

STATE OF CONNECTICUT

DEPARTMENT OF CONSUMER PROTECTION

In the Matter of

Pavilion Restaurant
Stephanie Livesey, Permittee
Restaurant Consultants, Inc., Backer
Liquor Permit No. LCA.5820
Case Nos. 2008-4486; 2008-5448

Docket No. 08-145
March 26, 2009

MEMORANDUM OF DECISION

This matter involves a café liquor permit issued to the Pavilion Restaurant, 85 Swan Avenue, Old Lyme, Connecticut. A formal administrative hearing was held before the Department of Consumer Protection on January 8, 2009, at which time Frank Maratta, president of the backer corporation, appeared with counsel. At the conclusion of the hearing, the record was left open until February 11, 2009 for the submission of briefs and additional documents.

The alleged violations came to the attention of the Department of Consumer Protection by way of a police referral from the Connecticut State Police and a special investigation conducted by the Department of Consumer Protection's Liquor Control Division. It is alleged that (1) on or about May 26, 2008, the Respondent violated Sec. 30-22a(a) of the Connecticut General Statutes, in three counts, with regard to the definition of a "café." It is further alleged that on or about June 1, 2008, the Respondent violated Sec. 30-22a(a) and 30-22a(c), Connecticut General Statutes, in five counts, with regard to the definition of a "café."

As to Charge 1, the Respondent left the department to its proof. The Respondent denied Charges 2 and 3, and the matter proceeded to a hearing.

On May 26, 2008, just past 6:00 p.m., Connecticut State Police Trooper Olsen observed a male patron, Robert English, exit the back door of Pavilion Restaurant towards the parking area carrying an open bottle of Bud Light beer, an alcoholic beverage. Thereafter, Trooper Olsen observed two other male patrons, Kevin Capobianco and Nicholas Carbone, exit the main door of Pavilion Restaurant, each carrying a bottle of Bud Light beer.

On June 1, 2008, at approximately 2:00 p.m. Supervising Agent Stanley Burk observed Sara O'Leary exit the permit premises carrying two plastic cups, each containing a vodka and cranberry juice alcoholic beverage. Ms. O'Leary walked across an outdoor patio, stepped onto the beach carrying the alcoholic beverages, and gave one of the drinks to Sarah Bastiaanse. Ms. O'Leary and Ms. Bastiaanse thereupon poured the alcoholic drinks into what appeared to be water bottles and went to another part of the beach. Another female patron, Patricia Lodovico, walked out of the Pavilion premises carrying a plastic cup containing a vodka tonic, past the doorman. She sat at an outdoor picnic table and drank her vodka tonic. At approximately 2:45 p.m., Ms. O'Leary returned to the Pavilion, exited the premises carrying two vodka drinks, and went onto the beach where she handed Ms. Bastiaanse one of the

vodka beverages. Subsequently, a male patron, Nhel Theam, exited the front door of the Pavilion café premises, past the doorperson, carrying a Bud Light beer.

The crux of this matter rests on whether or not this café permit has permanent approval for service and consumption of alcohol outside the permit premises, specifically on its deck and adjacent beach area. Based upon the testimony and documents presented, we find the following facts. This location has held a café liquor permit since April 1979. At the time this liquor permit was issued, it was not legally permissible for café liquor establishments to allow the outdoor service or consumption of alcohol. There was no statutory authority for the then-Department of Liquor Control to issue approvals for outdoor service of alcohol on decks, patios, or any other outdoor areas. It was permissible for liquor establishments to offer the sale and service of food and non-alcoholic beverages outside the permit premises. As part of their liquor permit application, many such establishments, the Pavilion included, provided sketches that depicted outdoor areas or patios where patrons could be served food and non-alcoholic beverages.

Statutory authority for the outdoor service and consumption of alcohol was provided by Public Act 79-604, effective October 1, 1979. P.A. 79-604 provided that an establishment operating under the auspices of a café liquor permit could, with approval from local zoning and health officials, seek permission from the Department of Liquor Control to sell,

serve, deliver or allow its patrons to consume alcoholic beverages outside the permit premises on a patio.

Whenever such permission was granted to a permit premises, the liquor permit was always endorsed by the department with the word "PATIO" typed or stamped on the document, and a copy of the stamped liquor permit was retained in the department's files. Thereafter, each renewed liquor permit would have also been endorsed "PATIO." If a liquor permit is not endorsed "PATIO," there is, in fact, no such approval by the department for the outdoor service of alcohol. Liquor permits for this location issued from 1982 to present found in the department's file lack the endorsement "PATIO."

Permits issued for the years prior to 1982 were not available for review due to department records retention policies in effect at that time. There are no records with the Old Lyme zoning authority to indicate that this premises has ever been granted permanent approval for the outdoor service of alcohol.

In 1991 and in 1992, the Pavilion sought and received temporary, one-day approvals for the outdoor patio service of alcohol. On these occasions, zoning approval was sought and received by the Pavilion and the department approved outdoor service of alcohol for the specific dates requested. Both sketches submitted by the Pavilion to the department for the temporary one-day patio approvals bear the local zoning and fire marshal signatures. Retired Liquor Control Agent Wyborny was the

department contact for such temporary patio approvals and corresponded with the Pavilion representatives at that time. One-day patio approvals would have been unnecessary if Pavilion had ever been granted permanent patio or outdoor approval by the department.

There was divergent testimony concerning whether the Respondent initially obtained department approval for outdoor service and consumption of alcoholic beverages, despite the fact that such approval would have been contrary to existing law. The determination of factual issues on conflicting testimony is within the province of the commission. Noyes v. Liquor Control Commission, 151 Conn. 524, 527, 200 A.2d 467 (1964). Based upon the substantial evidence in this matter, we find that the Pavilion does not have permanent approval for any outdoor service and consumption of alcoholic beverages. Therefore, the Respondent is in violation of Section 30-22a, Connecticut General Statutes.

The Liquor Control Act vests in the Commission a liberal discretionary power to determine factual matters with regard to liquor permits. Gulia v. Liquor Control Commission, 164 Conn. 537, 325 A.2d 455 (1973). Based upon the testimony and documents presented at the hearing, we find the Respondent in violation of Charges 1, 2 and 3, as alleged, and we hereby suspend the Respondent's liquor permit for a period of seven days. In lieu of the seven-day suspension, however, we will accept payment of a fine of \$525.00 in accordance with Section 30-6-A8(i) and (k) of the Regulations of Connecticut State Agencies.

**DEPARTMENT OF CONSUMER PROTECTION
LIQUOR CONTROL COMMISSION**

BY:

Elisa A. Nahas, Esq.
Designated Presiding Officer

Stephen R. Somma, Commissioner

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Non-Parties:

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Director John Suchy, Liquor Control Division

Connecticut Beverage Journal, 2508 Whitney Ave., P.O. Box 185159,
Hamden, CT 06518

Connecticut State Library, 231 Capitol Avenue, Hartford, CT 06106