



STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
LIQUOR CONTROL COMMISSION

IN RE: M. B. AND D., LLC
D/B/A BREW WORKS OF FREMONT
5885 S WARNER AVE
FREMONT, MI 49412
SHERIDAN TOWNSHIP

HEARING: DECEMBER 4, 2020
PLACE: ZOOM PLATFORM
COMPLAINT NO. CV-508760
BUSINESS ID NO. 2614

CLASSC BREW PUB SDM
SS (PM) ADDBAR DANC-ENT
OD-SERV CATERING SPECIFIC
PURPOSE PERMITS (GOLF,
BOWLING, FOOD)

NEWAYGO COUNTY

CHARGES – NOVEMBER 21, 2020

- (1) M.B. and D., LLC, and/or employees of the licensee engaged in an illegal occupation or illegal act upon the licensed premises, contrary to Rule 436.1011(1), specifically: allowing indoor gatherings at a food service establishment, contrary to sections 2(a)(2) and 3(b)(1) of the Michigan Department of Health and Human Services Gatherings and Face Mask Order dated November 15, 2020.
- (2) M.B. and D., LLC, and/or employees of the licensee engaged in an illegal occupation or illegal act upon the licensed premises, contrary to Rule 436.1011(1), specifically: allowing indoor gatherings at a bowling alley, contrary to sections 2(a)(2) and 3(a)(2) of the Michigan Department of Health and Human Services Gatherings and Face Mask Order dated November 15, 2020.
- (3) M.B. and D., LLC, and/or employees of the licensee engaged in an illegal occupation or illegal act upon the licensed premises, contrary to Rule 436.1011(1), specifically: allowing persons to participate in indoor gatherings at the licensed premises without requiring them to wear face masks, contrary to section 7(c) of the Michigan Department of Health and Human Services Gatherings and Face Mask Order dated November 15, 2020.

PROCEDURAL HISTORY

On December 4, 2020, a hearing was held virtually on the zoom platform in the above-entitled case before a duly authorized agent of the Commission, Administrative Law Judge Michael J. St. John.

Petitioner, Michigan Liquor Control Commission (Petitioner, Commission, or MLCC), was represented by Daniel Felder, Assistant Attorney General. The Respondent Licensee (Respondent or Licensee) was represented by Stephen Kallman, attorney at law.

EXHIBITS

The Petitioner Commission offered the following exhibits which were admitted without objection:

1. Violation Report
2. November 19, 2020 Facebook post
3. Gofundme Post
4. Gofundme Status
5. Photograph of bowling area
6. Photograph of bowling area
7. Photograph of bowling area food and drink area
8. Photograph of bowling area food and drink area
9. Photograph of bowling area food and drink area
10. Photograph of bowling area and bowling area food and drink area
11. Photograph of bowling area food and drink area
12. Photograph of staff member selling raffle tickets
13. Photograph of parking lot

The Respondent Licensee offered the following exhibit which was admitted over the Petitioner Commission's foundation and relevance objections:

- A. *ABC, et. al. v Whitmer, et. al.* Decision

FINDINGS OF FACT

Based on the testimony presented and the exhibits admitted at the hearing, the following facts are found:

1. Licensee allowed indoor gatherings at their licensed food service establishment on November 21, 2020.
2. Licensee allowed indoor gatherings at their licensed bowling alley on November 21, 2020.
3. Licensee allowed customers and staff to participate in indoor gatherings at their licensed establishment without requiring them to wear face masks on November 21, 2020.
4. Licensee continues to allow indoor gatherings and allow customers and staff to not wear masks.

The following represents a summary of the testimony of the witness. Any opinion is that of the witness:

Amanda Nye, Regulation Agent (Investigator) for the Petitioner Commission

5. Investigator Nye has been an Investigator for the last five plus years.
6. Investigator Nye did social media searches of the Licensee and located the Licensee's Facebook page which on November 19, 2020 showed a post indicating that they were remaining open (Exhibit 2).
7. On November 21, 2020, Investigator Nye went to the Licensee's establishment.
8. At the establishment, Investigator Nye observed the outside of the establishment and then went inside.
9. Once inside, Investigator Nye observed patrons inside the establishment eating, drinking, and bowling.
10. Investigator Nye attempted to bowl but was told that she could not because there was a bowling league that would start bowling shortly.
11. Investigator Nye next went into the restaurant area of the establishment and attempted to take a seat but was not allowed because she was told that she needed permission to sit down in the restaurant.
12. Outside the restaurant (but inside the establishment) the manager told the Investigators that he could get them seats inside the restaurant.
13. The manager was not wearing a mask.
14. The manager told the Investigators that the food may come in to go containers.
15. The manager told the Investigators that the bowling alley was taking a stand and if they were closed as required by the Order that they would need to close permanently on January 1, 2021.
16. The manager told the Investigators that they had received death threats because a patron believed that he/she had contracted COVID-19 at the establishment.
17. The Investigators ordered food and soft drinks which they were served in to go containers.
18. The Investigators consumed their food and drinks at the licensed premises.
19. Later, the Investigators observed more than 50 patrons bowling; none were wearing masks (Exhibits 5, 6, 10 and 11). Patrons were also observed sitting in the bowling area with drinks without masks (Exhibits 7, 8, 9, and 10).
20. Staff were walking around with a raffle bucket (Exhibit 12). The staff member was not wearing a mask.
21. When Investigator Nye left the establishment, she observed that the parking lot had several cars in it (Exhibit 13).

22. The violations are all violations of MLCC rules which in turn are violations of the Public Health Order.
23. Investigator Nye also observed illegal gambling (and was offered the opportunity to purchase a raffle ticket) on the premises but the Commission did not charge the Licensee with this violation of the law.

CONCLUSIONS OF LAW

The basic facts of this case are not in dispute. The Licensee allowed indoor dining and bowling on November 21, 2020 after the November 15, 2020 Public Health Order prohibited in person indoor dining and bowling. Neither the customers nor the staff wore masks. The credible and un rebutted testimony of the Investigator was supported by multiple photographs (Exhibits 5-12) which both show customers eating and drinking indoors and staff attending to customers; none are wearing masks.



Exhibits 5-12

Allowing in person dining is contrary to the November 15, 2020 Public Health Order and therefore contrary to MCL 333.2226(d) and therefore contrary to MLCC Rule 436.1101(1). The primary

question raised at the hearing is whether the Commission has the authority to sanction a licensee for violating a non-liquor-related order or statute. They do.

ABC v Whitmer is distinguishable from this case.

The Licensee argued that the Commission lacks the authority to sanction the Licensee for a violation of a non-liquor-related order or statute and cited *ABC v Whitmer* (Exhibit A) as the primary authority for that position. In *ABC*, the Court of Claims ruled that it was not permitted to add penalties found in another statute into an executive order. That is not what occurred here. Unlike Executive Order 2020-97 which references a MIOSHA statute, the November 15, 2020 Public Health Order does not reference the Michigan Liquor Control Code. Had the Public Health Order made a violation of that order a *per se* violation of the Liquor Control Code, that would have been impermissible. The November 15, 2020 Order did not do so.

ABC explicitly contemplates overlap between violating an executive order and another statute noting that “any violation under MIOSHA will be subject to the penalties available under that separate statutory scheme.” (Page 7). Here the Commission alleges that there was a violation of the LCC Rules by the Licensee when the Licensee committed an illegal act by violating the November 15, 2020 Order. The Commission is correct in that assertion.

The Licensee is in violation of the November 15, 2020 Public Health Emergency Order and MCL 333.2253(1).

If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code.
MCL 333.2253(1)

On November 15, 2020, the Michigan Department of Health and Human Services Director determined that control of the COVID-19 epidemic was necessary to protect the public health and issued an emergency order prohibiting the gathering of people and establishing procedures to be followed. That Order specifically prohibited indoor gatherings at food establishments with certain exceptions that are not applicable here (Order 3(b)(1)) and required face masks (Order 7(a)). By allowing indoor dining and bowling and not requiring either patrons or staff to wear masks, the Licensee is in violation of the November 15, 2020 Order.

The MLCC Rules prohibit any illegal acts on the licensed premises.

The clerk, servant, agent, or employee of a licensee shall not engage in an illegal occupation or illegal act on the licensed premises. ...
Rule 436.1101(1)

The Licensee engaged in illegal acts on the licensed premises by remaining open for in person dining and bowling despite the Public Health Emergency Order not to do so. By committing this illegal act, the Licensee is in violation of Rule 436.1101(1) and subject to discipline.

The Licensee's actions constitute an imminent threat to the public's health, safety, and welfare. The Commission's summary suspension under the Administrative Procedures Act was appropriate. There need not be proof of an actual injury to support a threat to public health, safety, or welfare. The Licensee is not free to do as they please until a case of COVID-19 transmission is confirmed to the Licensee's establishment. To adopt this line of reasoning would allow a licensed establishment to flout any rule until there is a negative consequence including to serve alcohol to intoxicated persons until a patron goes out and harms a member of the public; licensees are always prohibited from overserving customers from day one of their licensure, not from some arbitrary point after a customer kills another person while driving drunk. The Commission's summary suspension under the Administrative Procedures Act was appropriate.

Circumstances for restaurants and bowling alleys are dire but this does not allow the Licensee to pick and choose which orders, rules, and statutes to follow.

There is no dispute that the COVID-19 pandemic has hit some industries and groups harder than others. Restaurant and bowling alley owners and employees have been hit especially hard. Many restaurants have been forced to close; some of these restaurants will not reopen. Restaurant employees have lost wages and jobs.

The Licensee argues (but offered no evidence in support of their contention) that they cannot survive without continuing to offer in person dining. Economic necessity does not allow the Licensee to pick and choose which laws to comply with. Almost all restaurants and bowling alleys in the state have complied with the Order despite the hardship that has resulted; only a very select few restaurants and bowling alleys have deemed themselves above the law.

Further, this Licensee made no attempt to implement even the most basic and essential safety measure to combat this deadly disease: requiring wearing masks. It is necessarily difficult to have customers wear masks while eating and drinking, but it is entirely possible, reasonable, and essential to have staff wear masks while serving their customers. Similarly, it is possible to require bowling alley patrons to wear masks while bowling. The Licensee did not require staff or bowling alley patrons to wear masks, completely undermining restaurants' best argument that they should be allowed to remain open: that they can and will operate safely.

ORDER

With the issuance of this Order, the summary suspension is dissolved.

In determining penalty, the Administrative Law Judge considered the Licensee's total record, which shows four previous violations (sale to an 18 year old minor, sale to a 19 year old minor,

failing to provide evidence of server training, and serving an intoxicated person) since being licensed on September 12, 1989, at the above-named location under the current ownership.

The Administrative Law Judge also considers the Licensee's disregard for the health and safety of their staff and patrons by not requiring staff to wear masks while working and not requiring patrons to wear masks while bowling. Finally, the Licensee has, to date, not complied with the Public Health Emergency Order and continues to dangerously operate indoor dining and bowling.

Because of the extremely serious nature of the violations, the failure to operate safely, and the continued and ongoing failure to comply with the Public Health Emergency Order, as a penalty, the Administrative Law Judge Orders the following fines and suspensions:

Count 1: a fine of \$300 and a suspension of the license for sixty (60) continuous days from the date of the entry of this Order; and,

Count 2: a \$300 fine and a suspension of the license for sixty (60) continuous days from the date of the entry of this Order; and,

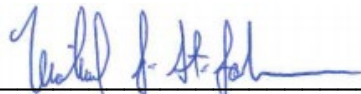
Count 3: a \$300 fine and a suspension of the license for sixty (60) continuous days from the date of the entry of this Order.

The three fines are consecutive: the total fine is \$900. The three sixty (60) day suspensions shall be served concurrently, not consecutively, for a total suspension of the license for sixty (60) continuous days from the date of the entry of this Order

Further, if the fine is not paid within forty-five (45) days from the mailing date of this Order, the Administrative Law Judge Orders that an additional suspension of forty-five (45) continuous days, with this suspension to run consecutively and not concurrently with the 60 day suspension or any other suspension Ordered by the Commission.

The Licensee is warned that further fines, suspensions, or a revocation of the Licensee's liquor license could result if the Licensee continues to operate in violation of the law or violates the Order of the Commission.

MICHIGAN LIQUOR CONTROL COMMISSION



Michael J. St. John, Administrative Law Judge

Date Signed: December 7, 2020

Date Mailed: _____

M. B. AND D., LLC
D/B/A BREW WORKS OF FREMONT

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COMPLAINT NO. CV-508760

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