 21. In addition, on May 23 the Board’s Chair met with business associations to hear their concerns and answer their questions. There was also an open meeting with the City Council’s Public Safety Committee on June 23. The Board also published two documents which outlined the proposed changes. The one published after the May 2nd meeting, gave a detailed explanation as to the Board’s proposed changes and

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reasoning behind the proposals. On July 7, 2016, the proposed changes to the rules were adopted as amended throughout the process.

During its discussions, the Board acknowledged through its members, including long-time members Chief Reardon and Commissioner Haas, that for years the Board had “abandoned” caps. The Board agreed that “breaking the cap,” which was meant to be the exception not the rule, had become the practice. The “self-imposed” caps had become “artificial.”

Moreover, the Board found that the purpose of the caps (to not saturate an area) was already built in the law. Specifically, G. L. c. 138, § 23, allows for the Board to deny an application for a new license if it did not “serve the public need and in such a manner as to protect the common good.” Therefore, the Board voted to remove the caps.

A consequence to eliminating the rules/addendums regarding the caps was the elimination of the requirement that an applicant show that s/he had taken all steps to try to secure a license through a private transaction with a party who held a license. There is no formula as to how the private market “assigned value” to licenses. Although the Board recognized that the market’s “value” of licenses was artificial, it recognized that to officially strike the practice of requiring parties to attempt to first purchase a license would lead to some “devaluation” of the current market on sales of licenses. However, the Board felt it should not insert itself in private transactions or act as “brokers.”

The Board also found, consistent with what had been previously discussed by City Council, that such a practice could impede the economic development of the City. The Board went on record to say that this did not mean that licenses would be granted without regard to the standards set by the law – public need and common good.

The Board also knew that the change was already in practice. Most persons that were issued a new license (did not purchase one) would basically inform the Board that it was too expensive to buy a license and provide the Board with community support. That was sufficient for the Board to issue a new license. The Board’s changes were meant to clarify and make the process that was already ongoing more transparent.

For example, the year prior to the Rules changing (July 2015-July 2016), there were 10 transfers, 4 of which were transferred to new locations. During that same time, the Board issued 13 new licenses, 5 of which were in cap zones. In addition, of the 13, four were locations that had previously held a license but since the license was “non-transferrable,” the new business entity had to reapply for a license.

Finally, the Board knew that even with the change, some licenses would still sell and transfer. Most of the time, when a business is going into a space with an existing license, the business is bought with the related assets, including the liquor license. The purchasing of the current liquor license usually allows for a seamless transition in business and an overall swifter approval process. In addition, a space that has a current liquor license has a presumptive showing of public need.

For example, from July 2016 to the present, 10 licenses have transferred and there are currently 2 pending applications for transfers, for a total of 12 licenses sought to be transferred (two of which are at a new locations). In that same period, the Board has issued 8 new licenses, and there are 3 pending local/final approvals, for a total of 11 new licenses. Of the 8, one is at a location that previously had a

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license but the license was “non-transferrable,” and therefore the new business had to reapply for a license.

The Board did not make its decision to remove the policy that persons first attempt to buy a license lightly. There were approximately 230 pouring licenses when the rules were changed. Of those, approximately 78 could end up in a position different than when they first started. The Board’s decision was a balancing act and one that took much consideration by the Commissioners.

Other Changes:

The other change related to the cap zones was that the Board eliminated the different tiers of licenses. Licenses would no longer be designated as “transferrable,” “non-transferrable,” “value,” or “no-value.” The Board did this to align itself with the purity of the designations within Chapter 138 – licenses are transferrable and can be pledged (§ 23). In addition, one of the biggest issues that had been unintentionally created with the “non-transferrable” licenses was that if a new business took over the space, there would be a “lag” time of at least 3 months during which time the new business could not get a liquor license/sell liquor because there was already a license attached to the location. This is because pursuant to G. L. c. 138, liquor licenses attach to a location and there cannot be more than one liquor license associated/attached to one location.

The Board voted to have licenses which were currently issued as “no-value/non-transferrable” to cease to exist on their own. This means that the licenses currently issued with such designations will remain that way until the business ceases to exist.

To align itself with the vote, and clarify and implement more transparent fees, on July 7, 2016, the Board eliminated the “value” versus “no-value” annual licensing fees. It voted that any license issued after July 7, 2016 and through the end of 2016, would pay the annual and corresponding fee designated under the column of “newly-issued license” of the fee schedule effective at the time. The Board further committed itself to evaluate the fee schedule and decide, prior to the renewal season of 2016, whether to change the licensing fees.

On October 5, 2016, after hearings on the matter, the Board eliminated the different tiers of licensing fees and made it effective for the 2017 new/renewal year. Therefore, all new licenses that sold the same type of alcohol and were in the same category would have the same initial annual fee, and all licenses that sold the same type of alcohol and were in the same category, would have the same renewal fee.

How it Works:

Pursuant to Chapter 138, liquor licenses attach to a location. This means that a person/business can only serve alcohol on the premises when the liquor license is under the name of the person/business in control of the premises. If there is a liquor license that has been “tied” to a location, the law prevents the issuance of another license at that location. In addition, the law prevents licenses from existing without being “tied” to a location.

Currently, if you are seeking to open a business in Cambridge with a pouring license and have identified a space you need to know the following: (1) if there is a liquor license currently attached to it, you either

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have to get it transferred to you or have to wait until the liquor license is transferred out or cancelled; and (2) if there is no liquor license attached to the location, you can apply for one either as a transfer (you are purchasing it from someone who has one and transferring it to your location) or as a new license.

At hearings, if an applicant is seeking a new license, the Board does not inquire as to whether someone attempted to purchase a license first. Conversely, if someone is applying for a transfer of a license, the Board does not inquire as to why. The Board's process is to ensure that licenses are issued only when the applicant meets the standards under the law, including but not limited to, showing there is a public need and the license will serve the common good.

Miscellaneous and Additional Information:

In addition to the matters raised by City Council Order O-9, a question has been raised as to when it is appropriate to designate licenses as "general on premises" pursuant to G. L. c. 138, § 12. This question arose after License Commission Investigators found that certain businesses, which held "restaurant" type licenses were not operating a kitchen or providing food to their patrons. In response, letters were sent to the businesses informing them that they must operate as a restaurant or file an application to seek the Board's approval to change the type of the liquor license to a "general on premise license." It has been questioned whether this was the appropriate process or designation, or whether the License Commission should have revoked the licenses. It is our position that the License Commission acted in accordance with the law, common regulatory practice, and the provisions of Chapter 138.

General on premise licenses are defined in G. L. c. 138, § 12, which states in part:

In any city or town wherein the granting of licenses under this section to sell alcoholic beverages or wines and malt beverages is authorized, a person may be granted a general on-premise license by the local licensing authorities, subject to the prior approval of the commission, authorizing him to sell alcoholic beverages without food to patrons and customers subject to all other relevant provisions of this chapter, provided that such beverages shall be sold and drunk in such rooms as the licensing authorities may approve in writing.

This is the only section in Chapter 138 where a general on premise is defined. Conversely, taverns, which were accepted by the voters of Cambridge in 1933, are defined in G. L. c. 138, § 1 as:

Tavern, an establishment where alcoholic beverages may be sold, as authorized by this chapter, with or without food, to be served to and drunk by patrons in plain view of other patrons, all entrances to which shall open directly from a public way. The business conducted therein shall be open to public view from the sidewalk level and the establishment shall be properly lighted. No window facing a public way shall be obstructed by any screen or other object extending more than five feet above the level of the sidewalk on which the establishment abuts, but in no event shall any screen or obstruction prevent a clear view of the interior of said tavern.

The definition of a tavern is very specific and it is a type that can only be assigned to those businesses that fall into it. Pursuant to G. L. c. 138, §§ 33 and 33A, the operating hours of a tavern are restricted in

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a manner different to other on premise consumption liquor licenses. None of the businesses which were found not to be operating a restaurant fall into the definition of a tavern.

Pursuant to G. L. c. 138, §§ 23 and 64, the License Commission may refuse to reissue or issue a license. Similarly, the License Commission may, after a hearing, suspend, modify, revoke or cancel a license if it finds that the holder is not in compliance with the law or the Rules and Regulations. Because the statute says "may," rather than "shall," the License Commission has broad discretion on what action to take. Sending an inquiry letter requesting that the business either come into compliance or petition to change its type of license within a definite period is a permissible and appropriate action pursuant to G. L. c. 138, §§ 23 and 64.

Moreover, the portion of section 64 which calls for a revocation of a license when issued in violation of any provision of Chapter 138, relates only to the action that must be taken by the Alcoholic Beverages Control Commission, not the local board. In this instance, this portion of the section would not apply since none of the licenses were issued in violation of the provisions of the Chapter. At the time the licenses were issued, the information before the Board was that these businesses were planning to operate as a restaurant not a general on premise. Accordingly, those licenses were issued in accordance with the law.

Finally, since the inquiry letters were sent, two of the businesses have received approval from the License Commission and the Alcoholic Beverages Control Commission to change the type to a general on premise.

Please let me know if you need further information on any of the above matters. Thank you.

Attachment: Liquor Licenses response NMF 091117 (CMA 2017 #224 : AR Response RE: Liquor Licenses)