

City of Salem, Massachusetts



“Know Your Rights Under the Open Meeting Law, M.G.L. c. 39 §23B, and City Ordinance Sections 2-2028 through 2-2033.”

The City Council Committee on Ordinances, Licenses & Legal Affairs coposted
with the Committee of the Whole

met in the Council Chamber on Wednesday, May 30, 2012 at 6:30 P.M.

for the purpose of discussing the matter(s) listed below. Notice of this meeting was posted on

May 25, 2012 at 9:14 A.M.

(This meeting is being recorded.)

ATTENDANCE

ABSENT WERE:

also in attendance c/ Todd Tavel

SUBJECT(S)

#468 of 2010 - Adopt Criteria for Home Rule Petition - Additional Liquor Licenses (COPOSTED)

#275 of 2011 - Review rules for granting and transferring Seasonal Liquor Licenses (OLLA ONLY)

#336 of 2012 - Criteria for Seasonal Liquor Licenses & temporary moratorium on issuance of seasonal liquor licenses (COPOSTED)

c/ Sigurd - reestablish a sub committee to produce criteria for
c/ Saugust 20th Home rule petition and seasonal liquor licenses
and report out to full committee by June 30th

5 Yes 0 nays - passed.

Lined area for notes or minutes.

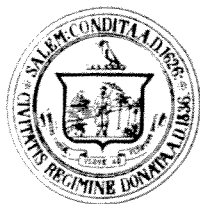
On the motion of C. *Oliver*

the meeting adjourned at 7:54 P.M.

Robert Smith

(Chairperson)

#468



CITY OF SALEM

In City Council July 15, 2010

Ordered: That the City Council adopt the attached Criteria for Requests for a Home Rule
Petition for an Additional Liquor License.

In City Council July 15, 2010

Referred to the Committee on Ordinances, Licenses and Legal Affairs co-posted with
the Committee of the Whole

ATTEST:

CHERYL A. LAPOINTE
CITY CLERK

**City of Salem
Criteria for Requests for a Home Rule Petition
for an additional Liquor License**

Any request for a liquor license through a Home Rule Petition shall not be forwarded to the City Council until the Licensing Board has reviewed the request and makes a favorable recommendation based on the criteria set forth below:

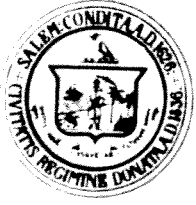
- A. The business must be located in the B-5 zoning district.
- B. Availability of an annual liquor license - The Licensing Board shall consider the availability of annual licenses when considering a request for an additional liquor license through a Home Rule petition. The Board may recommend a Home Rule Petition be filed when an annual liquor license is available, either all alcohol or beer and wine, depending on the license sought, but only if the Board determines that the license is not available at a reasonable market value. If such an annual liquor license is available for sale at an unreasonable market value, the Licensing Board will make every effort to seize the license and market it directly. Among other factors, the Licensing Board will consider comparable sales and length of time the license has been available when determining if a value is unreasonable.

If no annual liquor license is available for purchase, the City will consider adopting a Home Rule Petition for an additional liquor license if the applicant/requesting business meets a majority of the criteria set forth below. Note: that the criteria below are **not** required, but are to be considered by the Board when reviewing applicant requests.

1. The applicant holds a seasonal liquor license;
2. Quality Design: The business will have an exterior design appropriate to its context. To meet this criteria, the business will agree to have Design Review Board review and approval of all exterior improvements including signage and lighting even if the business is located outside of an Urban Renewal Area;
3. Market Diversification: The applicant demonstrates that its business fills an existing gap and meets unmet market demand. As such, it advances Salem objective of being the North Shore's dining destination;
4. Job Creation: The business will create new jobs;
5. Employment of Low and Moderate Income Persons: The business will commit to hiring low or moderate income persons;
6. Community Participation: The business will commit to actively participate in Main Streets programs and events for two years;
7. Compatibility: Business is not located within close proximity to residential units or if it is, the business shall not seek an entertainment license; and
8. Hours of operation: If in close proximity to residential units, hours of operation are limited to 11 pm.

9. Applicant proposes to open a restaurant in a blighted area or in a location that has remained vacant for more than one year.

#275



CITY OF SALEM

In City Council,

April 28, 2011

Ordered:

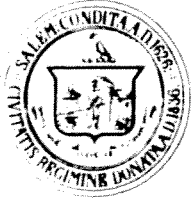
That the Committee on Ordinances, Licenses and Legal Affairs meet to review the rules for the granting and transferring of "Seasonal Liquor Licenses".

In City Council April 28, 2011
Adopted

ATTEST:

CHERYL A. L APOINTE
CITY CLERK

#336



CITY OF SALEM

In City Council, May 24, 2012

Ordered:

That the Committee on Ordinances, Licenses and Legal Affairs co-posted with the Committee of the Whole meet to discuss the criteria for seasonal liquor licenses and there be a temporary moratorium for the issuance of any seasonal liquor licenses and that the following be invited Mayor or her representative, Solicitor or her representative, Director of the Chamber of Commerce and the members of the Licensing Board.

In City Council May 24, 2012
Adopted as amended

ATTEST:

CHERYL A. LAPOINTE
CITY CLERK

Michael Sosnowski

From: Rinus Oosthoek [rinus@salem-chamber.org]
Sent: Wednesday, May 16, 2012 2:20 PM
To: Mike Sosnowski
Subject: licenses

Hi Mike:

As discussed yesterday, the decision made at a previous licensing board meetings to grant seasonal licenses to established businesses that possess an annual homerule license, was received as a "smack in the face" by a number of the existing restaurateurs. After spending more than a year to build consensus and to come up with a solution that would work fairly for both existing and new restaurants, it feels as if we are back at square one or worse. The fact that the licensing board has awarded a number of seasonal licenses to other non-seasonal businesses is a negative development.

We strongly believe that seasonal licenses should be given to seasonal businesses only (such as: at the municipal golf course, winter island, possibly in the future for the Blaney Street redevelopment).

Home rule licenses should only be allowed to move forward if there are no market licenses available (and potential restaurateurs need to make an honest effort to acquire available licenses – pocket licenses should not be allowed), and under the same conditions as was put forward in the petition for the "7" (i.e. have a fee assigned to the licenses based on the market value of the market licenses, with the money going into the established economic development fund). As a side note, only 3 out of 7 petitioners took advantage of the below market licenses (with interest free 3 year loans).

If all of the above is agreed upon, there is no further need for either the seasonal criteria, nor the homerule petition criteria.

Kind regards,

Rinus

Rinus Oosthoek
Executive Director
Salem Chamber of Commerce
265 Essex Street
Salem, MA 01970
T. 978-744-0004

City Solicitor
lic Bd. Members
Chairman - Chief Robert
STPruce
John Case.

Upcoming Events

May 19 – Living Green Fair in Old Town Hall
June 1 – After Hours at the Salem Arts Festival (Old Town Hall)

Chair & Comm
Rinus Oosthoek

Liquor Licenses - Salem Chamber Position Statement:



We strongly believe that **seasonal licenses should be given to seasonal businesses only** (such as: at the municipal golf course, winter island, possibly in the future for the Blaney Street redevelopment). The fact that the licensing board has awarded a number of seasonal licenses to other non-seasonal businesses is a negative development.

Home rule licenses should only be allowed to move forward if there are no market licenses available (and potential restaurateurs need to make an honest effort to acquire available licenses – pocket licenses should not be allowed), and under the same conditions as was put forward in the petition for the "7" (i.e. have a fee assigned to the licenses based on the market value of the market licenses, with the money going into the established economic development fund).

If all of the above is agreed upon, there is no further need for either the seasonal criteria, nor the homerule petition criteria.

History:

3 out of 7 petitioners took advantage of the below market licenses:

Café Polonia	Converted (75% of market rate, with 3 year pay-off schedule)
Howling Wolf	Converted (75% of market rate, with 3 year pay-off schedule)
Seaport Café	Converted (75% of market rate, with 3 year pay-off schedule)
Lobster Shanty	Not Converted
Thai Place	Not Converted
Coven	Not Converted
Sixty 2	Not Converted

Since then, the following seasonal licenses have been issued to non-seasonal businesses:

Salem Beerworks	Seasonal All Alcohol
Café Polonia	Seasonal All Alcohol
Howling Wolf	Seasonal All Alcohol
Lynde Street café	Seasonal Beer & Wine
Mattera's café & bar	Seasonal All Alcohol – denied (advised to apply for seasonal beer & wine)

From: Homerule Petition Criteria (November 2011):

C. If a liquor license is to be granted through the home rule petition process, the following provisions shall be included in the home rule petition text:

- 1. Applicant shall only hold one alcoholic beverage license per establishment. For example, if the applicant is issued an annual wine and malt license through a Home Rule Petition, the license holder may not also hold a seasonal all alcohol license.**
2. Any such liquor license issued may not be transferred to a new location.

Recent license transfers:

Strega → to Red Lulu - \$60,000 or \$80,000 (all alcohol)
Bangkok paradise → Bangkok paradise (new owners) - \$60,000 or \$80,000 (all alcohol)
Dodge Street Grill → to Village Tavern (former Lakay) - \$60,000 (all alcohol)
Lakay → to Mandeas Pizza - \$20,000 (beer & wine)
Coven → to Life Alive – transfer homerule license (beer & wine)
Lafayette Market's → to the Hess Station on New Derby Street: Denied (package store)

Recently closed: Lakay – Coven - Dodge Street Grill - Upper Crust Pizzeria

City of Salem

Criteria for Future Requests for a Home Rule Petition for an additional Liquor License

Edited last on November 29, 2011

Any request for a liquor license through a Home Rule Petition for an above quota liquor license shall not be forwarded to the City Council for its consideration until the Licensing Board has reviewed the request and provides the City Council with a written, favorable communication based on the criteria set forth below:

A. The business shall be located within an existing structure in the B-5 zoning district.

B. Availability of an annual liquor license - The Licensing Board shall consider the availability of annual licenses when considering a request for an additional liquor license through a Home Rule petition. The Board may recommend a Home Rule Petition be filed when an annual liquor license is available, either all alcohol or beer and wine, depending on the license sought, but only if the Board determines that the license is not available at a measurable market value. If such an annual liquor license is available for sale at an unreasonable measurable market value, the Licensing Board will make every effort to seize the license if it is not in use and market it directly. Among other factors, the Licensing Board will consider comparable sales and length of time the license has been available when determining if a value is unreasonable.

If no annual liquor license is available for purchase, the City will consider adopting a Home Rule Petition for an additional liquor license if the applicant/requesting business demonstrates to the Licensing Board that it meets a majority of the criteria set forth below. ~~Note: All criteria below are not required, but are to be considered by the Board when reviewing applicant requests.~~

1. The applicant is a holder in good standing of a seasonal liquor license, an annual wine and malt or annual wine, malt and cordial license;
2. Quality Design: The business will have an exterior design appropriate to its context. To meet this criteria, the business will agree to have Design Review Board review and approval of all exterior improvements including signage and lighting even if the business is located outside of an Urban Renewal Area;
3. Market Diversification: The applicant demonstrates that its business fills an existing gap and meets unmet market demand. As such, it advances Salem objective of being the North Shore's dining destination;
4. Job Creation: The business will create new jobs;
5. Employment of Low and Moderate Income Persons: The business will commit to hiring low or moderate income persons;
6. Community Participation: The business will commit to actively participate in Main Streets programs and events for two years;

7. Compatibility: Business is not located within close proximity to residential units or if it is, the business shall not seek an entertainment license after 11 p.m.;
8. Hours of operation: If in close proximity to residential units, hours of operation are limited to 11 pm.;
9. Applicant proposes to open a restaurant in a blighted area or in a location that has remained vacant for more than one year.

C. If a liquor license is to be granted through the home rule petition process, the following provisions shall be included in the home rule petition text:

1. Applicant shall only hold one alcoholic beverage license per establishment. For example, if the applicant is issued an annual wine and malt license through a Home Rule Petition, the license holder may not also hold a seasonal all alcohol license.
2. Any such liquor license issued may not be transferred to a new location.
3. Any recipient of such a license shall be required to pay a fee for either economic development or public safety.

SPECIAL INSTRUCTIONS FOR SEASONAL LIQUOR LICENSE APPLICANTS

On November 9, 2009, the City of Salem Licensing Board adopted the following Objective Criteria for Applications for Seasonal Liquor Licenses. Applicants for a Seasonal Liquor License shall be required, on a separate piece of paper, to address each of the objective criteria set forth below.

OBJECTIVE CRITERIA FOR REVIEW OF SEASONAL LIQUOR LICENSE APPLICATIONS

A. Availability of an annual liquor license – Please indicate whether an annual liquor license is available for the type of license you seek, beer and wine or all alcohol. If available, indicate the holder of the license and asking price.

The Licensing Board shall consider the availability of annual licenses when considering an application for a seasonal license. The Board may approve a seasonal liquor license application when an annual liquor license is available, either all alcohol or beer and wine, depending on the license sought, but only if the board determines that the license is not available at a reasonable market value. If such an annual liquor license is available for sale at an unreasonable market value, the Licensing Board will make every effort to seize the license and market it directly. Among other factors, the Licensing Board will consider comparable sales and length of time the license has been available when determining if a value is unreasonable. The applicant must demonstrate to the Board, through sufficient written evidence, that they have attempted, but have been unsuccessful, in acquiring an available license.

B. If no annual liquor license is available for purchase at a reasonable price, the Licensing Board will consider approving an application for a seasonal license if the application meets a majority of the applicable objectives set forth below. Certain objectives identified with an asterisk * shall receive a weight of +1. Please provide a written response to each objective. If an objective is not applicable to your application, please indicate such.

1. The applicant holds an annual beer and wine license*;
2. Street Activation: The business is located on a primary downtown street (Essex, Washington, New Derby, Derby) or can demonstrate that its location will advance the City's goals to appropriately activate the street life within its downtown, waterfront district*;
3. Quality Design: The business will have an exterior design appropriate to its context. To meet this objective, the business will agree to have Design Review Board review and approval of all exterior improvements including signage and lighting even if the business is located outside of an Urban Renewal Area;
4. Market Diversification: The applicant demonstrates that its business fills an existing gap and meets unmet market demand. As such, it advances Salem objective of being the North Shore's dining destination*;
5. Job Creation: The business will create new jobs;

6. Employment of Low and Moderate Income Persons: The business will commit to hiring low or moderate income persons;
7. Community Participation: The business will commit to actively participate in Main Streets or City programs and events for two years;
8. Compatibility: Business is not located within close proximity, as determined by the Board, to residential units*; and
9. Hours of operation: If in close proximity to residential units, hours of operation are limited to 11 pm*.

NOTE: The Salem Licensing Board reserves its right to amend or rescind the objective criteria set forth above and has the discretion to accept or reject any and all applications for seasonal liquor licenses.

- **PART I ADMINISTRATION OF THE GOVERNMENT**
(Chapters 1 through 182)
- **TITLE XX PUBLIC SAFETY AND GOOD ORDER**
- **CHAPTER 138 ALCOHOLIC LIQUORS**
- **Section 17** Number of licenses quotas; licenses for wines and malt beverages per population unit; additional licenses; estimates of increased population; decrease in quota due to loss in population; determination of population of city or town

Section 17. Except as otherwise provided in this chapter, the number of licenses issued in any city or town under sections twelve and fifteen and in force and effect at any one time during any license year shall be limited as hereinafter provided:

The local licensing authorities of any city or town, except the city of Boston, may grant one license under the provisions of section twelve for each population unit of one thousand or additional fraction thereof, and, in addition, one such license for each population unit of ten thousand or fraction thereof, over the first twenty-five thousand, but may, regardless of population, grant at least fourteen licenses under said section twelve; and the local licensing authorities may also grant one license under the provisions of section fifteen for each population unit of five thousand or additional fraction thereof, but may, regardless of population, grant at least two licenses under said section fifteen.

In addition to the number of licenses otherwise authorized to be granted by the provisions of this section, the local licensing authorities of any city or town, except the city of Boston, which has voted to grant licenses for the sale of all alcoholic beverages as provided in the first question appearing in section eleven, may grant not more than one license for the sale of wines or malt beverages only, or both under section twelve, for each population unit of five thousand or fraction thereof; provided, that in any such city or town, said authorities may grant at least five additional licenses for the sale of such beverages, irrespective of its population; and the local licensing authorities may also grant not more than one license for the sale of wines or malt beverages only or both under the provisions of section fifteen for each population unit of five thousand or fraction thereof; provided, that in any such city or town said authorities may grant at least five additional licenses for the sale of such beverages, irrespective of its population; and provided, further, that the establishment of this limitation shall not be construed to prevent the renewal of any license granted prior to June fifteenth, nineteen hundred and thirty-seven.

The local licensing authorities of any city or town, except the city of Boston, which has voted to grant licenses for the sale of wines and malt beverages, as provided in the second question appearing in section eleven, and which has also voted to grant licenses for the sale of all alcoholic beverages in packages, as provided in the third question appearing in the said section, may grant additional licenses under section fifteen for the sale of wines

or malt beverages only, or both, equal to the number of licenses under the said section otherwise authorized to be granted in any such city or town by the provisions of this section.

The local licensing authorities of any city or town, except the city of Boston, may make an estimate prior to March the first in any year of any temporary increased resident population in such city or town as of July the tenth following, and one additional license under section fifteen, to be effective from April 1 to November 30 or from April 1 to the following January 15 at the discretion of the local licensing authority, may be granted by said authorities for each unit of five thousand or additional fraction thereof of such population as so estimated, and the local licensing authorities of any city or town in Berkshire county, in which the city council, in accordance with the provisions of its charter, or the town, at an annual or special town meeting, votes to authorize such authority to grant winter seasonal licenses, or of any town in Franklin county, may make an estimate not later than October the fifteenth in any year of any temporary increased resident population in such city or town as of February the tenth following, and one additional license under section fifteen, to be effective from December the first to April the first of the year following, may be granted by said authorities for each unit of five thousand or additional fraction thereof of such population as so estimated; provided, that not more than one additional license shall be granted under this paragraph to the same person or for the same premises in any one year; and provided, further, ~~that the local licensing authorities of any city or town, except the city of Boston, may grant, in addition to and irrespective of any limitation of the number of licenses contained in this section, seasonal licenses under section twelve, to be effective from April first to January fifteenth of the following year,~~ or any portion thereof, and in any city or town in Berkshire county in which the granting of winter seasonal licenses is authorized as above provided, and in any town in Franklin county seasonal licenses under section twelve, to be effective from December the first to April the first, to the amount or number that such authorities deem to be in the public interest. Every estimate hereunder of temporary resident population shall be made and voted upon by the local licensing authorities at a meeting of said authorities called for the purpose after due notice to each of the members thereof of the time, place and purpose of said meeting and after investigation and ascertainment by them of all the facts and after co-operative discussion and deliberation. A copy of such an estimate, signed by a majority of the members of said authorities, stating under the penalties of perjury that all the foregoing requirements have been complied with and that the estimate is true to the best of their knowledge and belief, shall be forwarded forthwith to the commission. Upon the petition of twenty-five persons who are taxpayers of the city or town in which a seasonal license has been so granted, or who are registered voters in the voting precinct or district wherein the licensed premises are situated, filed within five days after the granting of such license, the commission shall, and upon its own initiative at any time may, after a hearing, examine and review any estimate made or action taken by the local licensing authorities in granting the same, and after such examination or review, may rescind, revoke, cancel, modify or suspend any such estimate or action. Nothing in this paragraph shall be deemed to authorize or permit the commission to deny a renewal of, or to rescind, revoke or cancel, because of a decrease in population, any

seasonal license outstanding and in full force on April thirtieth, nineteen hundred and fifty.

The licensing board for the city of Boston may grant six hundred and ninety-two licenses for the sale of all alcoholic beverages under section twelve; provided, that no further original licenses under said section shall be granted until the number of licenses outstanding thereunder shall have been reduced to less than six hundred and fifty by cancellation or revocation or the failure of holders of such licenses to apply for renewals and thereafter licenses thereunder may be granted only up to a total not exceeding six hundred and fifty. Said board may grant two hundred and fifty licenses for the sale of all alcoholic beverages under section fifteen. The number of licenses for the sale of wines and malt beverages only, or both, in the said city shall not exceed three hundred and twenty. The transfer of existing licenses shall be subject to a public hearing in the neighborhood in which the license is to be relocated, properly advertised and at an appropriate time to afford that neighborhood an opportunity to be present.

The licensing board for the city of Boston may grant up to 25 additional licenses for the sale of all alcoholic beverages to be drunk on the premises and up to 30 additional licenses for the sale of wines and malt beverages to drunk on the premises. Notwithstanding the first sentence, 5 of the additional all alcoholic beverages licenses shall be granted only to innholders duly licensed under chapter 140 to conduct a hotel and 10 of the additional all alcoholic beverages licenses shall be granted, to existing holders of licenses for the sale of wines and malt beverages under section 12 provided that those licensees return to the licensing board, the licenses that they currently hold. The remaining licenses for the sale of all alcoholic beverages to be drunk on the premises and the 30 additional licenses for the sale of wines and malt beverages to be drunk on the premises shall be granted in the areas designated by the Boston Redevelopment Authority as main street districts, urban renewal areas, empowerment zones or municipal harbor plan areas. Once issued to a licensee in a Boston Redevelopment Authority designated area, the licensing board shall not approve the transfer of that license to a location outside of the designated area. A license granted pursuant to this paragraph shall be nontransferable to any other person, corporation or organization and shall be clearly marked nontransferable on the face of the license. A license issued under this paragraph, if revoked or no longer in use, shall be returned physically, with all of the legal rights and privileges thereto, to the licensing board which may grant any such returned license to a new applicant consistent with the criteria set forth in this paragraph. No license shall be re-issued to the same location within 6 months from the date the prior license terminated unless the applicant files a letter in writing from the department of revenue with the local licensing authority indicating the prior licensee's good standing with the department.

Notwithstanding the provisions hereof, no quota established hereunder for any city or town shall be decreased because of any loss in population.

Unless expressly authorized by this chapter, local licensing authorities shall not grant licenses to any person, firm or corporation under more than one section of this chapter.

The population of any city or town for the purposes of this section shall be that enumerated in the most recent federal census.

In determining the population of any city or town for the purposes of this section the state secretary shall, if the last preceding census is the national census, by a writing filed by him in his office, make such adjustments in such census as will reflect the criteria used in making the last preceding state census.

Notwithstanding the provisions of this section, the number of licenses which a city or town was authorized to grant in nineteen hundred and thirty-three under this section shall not be decreased because of any loss in population, but only because of cancellation, revocation or failure to renew existing licenses, and no further original licenses shall be granted in a city or town where the population has decreased since nineteen hundred and thirty-three until the number of licenses outstanding shall have been reduced for the aforementioned reasons to a number which is less than that which may be granted based on such reduced population and thereafter the number of licenses in force and effect at any one time during the license year shall be based on such reduced population as provided in this section.

In addition to the number of licenses otherwise authorized to be granted pursuant to this section, a city or town may grant additional licenses under sections 12, 15 or 15F to the holder of a farmer-winery license under section 19B or in any other state for the sale of wine produced by or for the applicant. A license granted by a city or town under said section 12, 15 or 15F shall not be include as a license for purposes of determining the number of licenses allowed to be granted by a city or town under this section. A license granted pursuant to this paragraph shall be nontransferable to any other person, corporation or organization and shall be clearly marked nontransferable on its face.

▷

Supreme Judicial Court of Massachusetts,
Suffolk.

BOSTON GAS COMPANY
v.
CITY OF SOMERVILLE.

Argued May 2, 1995.
Decided June 28, 1995.

Natural gas utility brought declaratory judgment action against city, challenging constitutionality of city ordinance governing street excavations. Parties cross-moved for summary judgment. The Superior Court, Suffolk County, Margaret R. Hinkle, J., allowed city's motion. Utility appealed. Single Justice of Appeals Court enjoined city from enforcing ordinance pending appeal. Utility applied for direct appellate review. After granting application, the Supreme Judicial Court, Lynch, J., held that ordinance was invalid under home rule amendment to State Constitution because it was inconsistent with state's regulatory scheme for public utilities.

Vacated and remanded.

West Headnotes

[1] Municipal Corporations 268 🔑70

268 Municipal Corporations

268III Legislative Control of Municipal Acts; Rights, and Liabilities

268k70 k. Public Improvements. Most Cited Cases

City ordinance governing street excavations, which required natural gas utility to hire city contract representative to provide street repair services at rates higher than utility had obtained through competitive bidding and to use certain materials and techniques and gave utility extended responsibility for excavation site, was invalid under home rule amendment to State Constitution because it was inconsistent with State's regulatory scheme for public utilities; city could not use its limited authority to enact ordinance which had practical effect of frustrating fundamental

State policy of ensuring uniform and efficient utility services to public. M.G.L.A. Const.Amend. Art. 89, § 6; M.G.L.A. c. 164, §§ 1 et seq., 70, 75; Somerville, Mass., Code of Ordinances § 12-20.

[2] Declaratory Judgment 118A 🔑393

118A Declaratory Judgment

118AIII Proceedings

118AIII(H) Appeal and Error

118Ak392 Appeal and Error

118AK393 k. Scope and Extent of Review in General. Most Cited Cases

Natural gas utility could not raise for first time on appeal contention that city ordinance governing street excavations violated home rule amendment of State Constitution as imposing tax on utility, in utility's declaratory judgment action challenging constitutionality of ordinance. M.G.L.A. Const.Amend. Art. 89, § 7; Somerville, Mass., Code of Ordinances § 12-20.

[3] Municipal Corporations 268 🔑111(2)

268 Municipal Corporations

268IV Proceedings of Council or Other Governing Body

268IV(B) Ordinances and By-Laws in General

268k111 Validity in General

268k111(2) k. Conformity to Constitutional and Statutory Provisions in General. Most Cited Cases

Municipalities may not adopt by-laws or ordinances that are inconsistent with state laws. M.G.L.A. Const.Amend. Art. 89, § 6.

[4] Municipal Corporations 268 🔑111(2)

268 Municipal Corporations

268IV Proceedings of Council or Other Governing Body

268IV(B) Ordinances and By-Laws in General

268k111 Validity in General

268k111(2) k. Conformity to Constitutional and Statutory Provisions in General. Most Cited Cases

For purposes of determining whether local ordinance is invalid under home rule amendment to State Constitution because it is inconsistent with statute, in some circumstances Supreme Judicial Court can infer that legislature intended to preempt field because legislation on subject is so comprehensive that any local enactment would frustrate statute's purpose. M.G.L.A. Const. Amend. Art. 89, § 6.

**132 *702 Steven W. Phillips, Boston, for plaintiff.

Charles F. Haverty, III, Asst. City Sol., for defendant.

**133 Scott Harshbarger, Atty. Gen., Edmund J. Sullivan, Asst. Atty. Gen., and Dorian C. Mead, for Dept. of Public Utilities, amici curiae, submitted a brief.

Patrick W. Hanifin & Stephen S. Ostrach, Boston, for New England Legal Foundation, amici curiae, submitted a brief.

Paul K. Connolly, Jr., & Eileen M. Fava, Boston, for Massachusetts Natural Gas Council, amici curiae, submitted a brief.

Before LIACOS, C.J., and LYNCH, O'CONNOR and GREANEY, JJ.

LYNCH, Justice.

The plaintiff's complaint for declaratory relief pursuant to G.L. c. 231A (1992 ed.), challenges the constitutionality*703 of § 12-20 of the Somerville Code of Ordinances (ordinance).^{FN1} After a judge in the Superior Court denied the plaintiff's request for a preliminary injunction prohibiting enforcement of the ordinance, the parties filed cross motions for summary judgment. The judge allowed the city of Somerville's (defendant's) motion for summary judgment, and the plaintiff appealed. A single justice of the Appeals Court, pursuant to G.L. c. 231, § 118 (1992 ed.), enjoined the defendant from enforcing the ordinance pending appeal. We granted the plaintiff's application for direct appellate review.

^{FN1}. This ordinance is entitled "Asphalt street and sidewalk openings" and governs all aspects of street excavations in Somerville including: (1) the applicable fees, de-

posits, performance bonds and fines required for each street opening permit granted; (2) the required highway department notification procedures; (3) the required procedures for excavating, backfilling, patching, paving and barricading of excavation sites; and (4) the financial responsibilities and billing procedures required for permittees.

[1][2][3][4] The plaintiff contends that the ordinance is invalid under § 6 of art. 89 of the Amendments to the Massachusetts Constitution (Home Rule Amendment), because it is inconsistent with G.L. c. 164 (1992 ed.), the State's regulatory scheme for public utilities.^{FN2} We agree. Municipalities may not adopt by-laws or ordinances that are inconsistent with State laws. See *American Motorcyclist Ass'n v. Park Comm'n of Brockton*, 412 Mass. 753, 756 (1992) (invalidating local regulation banning use of motorcycles because regulation inconsistent with statute giving person right to operate motor vehicle); *New England Tel. & Tel. Co. v. Lowell*, 369 Mass. 831, 834-835, 343 N.E.2d 405 (1976) (invalidating ordinance requiring registered land *704 surveyors and professional engineers contrary to statute exempting engineers subject to Department of Public Utilities regulations from registration requirements); *Del Duca v. Town Adm'r of Methuen*, 368 Mass. 1, 9, 329 N.E.2d 748 (1975) (holding ordinance facially inconsistent with statute and therefore void). See also art. 89, § 6; G.L. c. 43B, § 13 (1992 ed.). To determine whether a local ordinance is inconsistent with a statute, this court has looked to see whether there was either an express legislative intent to forbid local activity on the same subject or whether the local regulation would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject. *Bloom v. Worcester*, 363 Mass. 136, 155-156, 293 N.E.2d 268 (1973). Moreover, in some circumstances we can infer that the Legislature intended to preempt the field because legislation on the subject is so comprehensive that any local enactment would frustrate the statute's purpose. *Wendell v. Attorney Gen.*, 394 Mass. 518, 527-528, 476 N.E.2d 585 (1985). See also *New England Tel. & Tel. Co. v. Lowell*, *supra* (intent to preempt inferred from comprehensive legislative scheme).

^{FN2}. The Home Rule Amendment states "[a]ny city or town may, by the adoption, amendment, or repeal of local ordinances or

by-laws, exercise any power or function which the general court has power to confer upon it, *which is not inconsistent with the constitution or law enacted by the general court ...*" (emphasis added). Art. 89, § 6, of the Amendments to the Massachusetts Constitution. The plaintiff also contends that this ordinance violates § 7 of the Home Rule Amendment because it imposes a tax on the plaintiff. However, this contention was not raised below and may not be raised for the first time on appeal. *Guardianship of Doe*, 411 Mass. 512, 513 n. 2, 583 N.E.2d 1263, cert. denied sub nom. *Doe v. Gross*, 503 U.S. 950, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992). Moreover, because we conclude the ordinance to be invalid for other reasons, we need not address this argument.

****134** The manufacture and sale of gas and electricity by public utilities is governed by G.L. c. 164. Given the comprehensive nature of this statute, we conclude that the Legislature intended to preempt local entities from enacting legislation in this area. See *Boston Edison Co. v. Boston*, 390 Mass. 772, 774, 459 N.E.2d 1231 (1984) (recognizing comprehensiveness of G.L. c. 164). Furthermore, the ordinance is inconsistent with particular provisions of the statute and the regulations of the Department of Public Utilities (department).

When the plaintiff excavates a street to work on its underground gas distribution facilities or to provide gas service to the general public, the department mandates that the plaintiff utilize a "least-cost" strategy to repair the excavation site including the use of competitive bidding procedures. See D.P.U. 93-60 at 232-233 (1993). See also D.P.U. 92-210 at 196 (1993). However, because of the ordinance the plaintiff must hire a "city contract representative," selected by the defendant, to provide patching, paving, and repair services at ***705** specified rates which, the plaintiff contends, exceed the rates it previously obtained with competitive bidding. ^{FN3} The ordinance also requires the plaintiff to use certain materials and paving techniques, such as infrared paving methods. ^{FN4} Moreover, under the ordinance, the plaintiff's responsibility for the excavation site continues for three years beyond the final infrared treatment, even though G.L. c. 164, § 70, does not require the plaintiff to maintain the street after the excavation site has

been repaired. ^{FN5} General Laws c. 164, § 70, on the other hand, only requires the plaintiff to return an excavation site back to its original condition. See *Wendell v. Attorney Gen.*, *supra* at 528, 476 N.E.2d 585 (holding by-law inconsistent because imposed conditions beyond those established by statute and exceeded town board of health authority). Because the ordinance conflicts with the statutory scheme for regulating public utilities, we conclude that it is inconsistent with c. 164 and therefore invalid. See *New England Tel. & Tel. Co. v. Lowell*, *supra* at 834, 343 N.E.2d 405 (discussing desirability of uniform utility regulation).

^{FN3}. It appears that, at the present time, only one paving contractor has the "qualifications" necessary to provide paving services under the ordinance. It is also noteworthy that this same contractor was involved in drafting the ordinance.

^{FN4}. Regardless, § 8 of the ordinance states that, "[a]fter a proper settling period, the excavating shall be infra-red heat treated by the contract representative of the city. This work shall be the financial obligation of the permittee." Moreover, § 10 of the ordinance provides that "[a]ll street excavations shall be made permanent by the infra-red heat process and will be the financial responsibility of the permittee."

^{FN5}. General Laws c. 164, § 70, provides in pertinent part that "[a] gas company may, with the written consent of the aldermen or the selectmen, dig up and open the ground in any of the streets, lanes and highways of a town.... It shall put all such streets, lanes and highways in as good repair as they were in when opened." However, § 11 of the ordinance provides that "[t]he installation of permanent patch does not alleviate the permittee from the responsibility for trench settlement for a period of three (3) years from the date of the final infra-red permanent repair...."

Finally, although the defendant argues that G.L. c. 164, § 75, ^{FN6} gives it the authority to regulate in this area, we conclude ***706** that the defendant cannot use its limited authority to enact an ordinance which

has the practical effect of frustrating the fundamental State policy of ensuring uniform and efficient utility services to the public. See New England Tel. & Tel. Co. v. Lowell, supra at 833, 835, 343 N.E.2d 405 (holding ordinance invalid despite city's statutory authority to establish reasonable regulations for welfare of citizens).

FN6. General Laws c. 164, § 75, provides:
“The aldermen or selectmen may regulate, restrict and control all acts and doings of a corporation subject to this chapter which may in any manner affect the health, safety, convenience or property of the inhabitants of their towns.”

The judgment of the Superior Court is vacated. The case is remanded for the entry of a judgment declaring that § 12-20 of the Somerville Code of Ordinances is invalid.

So ordered.

Mass., 1995.
Boston Gas Co. v. City of Somerville
420 Mass. 702, 652 N.E.2d 132

END OF DOCUMENT

C

Appeals Court of Massachusetts,
 Suffolk.

CELLARMASTER WINES OF MASSACHU-
 SETTS, INC.

v.


ALCOHOLIC BEVERAGES CONTROL COM-
 MISSION.

No. 88-P-151.
 Argued Jan. 12, 1989.
 Decided Feb. 21, 1989.

The Alcoholic Beverages Control Commission ordered a liquor licensee to stop advertising and conducting wine-tasting sessions at locations off the licensed premises, and licensee appealed. The Superior Court Department, Walter E. Steele, J., affirmed, and licensee appealed. The Appeals Court, Warner, J., held that: (1) licensee's off-premises wine-tasting sessions were statutorily prohibited; (2) licensee was given adequate notice of the charges; and (3) the doctrine of estoppel was inapplicable to commission's enforcement of the statute.


Affirmed.

West Headnotes

[1] Intoxicating Liquors 223  **99**


223 Intoxicating Liquors
223IV Licenses and Taxes
223IV(A) In General
223k98 Nature of Rights Conferred
223k99 k. In General. Most Cited Cases

Statute which provided that liquor licensee could provide, without charge, on premises sample wine tastings for prospective customers of wines available for sale on liquor licensee's premises, did not entitle licensee to conduct wine-tasting sessions at locations off-licensed premises. M.G.L.A. c. 138, § 15.

[2] Intoxicating Liquors 223  **108.2**


223 Intoxicating Liquors
223IV Licenses and Taxes
223IV(B) Revocation or Forfeiture of Rights
223k108 Proceedings
223k108.2 k. Notice. Most Cited Cases

Liquor licensee was given adequate notice by Alcoholic Beverages Control Commission of charge that licensee's off-premises wine-tasting session violated statute which permits on-premises wine tasting; notice made specific reference to statute, licensee was given access to commission's file which contained copy of investigator's detailed report, and licensee pointed to no prejudice. M.G.L.A. c. 138, § 15.

[3] Estoppel 156  **62.5**

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k62 Estoppel Against Public, Govern-
 ment, or Public Officers
156k62.5 k. Acts of Officers or Boards.
Most Cited Cases

Doctrine of estoppel was inapplicable to Alcoholic Beverages Control Commission's enforcement, as against liquor licensee, of statute which prohibited off-premises wine-tasting sessions conducted by licensee, despite licensee's contentions that its marketing practices were fully disclosed to Licensing Board prior to issuance of its license; there was no evidence that Commission had approved licensee's methods of operation. M.G.L.A. c. 138, § 15.

[4] Estoppel 156  **52(5)**

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General
156k52 Nature and Application of Estoppel
 in Pais
156k52(5) k. Application in General.

Most Cited Cases

If legislatively declared important public interest is involved, estoppel may not be applied against enforcement of statute.

**22 *25 Michael Eby, Boston, for plaintiff.

Sarah Wunsch, Asst. Atty. Gen. (Douglas Cummings, with her), for defendant.

Evan T. Lawson, Boston, for Fine Wine Council of Massachusetts, Inc., & another, amici curiae, submitted a brief.

Before GREANEY, C.J., and DREBEN and WARNER, JJ.

WARNER, Judge.

The plaintiff holds a package store license for the sale of wines and malt beverages from its premises at 186 South Street, Boston. The only issue presented by this appeal is the validity of orders of the defendant (commission) that the plaintiff stop advertising and conducting wine tasting sessions at locations off the licensed premises. A Superior Court judge, after review of the administrative record, see *26 G.L. c. 30A, § 14, made a memorandum and order for judgment affirming the commission's actions. From the ensuing judgment, the plaintiff appeals.^{FN1}

^{FN1}. The Fine Wine Council of Massachusetts, Inc., and Silenus Wines, Inc., filed an amici curiae brief.

The plaintiff's license, issued by the Boston Licensing Board and approved by the commission pursuant to G.L. c. 138, § 15, authorizes the retail sale of malt beverages and wines from the premises at 186 South Street. Since the granting of the license in 1984, the appearance of the premises and the method of operation of the business have been atypical. There was no exterior sign indicating the nature of the plaintiff's business. There were on display relatively few bottles of wine, along with some wine glasses and accessories. Sales representatives conducted business by telephone in several cubbyholes with desks. Using mail advertising, the plaintiff solicits participation, without charge, in wine tastings in private homes and offices in eastern Massachusetts; the

lure is the discovery of the "personality" and "character" of wines which will become favorites.

The plaintiff employs several wine consultants who are trained to conduct wine tasting sessions and to instruct the participants in proper methods of evaluating and using wine. The consultants bring sample wines to the home or office where they "extol the virtues and excellence" of the wines they carry with them. They instruct on the importance of appearance, bouquet, taste^{FN2} and desirable twirling and swirling exercises. Attendants are not permitted to buy or order wine at the tasting sessions, although they are given price ranges. Rather, they are asked to record preferences on the plaintiff's forms, which are then brought to the licensed premises by the consultants. Thereafter, the plaintiff's sales representatives may make telephone contact with a participant for the purpose of consummating*27 a sale, or the latter may initiate an order at the plaintiff's premises. The consultants are paid by commissions on the basis of sales generated by each wine tasting session.

^{FN2}. The promotional literature says that a "bouquet may remind you of old vanilla, cool moss by a brook or fresh flowers." Elements of taste include body and depth. The rhapsody continues. A taste of a full bodied wine "fills the mouth." A wine with depth has a taste "that lasts into the aftertaste like an echo of your first sip."

The commission reasoned, in essence, that the plaintiff's off-premises wine tasting activities violated the provisions of G.L. c. 138, § 15, under which the plaintiff was licensed. Section 15 permits, as to the plaintiff, the sale of malt beverages and wines to be consumed off the plaintiff's premises. By St.1981, c. 177, § 15, was amended to provide: "Any such license may provide, without charge, on premises sample wine tastings for prospective customers of wines available for sale on such premises." Thus, the commission concluded, as off-premises wine tastings are not expressly allowed, they are beyond the privilege granted by the plaintiff's license. In affirming, the Superior Court judge said that the plain meaning of § 15 required the result. To hold otherwise, he concluded, would render the words "on premises" in the 1981 amendment superfluous and violate the maxim of statutory construction **23 that the expression of one thing is an implied exclusion of others. The

plaintiff argues that as its wine tasting activities are not expressly prohibited and do not involve sales, there is no violation of § 15.

[1] 1. We think the analysis necessary to resolution of the question whether the plaintiff's off-premises wine tasting activities constituted a violation of G.L. c. 138, § 15, is quite direct. Regulation of the liquor industry in Massachusetts is comprehensive and pervasive. See G.L. c. 138. "The powers of the States in dealing with the regulation of the sale of intoxicating liquors are very broad. What they may wholly prohibit, they may permit only on terms and conditions prescribed by the Legislature." *Connolly v. Alcoholic Beverages Control Commn.*, 334 Mass. 613, 619, 138 N.E.2d 131 (1956). See *Johnson v. Martignetti*, 374 Mass. 784, 793, 375 N.E.2d 290 (1978). The Legislature has set out a broad prohibition in the first sentence of G.L. c. 138, § 2, as appearing in St.1943, c. 542, § 1, which provides, in material part: "No person shall ... sell or expose or keep for sale, store, transport ... alcoholic beverages or alcohol, *except as authorized by this chapter* " (emphasis supplied). The plaintiff's argument that what is not expressly prohibited is allowed *28 is, in this context, fundamentally mistaken. Under its license, the plaintiff could lawfully conduct business only in the manner authorized by G.L. c. 138, § 15. That authorization does not include off-premises wine tasting. See *M.H. Gordon & Son, Inc. v. Alcoholic Beverages Control Commn.*, 371 Mass. 584, 589, 358 N.E.2d 778 (1976). The failure of the commission's regulation permitting wine tastings to distinguish those which are held on and off premises is of no significance. See 204 Code Mass.Reg. § 4.04 (1986). The regulation cannot, of course, contradict the statute.

The plaintiff also argues that as the commission did not charge, nor did there occur, any sale at any wine tasting, there was no violation of G.L. c. 138, § 15. This contention, like others made by the plaintiff, ignores the sweep of G.L. c. 138, § 2.^{END} That section prohibits a variety of activities involving alcoholic beverages, including exposure for sale, "except as authorized by this chapter." We have described the plaintiff's relevant activities. It cannot reasonably be questioned that the plaintiff was exposing its wines for sale at wine tasting sessions. This method of operation was an integral part of the marketing strategy used by the plaintiff. In a procedures memorandum to

wine consultants, the plaintiff says: "Although the wine sampling itself is an educational and promotional tool, it is important that we be able to follow-up by subsequently offering our fine wines for sale to the participants at the tasting."

FN3. Nowhere in its main or reply brief does the plaintiff cite or discuss § 2.

[2] 2. There is nothing in the plaintiff's claim that it was given inadequate notice of the charges. The notice made specific reference to G.L. c. 138, § 15, and the 1981 amendment permitting on-premises wine tasting. The plaintiff was given access to the commission's file which contained a copy of the investigator's detailed report. The record of the hearing before the commission shows that the plaintiff was well prepared, and the plaintiff points to no prejudice. See *Aristocratic Restaurant, Inc. v. Alcoholic Beverages Control Commn.*, 374 Mass. 547, 551, 374 N.E.2d 1181 (1978).

*29 3. There is no merit in the plaintiff's claim that it was arbitrarily singled out for enforcement proceedings for the reason, if no other, that there was no showing that the commission knew that others were engaged in the same or similar practices.

[3][4] 4. The plaintiff seems to contend that un rebutted evidence established that its marketing practices were fully disclosed to the Boston Licensing Board prior to the issuance of its license and, therefore, the commission is now estopped from prohibiting that conduct. Even assuming the plaintiff's evidentiary position to be correct (a matter of substantial doubt), there is no factual or legal basis in the record for the application of the doctrine of estoppel. There was no evidence that the commission **24 had approved the plaintiff's methods of operation. This is not a case where the commission had rendered prior inconsistent rulings. Compare *Boston Gas Co. v. Department of Pub. Utils.*, 367 Mass. 92, 324 N.E.2d 372 (1975). See *Western Massachusetts Elec. Co. v. Department of Pub. Utils.*, 373 Mass. 227, 234-235, 366 N.E.2d 1232 (1977). Moreover, especially where, as here, a legislatively declared important public interest is involved, estoppel is not applied against the enforcement of a statute. See *New York City Hotel Co. v. Alcoholic Beverages Control Commn.*, 347 Mass. 539, 542, 199 N.E.2d 184 (1964); *LaBarge v. Chief Administrative Justice of*

534 N.E.2d 21
27 Mass.App.Ct. 25, 534 N.E.2d 21
(Cite as: 27 Mass.App.Ct. 25, 534 N.E.2d 21)

the Trial Court, 402 Mass. 462, 468, 524 N.E.2d 59 (1988); Gamache v. Mayor of North Adams, 17 Mass.App.Ct. 291, 294, 458 N.E.2d 334 (1983). Cf. Johnson v. Martignetti, 374 Mass. at 790, 375 N.E.2d 290.

JUDGMENT AFFIRMED.

Mass.App.Ct.,1989.
Cellarmaster Wines of Massachusetts, Inc. v. Alcoholic Beverages Control Com'n
27 Mass.App.Ct. 25, 534 N.E.2d 21

END OF DOCUMENT